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LEGAL RESEARCH FOUNDATION INC

CLOSER ECONOMIC RELATIONS AGREEMENT SEMINAR

AUCKLAND, NEW ZEALAND

22-23 JULY 1983

CER - A TRANS TASMAN COURT?

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The Hon Mr Justice M D Kirby CMG

Chairman of the Australian Law Reform Commission *

THE 'CRIMSON THREAD' AND CER

A fear of bold ideas, provincial attitudes and petty jealousies have all too often condemned the relations between Australia and New Zealand to a chronicle of lost opportunities. The humiliating severance of the American colonies, the consequential establishment of British rule in New South Wales and its later extension to New Zealand¹, amount to a tale, remarkable enough and only explained by the assurance of an Empire reaching its apogee. That British colonies, so relatively close together, sharing a common sovereign, common political institutions, common laws and social attitudes, should fail to come together in a political union, remains a constant rebuke to the imagination and largeness of spirit of the leaders of both our countries. It was so nearly otherwise : something that most New Zealanders and Australians of today do not know. The Federal Council of Australasia established in 1885 was the first opportunity.² But it had scanty legislative power, no executive, no power to raise revenue and no judicial arm apart from the Privy Council in London.³ New South Wales never joined it. The Council passed a few Acts about pearl shells, beche-de-mer fisheries, and inter-colonial service and execution of process. It eked out an inglorious existence till superseded in 1901.⁴

A second opportunity came in the 1890s as the Australian colonies moved to a more substantial and real federation. Sir Henry Parkes, Premier of New South Wales, hurried back from a tour of the North American English-speaking federation to demand a National Convention to frame a Constitution. The Premiers reluctantly agreed to a conference, which met in Melbourne early in 1890. New Zealand was represented. The toast of a 'United Australasia' was proposed. The customs tariff between the Antipodean colonies was described as the 'lion in the path'.⁵ Federationists must tackle trade barriers first or they would fail, so it was suggested. Responding to this address, Sir Henry Parkes made his historic utterance: 'The crimson thread of kinship runs through us all'.⁶ The Convention of 1891 met in Sydney. There were representatives from each Australian colony and from New Zealand. Sir Robert Garran described it:

In pre-federal days 'Australasia' was just as good a name to conjure with as 'Australia', neither had as yet any political significance; and at Australasian conferences New Zealand and Fiji were often represented. At this Convention, the senior New Zealand representative was the famous old statesman, administrator and autocrat, Sir George Grey, who had been both Governor and Premier of New Zealand. He told the Convention that New Zealand was there as a damsel to be wooed without prejudice, but not necessarily to be won. His colleague Captain Russell added that there were 1200 reasons why New Zealand should not join — the intervening miles of the Tasman Sea.⁷

Russell's observations had only a superficial attraction. In those days most of the links between all the Australasian colonies were by sea. And the distance from Sydney to Perth was then, as today, further than 1200 intervening miles: the space between, for the most part, as inhospitable and uninhabited as the Tasman Sea.

The Australian Constitution in 1901 was bold enough to contemplate political union between Australia and New Zealand. 'The states', it still reads, 'shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia and South Australia ... as for the time being are parts of the Commonwealth and such colonies or territories as may be admitted into or established by the Commonwealth as states ...'⁸ We all know that Australia and New Zealand then went their separate constitutional ways.

Few today know how or why this happened. But it did. And it is hard to reverse the story when so many institutions, careers, economic interests and social attitudes are caught up in the status quo. It would now require a fine act of political generosity on the part of Australia to reverse nearly a century of separate political development. It would require an act of sacrifice on the part of New Zealanders, brought up in their separate traditions to recapture the ideal of Australasia lost in the 1890s.

Short of these dreams, it is appropriate that our two countries should explore various means of enhancing their links. In particular, it is appropriate for lawyers and others to consider whether the times are ripe for new legal and institutional links between Australia and New Zealand.

If an occasion for such reconsideration is needed, it is provided by a new agreement, of treaty status, called the Australia-New Zealand Closer Economic Relations - Trade Agreement ('CER').⁹ The heads of agreement were signed on 14 December 1982 in a ceremony marked, symbolically enough, by a satellite link between Wellington and Canberra.¹⁰ It is believed that this is the first time a television satellite link has been used for the signing of such an international agreement. The trans national technology of modern communications triumphs over the tyranny of distance and reduces, to an instant, Russell's 1200 reasons.

The operation of the CER Agreement was postponed until the new Australian Government had examined specific aspects of it. On 28 March 1983 the agreement was signed in Canberra. It deals principally with the reduction and elimination of non-tariff barriers as well as tariff barriers to trade between the two countries. Only passing reference is made to wider areas of co-operation in provisions such as Article 1(a) which states that an objective of the agreement is 'to strengthen the broader relationship between Australia and New Zealand'. Traditionally, trade agreements entered into by Australia have focussed on the treatment of goods at national borders. The CER Agreement goes well beyond this. It lays a deliberate basis for moving on to trade-related issues. There Australian and New Zealand trade agreement history provides no tried path to guide either government or administering officials. That this is so is shown in the fact that a number of important matters have been specifically recognised in the agreement as requiring further examination by the two governments. These are the so-called 'second generation' issues. They include such matters as restrictive trade practices¹¹, co-operation in investment, marketing, movement of people, tourism and transport and taxation and company law.¹²

The CER Agreement does not establish an interjurisdictional court or commission to resolve trans-national disputes. In this regard, it has taken a different course to, for example, the International Joint Commission established by treaty to deal with certain common problems arising between the United States and Canada.¹³ Nor does it establish an interjurisdictional court similar to the Court of Justice of the European Communities created under the Treaty of Rome. I am informed that the question of new institutional arrangements to provide a joint body to resolve difficulties arising between Australia and New Zealand arose from time to time during the negotiations. But in the event, no provision was made. At this stage, the consultation process is still regarded as essentially between governments in respect of the formal provisions of the agreement.¹⁴

The Heads of Agreement recognise that industries in Australia and New Zealand may reach their own agreements affecting trans-Tasman trade. Such agreements will not, in themselves, be binding on the two governments, although they may be endorsed or supported by government action. Looking to the future, this recognition has particular application to Article 13 ('rationalisation of industry'); Article 15 ('anti dumping action'); Article 16 ('countervailing action'); and Article 17 ('safeguard measures during the transition period'). It is conceivable that the pursuit of some of these Articles in the situation of free trade across the board or movement into 'second generation' issues could bring about situations where harmonisation of domestic laws between the two countries becomes a much more precise requirement. Already in thoughtful articles in trade journals, the need for harmonisation of exchange control, corporate tax and foreign investment laws has been urged.¹⁵ During the negotiations, consideration was apparently given to some rationalisation of the customs legislation of the two countries. However, even this remains 'largely unexplored ground'.¹⁶

If little thought has yet been given, at a governmental level, to the problems of a macro-economic and macro-legal kind that will arise out of the CER Agreement, consideration of the micro-economic and micro-legal problems is virtually non-existent. That is why this seminar is well timed. But it is equally why any paper offering suggestions must be tentative, preliminary and speculative.

EFFECTS OF CER

The CER Agreement has its supporters and detractors on both sides of the Tasman. There is much more discussion of it in the New Zealand than in the Australian media. Awareness is only now dawning in Australia. A public opinion poll in October 1982 showed 62% of New Zealanders favoured 'closer economic relations with Australia'. Eighteen percent did not. Twenty percent were undecided.¹⁷ In the same poll, conducted after the July 1982 decision of the Privy Council in the Western Samoan Citizenship case, responses to the question 'Should New Zealand continue to use the Privy Council as the final court of appeal?' were evenly divided : 40% favouring retention; 40% favouring abolition and 20% being undecided. It was against this background of New Zealand opinion that the steps were taken to develop the Australian, New Zealand Free Trade Agreement (NAFTA) into the more comprehensive CER Agreement. In both countries, but particularly in New Zealand, the implications of the new agreement for the surrender of at least some aspects of sovereignty were clearly recognised. As early as May 1982, Dr Geoffrey Palmer, now Deputy Leader of the New Zealand Labour Party, warned that 'though CER was being treated as if it were a 'technical trade negotiation', in fact it had a possibility of being much more. Trading relationships, Dr Palmer pointed out, are often formalised in response to interest by governments in underwriting rather broader political and security relationships. He suggested that this had motivated the development of the European Economic Communities. He expressed the view that it was inevitable that certain 'shared institutions' would develop 'on the backwash of CER'. In particular, he predicted that the rules relating to 'competition, trade practices and the harmonisation of commercial law' would require attention when CER matured:

Australia is bound to become a more important place in the world with each decade that passes. We must become even more closely involved with them or risk becoming an isolated and somewhat primitive backwater. The challenge presented by CER is the challenge of restoring New Zealand to the path of economic progress and full employment in ways which will enhance our political integrity and sense of nationhood, not weaken it'.¹⁸

After CER was signed, predictions varied as to its likely impact on trans Tasman trade. One estimate suggested that the benefit to Australia was up to 0.5% of pre-integration national income and for New Zealand 3 or 4 percent. The same estimate suggested that Australia would import 21 to 23% more goods from New Zealand after 'netting out' replacement imports from the rest of the world. New Zealand would import 37 to 40% more from Australia.¹⁹ The commentator concluded:

It is to be hoped that in the next 10 to 20 years the idea of Australia and New Zealand backsliding into segregated economic units is as inconceivable as the secession of the American States is now.²⁰

The retiring Senior Trade Commissioner of Australia to New Zealand, fresh from business seminars in all Australian States, reported keen interest in the agreement and in its implications for trade between the two countries.²¹ One New Zealand report of these Australian business meetings suggested that 'political unity with Australia now looms as a real possibility, and perhaps sooner than a lot of people have thought possible hitherto'.²² CER was merely the catalyst which would create an impetus from the Australian side. The provisions involved 'a three step logical progression that starts with trade, moves to broader economic harmony and finally encompasses some form of political unity'.²³ Such developments were declared now to be 'inevitable'. However, Mr J D Anthony, former Australian Minister for Trade and the Australian 'godfather' of CER, cautioned against moves that were too swift, lest people be frightened off. Dr David Thomas, in a specially commissioned economic analysis of CER, concluded:

Given the history of free trade areas in most parts of the world, it appears that countries which lack sufficient commitment to enter into wider policy harmonisation than a free trade area alone are unlikely to be successful in the overall process of integration ... The second step beyond the commodity market integration is a so-called currency union.²⁴

Amidst all this euphoria, words of caution and even opposition have been voiced. The Chairman of the New Zealand Planning Council, Mr Ian Douglas, suggested that the CER Agreement had 'little to offer either Australia or New Zealand'. Its value would lie in its possible stimulation to economic growth and to the reduction of protection and the revision of attitudes in both countries.²⁵ From the treaty, Australia would secure progressively greater access over 12 years to a market less than one-fifth of its own size. 'It is not really the stuff of economic revolution', Mr Douglas concluded. New Zealand for its part stood to gain more. But given already low trans-Tasman tariffs, 'the scope for spectacular gain overall is not really apparent'.²⁶ Mr Douglas drew attention to the poor performance of Australia and New Zealand in comparison to competing economies, particularly in the Asian region. He also pointed to the comparatively poor performance of members of the European Communities 'whose inward looking approach has generated appalling economic waste'.²⁷ For Mr Douglas, the main significance of CER was no short-term rapid growth in trade, let alone an important step to economic and political union. Far from the 'vision splendid', CER was simply a modest contribution to a 'less protected environment'.²⁸

At the same time as this speech, Mr Bruce Rampton, Secretary of the New Zealand Overseas Investment Commission, warned that Australia's restrictive foreign investment laws could lead to the development of friction. This prediction in May proved accurate. The New Zealand Prime Minister's comments on the subject in Australia were sharp and critical.²⁹ The present controversy about Australian investment in New Zealand illustrates the fact that, even in the field of reciprocal economic arrangements, Australia and New Zealand still have a long way to go.³⁰ Mr Muldoon wants New Zealand investments to have a special status 'in the spirit of closer economic relations'. He argues that Australian policies on foreign investment should be reviewed 'in the context of CER'.³¹ The Australian Treasurer, Mr Keating, argues that Australia's laws and policies are non-discriminatory and consistent with international obligations, including under GATT, which prevent New Zealand investments being treated more favourably than those of other countries.³² The reality seems to be that since 1976, of 394 investment proposals from New Zealand, five only have been rejected.

Just the same, on both sides of the Tasman there would probably be sympathy for the call by the General Manager of the Bank of New Zealand when he urged Australia to regard New Zealand companies wanting to invest in Australia as 'less foreign' than applicants from third countries.³³ Yet 'foreign' in law they undoubtedly remain. This controversy puts the current level of achievement of CER into context. It represents only a small step. But it is the 'psychology' of CER, and the long-term prospect that it opens up, that may prove most significant for the future. Expectations are raised. In difficult economic times, two transplanted English-speaking European cultures find themselves in the South Pacific with faltering economies, uncertain markets and growing competition from more efficient economies to the North. The situation has economic, even political warnings for us. The resolution of the geo-political and economic issues is for others. If trade follows the flag, the law and its institutions follow trade. Against the background of the development of CER and the prospect of pressure for harmonisation of laws governing trade across the Tasman, the issue is now raised as to what rules and institutions could and should be developed to service the closer economic relationship. On one view of the comments cited above, the CER Agreement is unlikely to have a dramatic impact on trade between Australia and New Zealand, at least in the short run. On another, we should be lifting our sights to consider the way in which closer economic relations will require political adjustments to ready the two countries for federation or some other form of union. Giving full weight to the sceptics, and indeed the opponents of CER³⁴, it seems at least safe to contemplate a steadily rising trade in goods and services between Australia and New Zealand. In such trade, disputes will inevitably arise. They will arise over contractual matters, most matters of fact.

But they will also arise over legal questions : compliance with differing laws on trade practices, corporations, investment, taxation and choice of law. They will also arise over machinery matters, particularly service and execution of judgments and other process. Although these matters have been postponed as 'second generation' issues, it seems wise, because of their complexity and sensitivity, for lawyers and others to begin planning for the future.

In Australia and New Zealand, the CER Agreement coincides with what appears to be the likely demise of the one interjurisdictional court that links the two countries, the Judicial Committee of the Privy Council. The prospect of growing interjurisdictional legal issues for resolution coinciding with the termination of a neutral interjurisdictional forum for their resolution, naturally concentrates the attention of those planning for the future upon the possibility of a substitute.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Australian appeals. The Judicial Committee of the Privy Council was constituted by Imperial statute in 1833 as a development of the ancient right of the sovereign, as the fountain of justice, to dispense justice in his Council.³⁵ The Australian colonists were suspicious of a court, on the other side of the world, manned by judges with little or no knowledge of the harsh and special conditions of the colonies and considered likely to be sympathetic to English rather than local interests. For this reason, the Commonwealth Bill of 1891 provided that the Federal Parliament of Australasia might require that any appeals hitherto allowed from the colonial courts to the Queen in Council should be brought to a Federal supreme court whose judgments would be final. The possibility was retained that the Queen would have some power to grant leave of appeal to herself 'in any case in which the public interests of the Commonwealth, or of any State, or of any other part of the Queen's Dominions are concerned'. At the Adelaide session of 1897, appeals from the States courts direct to the Privy Council were to be abolished altogether. The only notable supporters of the Privy Council appeals at the Melbourne session in 1898 were those who spoke to petitions from Chambers of Commerce and Manufactures and other associations representing mercantile interests.³⁶

The Imperial authorities objected to the moves to limit Privy Council appeals. They actually deleted the clause from the Constitution altogether. Australian delegates finally persuaded them to accept a compromise excluding Federal constitutional appeals on so-called inter se questions, without the certificate of the High Court of Australia. Furthermore, the Federal Parliament was empowered to make laws limiting the matters in which leave might be asked for appeal to the Privy Council.³⁷

Once only did the High Court of Australia grant a certificate under the former provisions. No further certificates are imaginable. The power to 'limit' appeals has been exhausted by successive Federal Governments, so that now no case might be brought on appeal from the High Court of Australia to the Privy Council, nor any case in a State court exercising Federal jurisdiction.³⁸

During the Fraser administration, a meeting of Federal authorities and all State Premiers on 25 June 1982, agreed to the final severance of all remaining appeals to the Judicial Committee of the Privy Council. Federal Attorney-General Peter Durack conceded that the Judicial Committee had made 'notable contributions' to Australian jurisprudence over the years. However, he said that its lack of familiarity with modern Australian society and its laws was a 'fundamental drawback' to a continuing place for the Privy Council in the Australian court system.³⁹

This achievement of Federal/State consensus followed an earlier attempt in 1978 when the New South Wales Parliament tried to proceed unilaterally to abolish Privy Council appeals. The legislation was in the form of a request to the Australian Federal Parliament to consent to legislation under section 51(XXXVII) of the Constitution to confer relevant powers on the New South Wales Parliament which, at federation, were exercised only by the British Parliament. Attorney-General Durack took the view that colonial anomalies should only be removed on the basis of a uniform approach. Hence the importance of the Premiers' agreement in June 1982. It fell to Senator Durack's successor, Attorney-General Senator Gareth Evans, to take the request for the termination of remaining State appeals to the Privy Council to London. This he did in July 1983. Following discussions with British colleagues, Senator Evans announced that appeals from all State Supreme Courts to the Privy Council could 'end by Christmas [1983]'.⁴⁰ Some doubts that this timetable will be observed have now been expressed, in the light of more recent events, including the decision of the High Court of Australia in the Tasmanian Dams. But there does seem to be recognition at all levels in Australia, including in the State judiciary itself, that special problems for the integrity of the legal system are posed by having two ultimate, authoritative courts of final appeal for the one country. That is the position in Australia at present, at least in non-Federal matters. It leads to unseemly efforts of competing litigants to take large cases to competing courts of appeal.⁴¹

The moves to control, limit and ultimately abolish Australian appeals to the Judicial Committee of the Privy Council reflect some of the same concerns evidenced in the more recent New Zealand debates. But they also reflect the special determination of a Federal country to preserve the inherently political determinations involved in the interpretation of the Federal Constitution, not only to local judges, alert to local conditions, but also to lawyers brought up in the specially sophisticated intellectualism and legalism of a Federal polity.⁴² Furthermore, in Australia, there is and has been since federation, a second appeal tier. Dissatisfied litigants can have points of law determined by a Full Court or Court of Appeal of a State and then, if the necessary preconditions of special leave, leave or amount at stake are satisfied, reviewed for a second time in the Federal supreme court, the High Court of Australia. Australia's moves to abolish Privy Council appeals are instructive for New Zealanders; but they are not determinative of the New Zealand debate.

New Zealand appeals. The vestigial retention of Privy Council appeals from New Zealand has lately agitated public discussion of an issue that, until a decade ago was little more than a hardy perennial of academic texts and law conferences. A 1967 work on the development of New Zealand's constitution questioned whether the disappearance of this 'outside tribunal' would be 'a great loss'.⁴³ The prospect of maintaining the general uniformity of the common law having receded with the decline of the jurisdiction of the Privy Council, the conclusion was offered that the likelihood of the revival of the Privy Council was remote and proposals for a substitute, too late:

In New Zealand the existence of a right of appeal to the Privy Council is certainly valued by some large financial and commercial organisations, including those having close connections with the United Kingdom and, partly for emotional reasons, by the legal profession as a whole. There are becoming heard, however, some voices of dissent which doubt if the power of an outside body, however worthy of respect, to determine finally the law of New Zealand is warranted by either the status or the needs of this country.⁴⁴

Those with long memories remember the demeaning, and partly misconceived, criticism of the New Zealand judiciary offered by the Privy Council in 1903 in the case of Wallis v Solicitor-General for New Zealand.⁴⁵ By 1969 the Australian Chief Justice, Sir Garfield Barwick, was being invited to speculate on a regional court of appeal in substitution for the Privy Council in this part of the world⁴⁶ and by 1972, Mr Justice Haslam was leading discussion to defend the imperial tribunal against the growing numbers of sceptics.⁴⁷

In 1974 Dr A. M. Finlay, then Attorney-General for New Zealand, took the occasion of the first Fiji Law Convention to discuss a court of appeal for the common law countries of the South Pacific region. In doing so, he reflected on the unacceptability of appeals to London. For here were 13,000 reasons for termination — being the 13,000 miles between the Privy Council, invariably sitting in London, and the New Zealand jurisdiction, whose legal problems it occasionally sought to solve. Fostering the concept of a single legal system for the common law was declared to be a 'myth'.⁴⁸ The independence and integrity of the New Zealand courts and rule of law were 'long and securely established'.⁴⁹ The New Zealand Court of Appeal was 'perfectly capable of acting with distinction as principled final tribunal of law'.⁵⁰ Furthermore, the highest English judges had neither shone as law reformers nor did they provide clear and unambiguous answers to important questions of law.⁵¹

In 1976, a past President of the Court of Appeal expressed the view that until the New Zealand Court of Appeal was free to act in a completely autonomous manner, it could not effectively adapt New Zealand law for New Zealand conditions.⁵² Other New Zealanders began to express the view that the appeal to London was inconsistent with the 'national identity' and that it was important for the New Zealand law 'to be firmly rooted in the New Zealand and Pacific context'.⁵³

In 1978 the Royal Commission on the Courts examined the issue of Privy Council appeals, although the actual issue of whether such appeals should be abolished was outside the Commission's terms of reference. It decided to summarise the arguments both for and against retention, acknowledging that there were meritorious points on both sides.⁵⁴

Bearing in mind that, taken overall, the existence of the right of appeal to the Judicial Committee has been of real value to the development of New Zealand jurisprudence, we are of the opinion that this right should not lightly be abolished, and that the sole criterion must be whether abolition of such appeals would be beneficial to New Zealand's judicial system in the wider sense.⁵⁵

Attention to the apparently extraordinary phenomenon in this post-Imperial world of taking sometimes highly sensitive and controversial issues of great local moment to a group of elderly gentlemen in London, usually drawn from England and often with no knowledge of the local scene, came into recent public focus in New Zealand largely because of the unexpected decision of the Privy Council in the Samoaan Citizenship case⁵⁶, and the leave to appeal granted to the former Mr Justice Mahon arising out of his Royal Commission's inquiry into the Mount Erebus plane disaster. To defenders of the appeal to London, these cases vindicate the present system. The very existence of the appeal 'keeps the minds of New Zealand judges well sharpened'.⁵⁷

According to Mr Paul Temm QC, with such a small population it is inevitable that social and other pressures would be produced from which the New Zealand Court of Appeal could not be fully immune. Appeal to London gave New Zealanders access 'to the world's top judges'. On the other hand, the Minister of Justice, Mr McLay, who once favoured retention of the right of appeal, has now come to the conclusion that it should be abolished, though only after a full public debate. Mr McLay summarised the arguments with fairness and clarity. Quite apart from the issues of sovereignty, cost and the dignity of New Zealand judges, there was the reverse side of Paul Temm's coin. New Zealand law ought to develop freely to suit local conditions. The availability of appeals to the Privy Council has tended to inhibit that process because of the ultimate tendency of its judgments to be made against the background of social developments in Britain — itself a changing society because of its multiracial problems, economic difficulties and growing association with the laws of the European Communities.

Mr McLay cited figures indicating that the actual number of New Zealand Privy Council appeals is small. Since 1960 there have been 32 New Zealand appeals to the Privy Council. Ten of these were allowed and four were awaiting hearing at the time of Mr McLay's speech in February 1983.⁵⁸ Mr McLay pointed out that following the Royal Commission on the Courts, the New Zealand Court of Appeal had been increased from three to five judges, is operating effectively and 'has the necessary professional and public confidence'.⁵⁹ In June 1983 Mr Muldoon added his voice to the controversy. He predicted abolition of Privy Council appeals; but not overnight. He was :

cognisant that a number of cases where a lack of familiarity with social or historical aspects of this country either produced, or could have produced, faulty decisions from the committee. But as with most constitutional issues, progress I believe is best made slowly. Bearing in mind that the time may come when appeals to the Judicial Committee cease, any intervening period should be used to structure our court system to enable the best possible appellate system to be introduced.⁶⁰

As is so often the way in debates about law reforms, there has been remarkably little analysis of the direct and indirect impact of the Privy Council on outlying legal jurisdictions. Its declining jurisdiction has left New Zealand as its leading customer, along with Hong Kong, Malaya, Singapore, Fiji, a few West Indian mini-nations and a diminishing band of island states. Scholars in the United States, fascinated by this international agency and perhaps more dispassionate about it than we can be, are now beginning to write of its role and effect. In 1977 an interesting analysis of its functions between 1833 and 1971 was offered by Dr L P Beth.⁶¹

He concluded that its decisions 'seem to have been one of the more important means of keeping the empire intact'.⁶² He analysed the caseload. So far as New Zealand is concerned, he concluded the Privy Council's influence on the development of the law in New Zealand was not as great as in Australia.⁶³ This conclusion supports the comment of Mr McLay that at least in recent times, only four of its decisions 'might have actually had a profound influence on the development of New Zealand law'.⁶⁴ Fortunately, Beth has taken the trouble to analyse the tendencies of Privy Council decisions over more than a century. In federations, the statistics are given on the decisions that favoured the centre and those that favoured the states. As for other cases, analysis is offered of appeals upheld and disallowed by different countries and decisions which favoured government intervention and those that favoured laissez-faire. The conclusions are surprising. The reversal rate, overall was 'far higher than one would have expected' though there is a degree of periodicity.⁶⁵ Perhaps the most significant 'finding' is that the rate approximates 50% in private law cases where the Privy Council was able to exert maximum impact on the development of social and economic institutions, 'a position of which it has apparently taken full advantage'.⁶⁶ Its early influence on Canadian and Australian constitutional law is described as 'enormously significant'.⁶⁷ On the analysis of the cases, Beth concludes that the Judicial Committee fostered and maintained the development of laissez-faire economic values.⁶⁸ Special criticism is reserved for the tendency to hide decisions relevant to social and political issues in 'inarticulate major premises' — a tendency blamed on the 'prevailing efforts of legal education in the United Kingdom and Commonwealth countries ... [which fall] far short of giving the legal decision-maker the broad training in the social sciences that is necessary in handling complex public law issues'.⁶⁹ However that may be, the conclusion on the analysis of the New Zealand appeals is that:

The Privy Council contributed little to the development of the New Zealand Constitution, although the cases are more recent and seem to involve more significant questions ... But probably the most significant influence from England is not specifically attached to Privy Council decisions directly applicable to New Zealand. It rests instead on the doctrine, apparently followed rigidly, that all Privy Council decisions (even those from other jurisdictions) must be followed in New Zealand ... Such a doctrine means that the twists and turns of English legal developments are likely to be reproduced in New Zealand without regard to differences in local needs and desires. Whether such excessive attachment to the home country will survive the loosening of the ties of Commonwealth preference remains to be seen.⁷⁰

I have quoted at length from Beth's article because it has the merit of offering comments on the basis of an analysis of many cases.⁷¹ It represents the observations of an outsider, but one brought up in the common law tradition. The comments are obviously relevant to the continuance of the Privy Council. But they are equally pertinent to any interjurisdictional alternative.

INTERJURISDICTIONAL NEEDS

I recapitulate the point reached in this paper. A hundred years ago Australia and New Zealand nearly drifted into political union. It seemed a natural thing for the two English-speaking Antipodean dominions. It came close several times. But political union was not achieved and the growth of separate sovereignties makes the achievement now more difficult. The two countries have continued to enjoy a 'special relationship'. It has been cemented in war, in common loyalty, in defence arrangements and increasingly in trade agreements. The CER Agreement is the latest trade arrangement. Though opinions differ as to its likely effect, it seems probable that it will lead to much increased trade, particularly in time. Perhaps in due course it may lead on to other things.

Increased trade will inevitably mean increased pressure for harmonisation of laws and calls for an acceptable, mutually trusted means of resolving the inevitable legal disputes that will arise. As to harmonisation of laws, there have been two recent developments of importance. The first is the clarification by the High Court of Australia of the power of the Federal Parliament in Australia to enact Federal laws in matters of international concern, relying on the 'external affairs' power under the Australian Constitution.⁷² The Federal Attorney-General has also announced his intention to establish a National Uniform Law Reform Advisory Council.⁷³ This will provide an institution, to complement the Standing Committee of Attorneys-General and to assist in the development of uniform State laws where there is no Federal power or where it is preferable to proceed with the concurrence of the States. The New Zealand Minister of Justice regularly attends the meetings of the Standing Committee. Representatives of the New Zealand Law Reform Committees were present when the Australian Law Reform Agencies Conference unanimously supported the proposal for the Uniform Law Reform Council.⁷⁴ Just as New Zealand is always invited to send representatives to the Law Reform Agencies Conference, it may be expected that New Zealand will be invited to participate in some appropriate way in the new national Uniform Law Reform Advisory Council. If new institutions and enhanced constitutional power facilitate the capacity of Australia to treat with New Zealand as a single jurisdiction for the purposes of harmonisation of at least some areas of Australian law, there will remain important areas of divergency and uncertainty arising from the simple fact that much of the private law in Australia is the legal responsibility of the States.

Confusion and disputes will inevitably arise requiring authoritative resolution by courts of law. The recognition of the utility of some form of interjurisdictional court to address these problems coincides exactly with the final moves in Australia to abolish Privy Council appeals and the active debate in New Zealand on the same topic. In one sense, the existence of the Judicial Committee of the Privy Council as 'neutral territory' for high judicial determination of legal disputes between Australia and New Zealand might seem worth preserving. One Australian judge has recently called attention to the special value of the Privy Council in linking the Australian [and by inference, New Zealand] legal systems to the English judicial system, centred in London with its developed expertise, particularly in business law:

[T]he forcible hitching of the legal system of a small State to one of the great legal systems of the world has provided stimulus to us ... That leadership would have operated anyway without the existence of the Privy Council, but its existence guaranteed its success ... In a relatively provincial country (though very litigious) such as Australia, the tendency to lapse into self-satisfaction has been restrained by the continual presence of a major legal system, not as a distant exemplar, but as a continual force for change.⁷⁵

But whatever view is taken of the 'objective' value of Privy Council appeals -- including in the new Australian/New Zealand relationship following CER -- the political reality must be faced. Australia is moving fast, with general political unanimity, to terminate the remaining appeals. It seems likely that New Zealand will also terminate appeals, in due course. Therefore, the prospect of reviving the Privy Council as a useful mechanism for settlement of trans-Tasman legal disputes is a pipedream. If it is intended as a 'second generation' issue of CER to explore an interjurisdictional court, we must look elsewhere than the Privy Council in London. A number of alternative possibilities have been proposed in recent years and these will be explored. But first, it may be useful to list the considerations that should be kept in mind in designing any trans-Tasman court. These considerations include the following:

- (1) Nationalism. This is the natural desire of a community to want its own laws and its own lawmakers, law enforcers and law interpreters. In part, it is a concern with the niceties of sovereignty, the dignity and authority of municipal judges and the termination of historical relics of a faded Empire. In part, it is simply the removal of a 'legal oddity'⁷⁶ by which decisions affecting rights and duties in one country are made by judges far away, having an entirely different lifestyle and inadequate knowledge of the mosaic of local law, local legal idiosyncrasies and the special needs of the local legal system.⁷⁷

Any transjurisdictional court involves some loss of local sovereignty. The prospect of loss of sovereignty on the part of the Australian and New Zealand Parliaments is clearly under contemplation in CER. Different countries will seek to preserve particular aspects of sovereignty. Thus, the Chief Justice of Fiji, discussing a transjurisdictional court for the Pacific, contemplated the exclusion of the title to native land.⁷⁸ Just as Australia, in 1901, sought to limit Privy Council interference in the central Federal issues of the Australian Constitution.⁷⁹

- (2) Social responsiveness. Another consideration, closely allied with the last, is the concern that the law should not be seen as entirely value neutral and divorced from the society it serves. As long ago as 1956, Lord Denning, in robust language, acknowledged the need for adjustment of the common law of England to the conditions in the multitude of countries which have adopted it:

It has many principles of manifest justice and good sense which can be applied with advantage to people of every race and colour all the world over; but it has also many refinements, subtleties and technicalities which are not suited to other folk ... In these far lands the people must have a law which they understand and which they will respect.⁸⁰

Some acknowledgement of the need for awareness of local conditions was made in the invitation to other Commonwealth judges, increasingly in recent years, to sit as members of the Judicial Committee of the Privy Council.⁸¹ But the majority, indeed the overwhelming majority, always remain English Law Lords. The result is an institution which places a very high value on 'rigid conformity to English legal practices and values'.⁸² This was initially supported as a contribution to uniformity of laws throughout the common law world. But with the decline of the Privy Council's jurisdiction, the system is now supported as providing neutral, independent solutions to legal problems divorced from local personalities, controversies and pressures. Whilst this view of the law as a 'serene olympus'⁸³ has many supporters within the legal profession and in the general community, it is lately being questioned. The Chief Justice of Fiji, for example, asked at the Fifth South Pacific Judicial Conference in 1982 :

[W]hat kind of justice are we searching for? One is that of 'high quality' in the sense of rigid conformity to English legal practices and values? Or do we seek the kind of judgments that are firmly rooted in the Pacific context where judges are attuned to the customs, conditions and the way of life of the people they are judging? It does not follow that the greater the measure of detachment the better the quality of the judgments, as detachment could very well breed an inability to understand the local conditions, as values, customs and culture differ from society to society; nor does ignorance guarantee objectivity.⁸⁴

- (3) Economic interests. It has been suggested that the Privy Council's function was partly to protect the commercial interests of Imperial investors in the far-flung colonies of the United Kingdom. Some analysis of the decisions of the Privy Council supports the notion that the Judicial Committee fulfilled this expectation⁸⁵. Of course, its judges may have done no more than to reflect the economic philosophy of English leaders of the day. Many writers have pointed to the entry of the United Kingdom into the European Communities as an additional reason for abolishing Privy Council appeals.⁸⁶ Some ground this argument on the likely divergence of the English common law from that of the old Commonwealth. One writer even suggested that Australia and New Zealand might become ultimate guardians of the common law grail.⁸⁷ However that may be, where commercial matters are involved, decisions, even on legal issues, can sometimes be influenced by attitudes to economic and social policy. The complaint voiced over more than a century concerning the economic nationalism of the Privy Council can just as readily be directed at any substitute transnational court. So long as we have human justice, judges will not be immune from their attitudes. In commercial law matters, those attitudes can sometimes affect the outcome of the litigation.

- (4) Uniformity : does it matter? Much of the argumentation in favour of a transnational court has been grounded in the assumption that uniformity of the common law and of the interpretation and enforcement of statutory law is desirable and best attained through a single court at the apex of the judicial system. Dr Finlay questioned these assumptions.⁸⁸ In any case, he pointed out legislation is now the hallmark of all common law countries and will increasingly replace broad common law principles by detailed statutory provisions inevitably differing from one jurisdiction to another.⁸⁹ Sir Robin Cooke, in his recent paper to the 22nd Australian Legal Convention, wrote that it was no longer 'rationally arguable' that there is only one common law — even in those Commonwealth jurisdictions whose starting point was English law.

'Heroically loyal judicial efforts', he declared, 'have failed to hold back the inevitable tide of disparity'.⁹⁰ In proof, he offered numerous illustrations, whilst acknowledging the instructive value of access to the 'restrained creativity' of judges throughout the common law world:

Springing from the same source, to which we all pay homage, the common laws of the countries [of the Commonwealth] ... have already diverged significantly. They will inevitably diverge more. In that sense unity and uniformity as goals are largely obsolete. What can replace them is a determination to make the most of one another's work and experience : to fashion the best national systems we can with the help of reciprocal stimulation.⁹¹

- (5) Who judges? Until now, in the Privy Council, it has been the Law Lords and other high Commonwealth judges who have manned the interjurisdictional court. But if any new court were to be formed, who would be the judges? Who would select them? Would they be chosen in proportion to populations? Would there be a choice not based on the highest legal skills above but on representation of a particular jurisdiction? Would this diminish the overall technical and intellectual quality and would that be too high a price to pay? At present, the overwhelming costs of providing the facility of the Privy Council is borne by the United Kingdom.⁹² The costs of any substitute would almost surely have to be found elsewhere. Yet such costs could be offset against the high marginal expense of taking lawyers to London given the plain disinclination of the Judicial Committee ever to sit elsewhere.
- (6) Defining the limits. If it is suggested that a substitute transnational court should have only limited jurisdiction, either by excluding some matters (such as constitutional, human rights or customary law disputes) or by including only a limited area of jurisdiction (such as trans-border commercial cases or common customs, tax exchange or corporate cases), issues arise which are only too painfully known to those familiar with the Australian courts' system. Observers of the Australian scene will be aware of the vigorous debate which has occurred in the past few years concerning the respective jurisdiction of Federal and State courts.⁹³ Constitutional amendments are under consideration. Other solutions are also being suggested. The inconvenience of jurisdictional disputes arising from establishing courts of limited jurisdiction is becoming increasingly clear in Australia. It stands as a warning to other countries in the region.⁹⁴

(7) Available judges. A further consideration is the availability of sufficient judges of appropriate quality to sit in any transnational court, whether at a trial or appeal level. In 1969, Chief Justice Barwick talked of the workload of the High Court of Australia as between 50 and 60 fully reasoned judgments a year.⁹⁵ Despite the establishment of the Federal Court of Australia, a step taken partly to ease the workload of the High Court, the pressure on that court has continued to mount. Recently, it provoked Mr Justice Deane to complain that the court was 'burdened and over-burdened'.⁹⁶ The New Zealand Royal Commission on the Courts also commented on the limited number of persons available with appropriate talent to serve on an ultimate appeal court.⁹⁷ It claimed that this was a special problem for a country like New Zealand with a small population. But it is equally a problem in Australia, if the high quality of analysis and reasoning expected of our appeal courts is to be maintained.

(8) Second tier? The final consideration of a general character to which attention should be drawn is the possible desirability of a second level of appeal. Chief Justice Barwick, reverting to the history of the Writ of Error, suggested that the calmer consideration that was possible on a second appeal, was desirable.⁹⁸ It allowed a degree of dispassionate examination of the case and one that permitted a full consideration of policy concerns that might not be feasible at an intermediate appeal level. He pointed out that, in the case of Australia, the problem of a second tier appeal was solved by the facility of State appeal courts.⁹⁹ Abolition of the appeal to the Privy Council would, without more, deprive New Zealand of the second tier. Yet some commentators have doubted the need for such an expensive luxury¹⁰⁰, especially if it involves appeal to London which few litigants can afford. Others have pointed out that some appeals from the Australian States can proceed from a single judge direct to the Privy Council, amounting effectively to only one tier of appeal.¹⁰¹ Others have suggested reconstituting a Full Court of the High Court of New Zealand, abolished in 1958 when the Court of Appeal was established.¹⁰² Others have simply concluded that however theoretically desirable, the disadvantages of London are outweighed by the advantages of confining appeals in New Zealand to the Court of Appeal and thereby releasing that court from the inhibitions and restraints inevitably involved in a possibility of Privy Council review.

Doubtless other considerations could be mentioned. Criteria for the reform of the court structure are admirably stated at the beginning of the consideration of the subject by the New Zealand Royal Commission on the Courts. The seven considerations mentioned were : Suitability to conditions in New Zealand; economic feasibility; service to the public; preservation of the independence of the judiciary; the best use of judicial and legal talent; simplicity and efficient administration.¹⁰³ To some extent these criteria overlap and complement my own.

If it is desirable to establish interjurisdictional machinery for resolving interjurisdictional legal problems, it is suggested that these criteria should be kept in mind. The balance of this paper will address the various options that have been proposed. For convenience, I list them:

- (a) reconstitution of a South Pacific Privy Council;
- (b) conferring transnational jurisdiction on the High Court of Australia;
- (c) establishing a general South Pacific Court of Appeals;
- (d) creating a special trans-Tasman Commercial Court; and
- (e) (less boldly) exploring other practical and machinery provisions short of creating a court.

OPTIONS

Regional Privy Council. The history of the Judicial Committee of the Privy Council is a further case of lost opportunities. When Post War independence came, so rapidly, to the countries of the Commonwealth of Nations, no real effort was made to modify the judicial institution of the Empire. In part, this was probably out of recognition that the former colonies, like Canada, would probably withdraw anyhow. In part, it was doubtless the result of a consideration of costs. Mostly the inactivity can be explained by apathy, indifference on the part of the United Kingdom, concern about overseas service of its judges and the fact that rapid international air travel arrived just too late to inspire the thought that this interesting transnational court could be reformed and saved. It is not as if the idea was never promoted. One after another of the leading colonial judges suggested the establishment of an alternative court for the new Commonwealth. An early proponent in the 1940s was New Zealand's Chief Justice, Sir Michael Myers.¹⁰⁴ In 1965, at the Commonwealth Law Conference in Sydney, a paper was presented on 'intra Commonwealth judicial machinery'.¹⁰⁵ It proposed a new Commonwealth Court of Appeal to replace the Privy Council and the House of Lords. The idea did not find much favour. It seemed unlikely that the United Kingdom would take the necessary step of finally subordinating its judicature to a truly international Commonwealth court. Furthermore, the new Commonwealth countries, freshly independent, were, for the most part, unenthusiastic. The New Zealand Attorney-General, Mr Hanan, welcomed the proposal.

But other New Zealanders considered the notion 'too much behind its time'.¹⁰⁶ Chief Justice Barwick revealed in 1969 that he had urged the United Kingdom to alter the rules of the Privy Council both as to its constitution and venue. For once, however, his considerable persuasive powers went unrewarded.¹⁰⁷ Perhaps it was because he considered the proposal 'too late' for the developed countries of the Commonwealth and merely saw it as a service for certain of the new developing countries. Later, he ventured telling criticisms of the Privy Council's mechanics : the expense of litigants travelling (often twice) to the court in defiance of the peripatetic tradition of English justice; the unfamiliarity with local conditions and the tendency to give oral judgments where wisdom and local importance might have dictated more care and reflection.¹⁰⁸

In these circumstances, recognising the unlikelihood of converting the Judicial Committee to a general court of appeal for the Commonwealth, proposals of a more modest character were made. Generally, these suggested creation of regional courts of appeal, mentioned below. But drawing on the very English way by which institutions are adapted to new needs¹⁰⁹ a new idea was ventured a decade ago for an Antipodean Privy Council. The notion was advanced as a relatively simple solution to the complex problem that had arisen in Australia of two ultimate courts of appeal. Prime Minister Whitlam proposed to United Kingdom authorities that an entirely Australian Judicial Committee of the Privy Council should be created to hear Australian Privy Council appeals.¹¹⁰ At that time, many members (and past members) of the High Court of Australia were members of the Judicial Committee of the Privy Council and sat from time to time in London. Mr. Whitlam's proposal did not find favour with the United Kingdom Government. The main reason for opposition appears to have been less the division of the Crown's curial advisers (for the division of the Crown had long since been accepted) so much as concern that the procedures for frank amendment of the Australian Constitution should not be circumvented without the participation either of the States or of the people. The full details of this negotiation have not yet been revealed. It is mentioned here, in the context of this paper, because it still provides what (at least in machinery terms) would be the simplest method of creating a trans-Tasman or South Pacific court of appeal of high authority. The numbers of members of the Judicial Board are dwindling in this part of the world. In Australia, of the current High Court Justices, only the Chief Justice is a Privy Councillor, although Sir Ninian Stephen and his two predecessors as Governor-General, as well as a few retired judges would qualify to sit. In New Zealand, there is, likewise, a handful of qualified judges and doubtless there are one or two throughout the Pacific.

The difficulties in the way of the proposal remain 'practical politics'.¹¹¹ Having taken so much time and trouble to abolish Privy Council appeals and being on the brink of doing so entirely after more than a century of talk, it is unlikely that Australia could be persuaded to return to this distinguished imperial anachronism. It would require breathing new life into an institution all but dead, with few currently qualified personnel. Even if its jurisdiction were limited to non-Australian regional appeals, it would be demeaning for countries to submit appeals to a regional judicial committee, largely made up of judges from a country which did not do so. This was always the essential vice of the Board in London. In short, the proposal to create an interjurisdictional court for the Asian and Pacific common law countries by a convention that such appeals would be heard only by qualified members of the Privy Council in the region, is an idea whose time has passed. If there had been the imagination to create such a court even 20 years ago, it might have flourished. It could have made a significant contribution to harmonisation of at least some common law principles in the region. For various reasons it did not come about. Unless the idea is now adapted and refurbished for the micro states of the common law in the Pacific, it seems unlikely to get very far.

Using the High Court of Australia. A second possibility might be to confer jurisdiction to hear transnational appeals upon the High Court of Australia. The simplest way this result could be achieved in relation to New Zealand is probably the reversal of a century of separation through final entry of New Zealand into the Australian [or Australasian] Commonwealth. As has been said, the Australian Constitution contemplates that New Zealand may become a State. Section 121 of the Constitution affords the Australian Parliament exclusive authority to admit new States.¹¹² An act of generosity — possibly an offer to admit New Zealand as two States — is probably needed if this brave idea, so natural and rational, is ever to come to pass. On federation it would plainly be necessary to enlarge the High Court of Australia [or Australasia] to include, say, two additional justices from New Zealand. The Australian Constitution places no limitation in the way of such enlargement and there is no doubt that the court could be greatly strengthened by the appointment of two eminent New Zealand justices. Federation under appropriate 'terms and conditions'¹¹³ would resolve the transborder legal disputes for there would then be an ultimate court of appeal with full authority throughout Australia and New Zealand. Section 92 of the Australian Constitution, guaranteeing that trade between the States shall be absolutely free, would greatly enlarge the access of New Zealand primary products to Australia.¹¹⁴ The legal, political and economic implications of federation deserve fresh consideration and perhaps CER will promote it.

Short of federation, appeals to the High Court of Australia could, theoretically, be allowed from New Zealand courts, possibly limited to defined matters, such as matters involving the interpretation of 'harmonised' statutes on tax, trade practices, corporations, exchange control and the like. A precedent exists in the little-known provisions of the Nauru (High Court Appeals) Act 1976. The Act relies upon an agreement between Australia and the Republic of Nauru, under which appeals are to be brought to the High Court of Australia from certain classes of decision of the Supreme Court of Nauru, an entirely independent republic within the Commonwealth. Australia acceded to the expressed wishes of Nauruan leaders that provision should be made for that appeal when Nauru, a former Trust territory administered by Australia, gained its independence. Introducing the Bill, the then Attorney-General, Mr R J Ellicott, pointed to its novelty:

The Bill represents a novel and significant step in that for the first time the High Court will function as a final court of appeal from the Supreme Court of another independent sovereign country. Generally, newly emerging countries establish their own judicial institutions. In this case the Nauruan Government took ... the initiative in seeking to have the High Court serve as the final appellate court of Nauru.¹¹⁵

The Nauru Act is the only example of the High Court of Australia being given an extra-Australian jurisdiction. There are certain constitutional problems with the legislation. It is difficult to reconcile it with any of the categories of appellate jurisdiction contained in section 73 of the Australian Constitution. Quite possibly, the High Court's jurisdiction is original rather than appellate, in that it arises under a law made under the 'external affairs' power.¹¹⁶ However this constitutional problem would appear to make no significance difference in practice.

Speaking then in Opposition, Mr Lionel Bowen supported the legislation but only on the basis that the jurisdiction of the Australian High Court was not to be seen as 'neo-colonial'¹¹⁷, was enacted at the specific request of Nauru and could readily be terminated by that country. Mr Bowen pointed to the fact that Papua New Guinea, whose appeals ran to the High Court of Australia during Australian administration of that country, had chosen not to continue appeals after Independence.

So far no appeals have been filed in the High Court of Australia under the 1976 Act. However, in June 1983 a Chamber summons application was heard in Melbourne seeking an extension of time within which to file a notice of motion to seek special leave to appeal from a decision of the Chief Justice of the Supreme Court of Nauru, sitting in the appellate jurisdiction of that court. A successful appeal had been brought to the appellate jurisdiction of the Supreme Court of Nauru from convictions recorded in a magistrate's court. The Director of Public Prosecutions of Nauru was allowed until late July 1983 to file a notice of motion seeking special leave to appeal to the High Court of Australia. At the time of the writing of this paper, no such notice of motion had been filed.

There are, of course, enormous difficulties in suggesting that, outside federation, appeals should lie from New Zealand courts to the High Court of Australia, presently the highest court of a separate, sovereign country. Whatever the dignity and reputation of that court, it is entirely constituted of Australian judges and would not even have the advantage, which the Privy Council enjoys, of specially constituting itself with a New Zealand or other relevant judge to hear New Zealand appeals. There are other problems including some doubts about the constitutional validity of conferring an external appeal on the High Court as such and the oppressive Australian workload about which the present High Court justices are increasingly heard to complain.¹¹⁸ In the case of New Zealand, with its own distinguished Court of Appeal and long-established, special legal traditions, the prospect of submitting appeals to the High Court of Australia, without some change of that court's constitution, seems fanciful.

South Pacific Court of Appeal. Faced with the declining jurisdiction, remoteness, perceived unsuitability and great cost of Privy Council appeals to London, yet desiring the occasional input of the external stimulation of high intellectual quality, proposals have been made from time to time for a general South Pacific Court of Appeals. In essence, this is the notion of a regional court of appeal for the common law countries of our part of the world. It was an idea put forward at the Commonwealth Law Conference in Sydney in 1965 as an alternative to a general Commonwealth court of appeal. If the latter was regarded as 'too ambitious or politically difficult'¹¹⁹ the conference was urged to consider the possibility of setting up regional courts of appeal. Three models were proposed, namely the East African Court of Appeal, the British Caribbean Court of Appeal and the West African Court of Appeal. Perhaps it is significant that each of these courts is now defunct. Slim volumes are all that remain as memorials to their contribution to common law jurisprudence.

The idea was revived in Mr Cameron's 1970 essay.¹²⁰ A South Pacific/Asian Court of Appeal could provide a 'third principal nucleus of development of the common law, comparable with England and America'.¹²¹ The only Australian known to have taken up the idea was the former Attorney-General for New South Wales, Mr Ken McCaw. As recorded by Dr Finlay, he did so only as a strategic move to discourage Prime Minister Whitlam's determination to terminate appeals to London.¹²² Dr Finlay, being 'realistic without being offensive', questioned the manning of such a court, even allowing that Australians would predominate. He asked whether such a regional court would be more than a group of Australian and New Zealand judges 'set up under some nominating formula and operating under another name'. He questioned the need for such a court 'without the centripetal effect of some economic grouping such as a common market which no one has suggested and which present circumstances and trade just could not support'.¹²³

New life was breathed into the idea by the New Zealand Royal Commission on the Courts. But the chief protagonist in recent years has been the Chief Justice of Fiji. He argued the case for a regional court of appeal for the Pacific, principally from the point of view of small nation states, set up in the retreat of empire but without the pool of experienced talent needed to provide the 'calmer consideration of important points' of law typical of a second tier appeal.¹²⁴ Again, there are many problems, however theoretically attractive the idea may be. They include the difficulties of nationalism and sovereignty, the debate about the respective values of dispassionate independence and responsive awareness in legal decision-making, the enormous problems that would arise in persuading Australians to change their Constitution if it were proposed to afford an appeal to an external court from the High Court of Australia, the difficulties of finding available appropriate personnel and the overwhelming problem of enforcement of orders in the event of dissatisfaction with a particular decision.¹²⁵ The conclusion Chief Justice Barwick offered in 1969 still seems apt. As a form of external affairs assistance to small jurisdictions of the Pacific, it might be an idea worth exploring. But as the notion of an appeal from countries with long and established judicial traditions, such as Australia and New Zealand, it has 'no chance in practical politics'.

Trans-Tasman commercial court. When the bold designs are put aside, is there any room for a special trans-Tasman court with a limited jurisdiction, specifically conferred on it, to hear particular cases of mutual concern to Australia and New Zealand? Would it be possible to establish a single court of appropriate authority and neutrality to determine appeals? Clearly there would be some advantages in such a court. Specialist judges could be appointed, possibly those with familiarity in commercial law, tax and the like.

Such a court could develop its own jurisprudence. It could contribute, by consistent decision-making, to uniform interpretation of 'harmonised' laws, such as are now contemplated by the CER Agreement. It might even have powers conferred on it directly to enforce decisions in both countries. In this way, it could reinforce the initiatives being taken by the legislative and executive branches of government.

The nearest equivalent to such an interjurisdictional court is the Court of Justice of the European Communities, commonly known as the European Court of Justice. In one sense, this court acts as an interjurisdictional 'court of appeal'. However, it is not truly a court of appeal in the strict sense. It is not possible to appeal to the European Court of Justice from a decision of a court in a Member state. Cases come before the European Court in a number of different ways. They may be brought by Member states against other Member states or against the European Commission. They may be brought by the European Commission against member states. More importantly, for present purposes, a court in a Member state may refer a question to the European Court of Justice under Article 177 of the Treaty of Rome. References under Article 177 are a major way by which the European Court of Justice has developed the jurisprudence of the Treaty. A number of English cases have shed light on the reaction of English courts to references made pursuant to Article 177.¹²⁶ So far, English courts have been willing to make references under Article 177 in appropriate cases. Nor have there been any noticeable problems about English courts following the decisions of the European Court of Justice on matters of European law. There remain a number of residual technical and constitutional problems. However, in general, it is accurate to say that the decisions of the European Court of Justice have had a significant impact in a variety of areas of domestic law in member countries, such as industrial property law, customs law and sex discrimination law.

A second interjurisdictional court that should be mentioned is the European Court of Human Rights. That court is established pursuant to the European Convention on Human Rights of 1950. Again, no provision is made for an appeal to be brought to that court from a domestic court in a member country. Cases are brought in the first instance to the European Commission, either by Member states or by individuals. They may then be brought before the European Court of Human Rights by Member states or by the Commission itself. Individual litigants are not, as such, parties to cases before the European Court of Human Rights. However, in practice, their views are put as part of the presentation of the case by the European Commission of Human Rights. Decisions of the European Court of Human Rights have had important indirect effects upon the municipal law in member countries, including the United Kingdom. One case which was tantamount to an appeal, was the Sunday Times case.

The European Court of Human Rights held that a decision of the English House of Lords on the law of contempt was a violation of the European Convention on Human Rights.¹²⁷ An important difference of opinion emerged about the proper function of contempt law. The decision of the European Court of Human Rights was instrumental in initiating statutory changes to the United Kingdom law on contempt.¹²⁸ In other areas, English courts have been sensitive to the implications of their decisions under the European Convention of Human Rights. However, the European Court of Human Rights is not strictly an interjurisdictional court of appeal. I know of no plan to allow direct appeals to that court from municipal courts. It remains simply a special court established pursuant to a treaty to operate, effectively, as a competitor and a stimulus to municipal courts in a limited area of defined, and agreed, jurisdiction.

For completeness, it should be said that there is no appeal from any municipal court to the International Court of Justice. It sometimes happens that cases which start as municipal cases become matters of international litigation by separate application. The 'transfer' of such cases from municipal and international fora can be a difficult one, raising local constitutional problems. The most notable example in recent years is the termination of the cases involving Iran in the United States, by Presidential Order made pursuant to the settlement of the hostages crisis between Iran and the United States. The Supreme Court of the United States held that the 'transfer' of these cases to an international tribunal at the Hague was permitted by the United States Constitution.¹²⁹

Although the establishment of a special and limited trans-Tasman court or commercial court would be feasible, pursuant to a treaty, and although precedents for the successful operation of such interjurisdictional courts exist, numerous problems must be faced. Quite apart from the theoretical and practical problems mentioned in relation to the earlier options, they include, in the case of Australia, the inability to exclude the constitutional prerogative review of the High Court of Australia of all Australian courts and the probable invalidity of any attempt to create an appeal from any Australian court to a body outside Australia, other than the Privy Council. The High Court of Australia has already held invalid a provision which purportedly created an appeal from the High Court to the Court of Conciliation and Arbitration in certain industrial matters. The argument would be reinforced in the case of non-Australian courts.¹³⁰ I do not believe that there could be any appeal from the High Court of Australia to an interjurisdictional court of appeal without amendment of the Australian Constitution. The record of such amendment in the history of Australian federation is discouraging.

Finally, even if all that was done was to create a special, parallel court of limited and particular jurisdiction in commercial or trade matters, the arrangement would, in the event of dispute, invite precisely the same definitional problems as have arisen in Australia in recent years in relation to the jurisdiction inter se of the Federal and State courts.¹³¹ It is precisely in these circumstances that it might be expected that parties would seek the authoritative determination in constitutional supreme courts. In the case of the High Court of Australia, the prerogative writs provided under the Constitution would effectively transfer the jurisdictional determination into the High Court of Australia, thereby subordinating the wished-for interjurisdictional independence to the determination, authoritative in Australia at least, of the highest court of one Member country only. In this regard, New Zealand's Constitution is more readily adaptable to modification of the court structure than is the written language and specific design of Chapter III of the Australian Constitution.

PRACTICAL AND MACHINERY PROVISIONS

Dual commissions. Without taking the uncertain path of establishing new courts and associated institutions, there are a number of steps that could be contemplated to facilitate better legal servicing of the problems likely to arise from closer economic relations between Australia and New Zealand. In the context of the courts, one possibility not to be entirely excluded is that of providing judges of different countries with commissions to sit in each other's courts. The notion has some complications but these are not insuperable. It was mentioned in the Royal Commission on the Courts:

It was suggested to us that by arrangement with other countries having a similar common law background, it might be possible to make provision for judges from those countries to sit from time to time on the New Zealand Court of Appeal where their knowledge and expertise would be of value. There are practical difficulties in such a proposal, we think it preferable for our judges to continue to have regard to the decisions of courts in other countries rather than bring the judges to our court.¹³²

The conclusion is eminently sensible. But the idea deserves some further exploration. The manner in which the Privy Council (avowedly an interjurisdictional court) invites 'ad hoc' judges provides a precedent. Already the issuance of interjurisdictional warrants has begun. Mr Justice Stewart, a judge of the Supreme Court of New South Wales, received a commission as a Royal Commissioner of Inquiry from the Governor-General of New Zealand, as well as from the Governor-General of Australia and the Governors of three Australian States.

This recent report on aspects of narcotic drug activities in both countries was released simultaneously in Australia and New Zealand.¹³³ Within Australia, the issuance of such multi-jurisdictional Royal Commission warrants is becoming more common following the earlier inquiry on drugs by Mr Justice Williams of the Supreme Court of Queensland. In tribunals, it was announced in June 1983 that Mr Justice Ludeke, a Deputy President of the Australian Conciliation and Arbitration Commission, had received a commission as a Deputy President of the Tasmanian Industrial Appeals Tribunal. This may facilitate resolution of interjurisdictional Federal/State industrial concerns in Tasmania. Judges of the Federal Court of Australia hold personal commissions as Presidential Members of a number of Federal tribunals in Australia. Mr Justice Barblett, Chief Judge of the State Family Court of Western Australia, holds a commission as a judge of the Family Court of Australia, a Federal court. This allows him to sit on appeals from the Family Court of Western Australia and thereby to provide local knowledge and experience to the Full Court of the Family Court of Australia, acting in its appellate capacity.

Admittedly, the issuance of additional commissions as justices of the High Court of Australia or New Zealand Court of Appeal would provide special problems, not least because of the significant constitutional function of the Australian High Court. But at a lower level, the possibility of developing a trans-Tasman court with judges holding commissions from both countries should not be ruled out. I have always thought that this methodology of reconciliation of jurisdictions is more likely to be fruitful in the short term at least, than the creation of entirely new courts with the additional problems that involves.¹³⁴

International arbitration. The second practical possibility for the resolution of interjurisdictional disputes, or some of them, would be the activation or creation of agencies of international arbitration. New Zealand, for example, has ratified the Convention on the Settlement of Investment Disputes between States and nationals of other States. That Convention, drawn up under the auspices of the World Bank, establishes the International Centre for Settlement of Investment Disputes.¹³⁵ There are many similar interjurisdictional agencies for the settlement of disputes. The International Joint Commission between the United States and Canada has already been mentioned.¹³⁶ In our region there are already international bodies which could be developed to provide facilities of arbitration of international disputes. The South Pacific Forum may be one such body. Arising out of the CER Agreement, a body specific to legal and other disputes between Australia and New Zealand might in due course be created. Of course, arbitration is in some ways not as satisfactory as authoritative judicial determination. In the trade and commercial fields, arbitration has never been as successful in our region as it is in the United Kingdom and North America.

The development of international commercial arbitration should be examined as an alternative means for the resolution of at least major interjurisdictional disputes. Such voluntary arbitration would have the advantage of avoiding many of the constitutional and institutional problems listed in this paper.¹³⁷

Service and execution of process. A very practical contribution to the reduction of interjurisdictional difficulties between Australia and New Zealand could be the extension of facilities for the service and execution of legal process throughout the two countries. The Australian Law Reform Commission has been asked to examine reforms of the service of process and the execution of judgments. Its review is confined to the Service and Execution of Process Act 1901 (Cth) and its operation in Australia. The chief source of Federal legislative power in the Australian Constitution only appears to contemplate legislation with respect to intra-Australian service of process and execution of judgments.¹³⁸ The intra-State situation within Australia may be sufficiently distinguishable from the international situation to warrant separate treatment. However, it could be argued that a more liberal and streamlined procedure should be developed, both within Australia and in relation to New Zealand, if the latter could be secured on a reciprocal basis.

At present, if Australian process is to be served in New Zealand, or New Zealand process in Australia, resort must be had to the rules of the several courts of the two countries. Generally speaking, service out of the jurisdiction is only possible with respect to Supreme Court process. Accordingly inferior courts in Australia or New Zealand cannot serve their process out of the jurisdiction at all. In relation to the enforcement of foreign judgments, all Australian States and Territories and New Zealand provide for the enforcement of certain foreign judgments. There are common law rules governing such enforcement and in all Australasian jurisdictions there is relevant legislation. Significantly, however, jurisdiction assumed over an absent defendant who is served outside the forum does not appear to be enforceable under present State law either in the Australian States or in New Zealand. Thus, if an Australian defendant is sued in a New Zealand court and the Australian defendant is served in Australia pursuant to the rules of the High Court of New Zealand, the resulting judgment will not be enforceable in Australia. Likewise, the judgment of an Australian State or Territorial court against a New Zealand defendant served in New Zealand pursuant to an Australian provision for service ex juris, will not be recognised or enforced in New Zealand. However, judgments obtained in Australia or New Zealand where the defendant is served within the forum (or submits to the jurisdiction) are enforceable in the other jurisdictions. Provided the judgment complies with all other requirements, namely that it is final, for a fixed sum of money and that enforcement will not contravene local public policy and that there is no fraud, the judgment will be enforced.¹³⁹

If it should be decided to expand and facilitate the service and execution of process and judgment throughout Australia and New Zealand, this could be done either by concluding a treaty with New Zealand, subsequently implemented by legislation in both countries or, in the case of Australia, by the extension of the Federal Service and Execution of Process Act to New Zealand in reliance upon the 'external affairs' powers, with reciprocal action on the part of the New Zealand Parliament. In the case of Australia, such extension would probably be constitutionally possible despite the limitations of the relevant special provision of the Constitution by reliance on the external affairs power, as now elaborated. Obviously, because Australian legislation cannot by itself have force in New Zealand, it would be necessary to have complementary legislation in New Zealand either adopting the relevant provisions of the Australian statute or, more likely, re-enacting it.

Because of the close historical and trade ties between Australia and New Zealand, a case can certainly be made for placing New Zealand on a more favourable basis than other foreign countries with respect to judicial assistance involving the service of its process and the execution of the judgments of its courts in Australia. The details of the machinery of mutual enforcement of legal process need to be considered. The invariable rule at common law and under the foreign judgments legislation of the Australian States and New Zealand is that a foreign judgment for tax is not enforceable.¹⁴⁰ On the other hand, under the present Federal Act, State judgments are enforceable or liable to execution with virtually no preconditions and therefore a judgment founded on a tax liability is enforceable in any other Australian jurisdiction. As steps are taken to harmonise tax and other laws, consideration should be given in both Australia and New Zealand to the practical facility of establishing, out of respect for each other's courts, a sensible procedure for the recognition of each other's process and the enforcement of each other's judgments. This is a matter that might be reconsidered when the report of the Australian Law Reform Commission on this topic is delivered in 1984.

Other practical matters. There are many other practical steps that could be taken to reduce the barriers of inconvenience that exist between the legal systems of Australia and New Zealand. First, harmonised laws, so desirable from the point of view of business and commerce, will not come about by their own motion. The experience of Australia's painful moves to uniform corporation and securities laws demonstrates the difficult process of interjurisdictional negotiation. The enhanced power of the Australian Parliament under the 'external affairs' power may facilitate the development of interjurisdictional uniform law. However, it seems obvious that disparate commercial laws will remain an impediment to trans-Tasman trade, unless something is done.

The position is complicated by the fact that whilst New Zealand has a single legal system, New Zealand traders dealing with Australia must acquaint themselves not only with Federal commercial laws but also with the relevant laws of the States. Accordingly, any interjurisdictional body for the harmonisation of commercial laws will need to include representatives of the Australian States. The sooner such 'second generation' machinery of intergovernmental consultation is established, the better.

Secondly, it has already been mentioned that in Australia the Federal Attorney-General plans to establish a National Uniform Law Reform Advisory Council. New Zealand representatives were present at the creation. But it will be desirable for the New Zealand law reform agencies to play an active part in that body, at least when it is examining laws of mutual interest, such as the development of uniform laws on commercial matters or, possibly, service and execution of process.

Thirdly, fresh consideration should be given to the admission of legal practitioners to practise before the courts in Australia and New Zealand. Because a note on a 'Strategy for New Zealand practitioners' will shortly be published in the New Zealand Law Journal dealing with this subject, I will not elaborate it.¹⁴¹ In the context of the implementation of the CER Agreement, it seems appropriate and timely to review the Admission Rules of the State Supreme Courts dealing with interstate and overseas practitioners as these affect New Zealand lawyers wishing to practise in Australia. The recent liberalisation of admission to practise in Victoria, without residency requirements, may provide a 'springboard' by which, pending the more thorough review, New Zealand practitioners can gain admission in other Australian States.¹⁴² Clearly it would seem desirable that New Zealand customers having problems before Australian courts should normally be entitled to be represented, with minimum difficulty, by New Zealand lawyers, whom they know and in whom they have confidence. Similarly, Australian litigants should have a similar facility in New Zealand. The movement of practitioners throughout Australia is now facilitated by a national right of audience before Federal courts and tribunals. The barriers to admission before State courts may need Federal review in the light of the CER Agreement.

Fourthly, it is clearly desirable that there should be enhanced contact between trans-Tasman legal practitioners and their organised societies. There is already communication at the level of law societies. Informal, specialised associations have also been created, including the Maritime Law Association of Australia and New Zealand. It would be a good thing if lawyers habitually practising in trade and other matters of concern to trans-Tasman clients could form a special association not only to pool knowledge and share experiences, but to provide stimulation to law reform and judicial reform and an ongoing dialogue about harmonisation of laws and institutions.

Finally, lawyers tend to be very conservative in matters of judicial administration. Just as the CER Agreement was initially signed by satellite, there is no doubt that interjurisdictional disputes will before too long be dealt with by telecommunications. In Australia, the continental size of the country has already forced the Administrative Appeals Tribunal to deal with certain disputes, including the taking of evidence, by telephone hearings. The amount at stake in a social security appeal, though important to the litigant, simply does not warrant the great costs of travel over huge distances. The general development of telecommunications court hearings will come. It will affect Australian and New Zealand courts. It is only a matter of time. When the rest of the world moves rapidly to the acceptance of telecommunications and computerisation, the law, though it will be tardy, must not ignore these developments altogether.

There are many other like matters that could be considered. Though they do not have the imaginative attractiveness of the revival of the Privy Council, the reconstitution of our courts, the creation of an interjurisdictional tribunal and so on, by the same token, the adoption of a number of specific and attainable targets might be more likely to bear fruit, at least in the short term.

CONCLUSIONS

This paper has reviewed the Closer Economic Relations Agreement against the background of the surprising persistence of the political and economic divisions of Australia and New Zealand. The CER Agreement does not establish any interjurisdictional machinery for the resolution of the legal disputes that may be expected to arise in increasing number as trade between Australia and New Zealand grows. The new economic relationship between the two main English-speaking countries of the South Pacific is established at a critical time for each of them. The economy of each faces new and difficult problems, including significant competition from seemingly more efficient countries in the Asian/Pacific region. The time is also critical because the Agreement has been signed at the very moment when the last vestiges of the one interjurisdictional court shared by Australia and New Zealand (the Privy Council) are being terminated in the case of Australia and seriously questioned in the case of New Zealand.

An attempt has been made to review briefly the moves that have called in question the Privy Council, a remarkable instrument of Imperial government, whose contribution for good and ill on the far flung Empire is yet to be fully explored. A number of considerations have been suggested against which any new interjurisdictional curial substitute must be measured. The paper then examined the options before us.

Establishment of a regional Judicial Committee of the Privy Council to service the Commonwealth members in the region would be the simplest solution, from the point of view of its creation. But the idea, if it was ever viable, is too late by at least 20 years. Even in the declining days of Empire, Whitehall showed insufficient interest and imagination.

A further possibility lies in the use of the High Court of Australia. That court hears appeals from independent Nauru. By coincidence, the first such appeal is now being brought. But again, there are problems and the notion of appeals to the High Court of Australia from the New Zealand Court of Appeal, without New Zealand participation, is unthinkable. Only Federation provides the solution in the creation of an enlarged High Court of Australasia. The crimson thread of kinship may still be there. But there is a need for more interest in Australia and New Zealand before federation is seriously considered again. Certainly, it must come from motives deeper than the resolution of a few interjurisdictional legal cases.

A court of appeal for the South Pacific can realistically only be seen as a facility for developing countries of the region. A special trans-Tasman Commercial Court has some distinguished international precedents. But the difficulties are large and the problems in the way of its establishment seem virtually insuperable.

A number of practical suggestions can more readily be embraced, short of the dreams of federation and the creation of special courts. These include experimentation with dual judicial commissions, exploration of international arbitration, reform of the law governing service and execution of process, development of effective, working machinery for the harmonisation of laws, improved access by legal practitioners to the courts of each other's country, improved contact between lawyers and their associations and development of new, more modern means for the administration of justice on both sides of the Tasman.

Exactly a century ago, Australian and New Zealand lawyers and citizens were debating the precise form of their political relationship. Is it too much to hope, a hundred years on and in times less certain and more dangerous, that the CER Agreement may revive the old debates and require our re-exploration of the lost opportunities?

FOOTNOTES

The views expressed are personal views only.

See J Hight and H D Bamford, The Constitutional History and Law of New Zealand, 1914, 353. British sovereignty was proclaimed over New Zealand and the islands were constituted initially a dependency of New South Wales. As to separation from New South Wales, see J Quick and R R Garran, The Annotated Constitution of the Australian Commonwealth, 1901, 78-9.

2. Federal Council of Australia Act 1885 (Imp).

3. R R Garran, Prosper the Commonwealth, 1958, 89.

4. *ibid.*

5. James Service, cited Garran, 91.

6. Sir Henry Parkes, cited Garran, 91.

7. Garran, 93. Cf Quick and Garran, 233. As to Mr Seddon's New Zealand resolution in 1900, see Quick and Garran, 251.

8. Australian Constitution, Covering clause 6.

9. See Australian Foreign Affairs Report, February 1983, 59.

10. *ibid.*

11. Article 12(1).

12. Article 22(3).

13. M Cohen, The Regime of Boundary Waters — The Canadian-United States Experience, in Collected Courses of the Hague Academy of International Law, 1975, III, Volume 146, 219, 267ff.

14. Letter of Mr N R Lind, Australian Department of Trade, to the author, 3 June 1983.

15. S A Fowler, 'Let's Widen CER', in Business Bulletin, June 1983, 66-7.

16. Lind, 2.
17. New Zealand Herald National Business Research Bureau Survey, reported NZ Herald, 26 October 1982, 1.
18. Dr G Palmer, reported NZ Herald, 24 August 1982.
19. Estimate by Dr D G Thomas for Australia-New Zealand Businessmen's Council, reported NZ Herald, 2 May 1983.
20. *ibid.*
21. Mr R Hines, cited Auckland Star, 11 May 1983.
22. A Parker, 'First Step to Full Union?' in National Business Review (NZ), 30 May 1983, 33.
23. *ibid.*
24. cited *ibid.*
25. I Douglas, cited NZ Herald, 19 May 1983.
26. *ibid.*
27. *ibid.*
28. Reported Auckland Star, 18 May 1983.
29. Mr Muldoon, reported Australian Financial Review, 28 June 1983, 1.
30. This point was made by the Confederation of Australian Industry, reported Auckland Star, 23 June 1983. Cf Sydney Morning Herald, 22 June 1983, 12.
31. Auckland Star, 29 June 1983, A8.
32. *ibid.*
33. Auckland Star, 18 May 1983, B10.
34. The NZ Federation of Labour announced in June 1982 that it did not support CER. .

35. Act 3 and 4 Wm IV c.41. Cf Quick and Garran, 751.
36. Quick and Garran, 751. See also R de Garis, The Colonial Office and the Constitution Bill, in A Martin (ed), Essays in Australian Federation, 1969, 104.
37. Australian Constitution, s.74. Note that constitutional cases, other than inter se cases, were frequently appealed to the Judicial Committee until 1969.
38. Privy Council (Limitation of Appeals) Act 1968 (Cth); Privy Council (Appeals from the High Court) Act 1975 (Cth).
39. P D Durack, The Future of the Constitution, (1983) 6 Commonwealth Record and note (1983) 57 ALJ 320.
40. Sydney Morning Herald, 11 July 1983, 8.
41. See eg XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd, reported Australian Financial Review, 12 May 1983, 5.
42. Cf G E Barwick [1972] NZLJ 549, hereafter 'Barwick, 1972'.
43. B J Cameron, 'The Judicial System', in J L Robson (ed), 'New Zealand — The Development of Its Laws and Constitution', 1957, 85.
44. *ibid.*
45. [1903] ACT 173.
46. G E Barwick, 'A Regional Court of Appeal', [1969] NZLJ 315, hereafter 'Barwick, 1969'.
47. Haslam, 'The Judicial Committee — Past Influence and Future Relationships', [1972] NZLJ 542.
48. A M Finlay, 'A Court of Appeal for the South Pacific Region', in Convention Papers for the First Fiji Law Convention, 1974, 6.
49. *ibid.*
50. *ibid.*

51. Finlay, *ibid* citing L G B Gower, (1973) 23 Uni Toronto LJ 257.
52. See P McCarthy, [1976] NZLJ 376.
53. As cited by the New Zealand Royal Commission on the Courts, Report, 1978, 80.
54. *ibid*, 82.
55. *id*.
56. Lesa v Attorney-General of New Zealand, [1982] NZLJ 274.
57. B Clark, cited Auckland Herald, 16 February 1983.
58. J McLay, Speech at Waikato University, February 1983. Other figures were given in answer to a Parliamentary Question by Mr T A de Cleene MP, Law Talk, 171, 4. Five of 17 New Zealand appeals heard by the Judicial Committee since January 1975 have been allowed in whole or in part.
59. Canberra Times, 14 March 1983, 2.
60. R Muldoon, NZ Herald, 30 June 1983, 1.
61. L P Beth, 'The Judicial Committee as Constitutional Court for the British Empire 1833-1971', 7 Georgia J Int & Compar Law 47 (1977).
62. *ibid*, 47.
63. *id*, 49.
64. McLay, n.58, *id*.
65. Beth, 54.
66. *ibid*, 55.
67. *id*, 56.
68. *ibid*.
69. *id*, 75. Cf G Sawyer, Australian Federalism in the Courts, 1967, 29.

70. Beth, 58.
71. It should be noted that the methodology used by Beth is not entirely clear from his article.
72. Tasmania v The Commonwealth (The Tasmanian Dams case), unreported decision of the High Court of Australia, 1 July 1983.
73. G J Evans, 'Uniform Law Reform and the Case for a National Law Reform Advisory Council', Paper delivered to the Eighth Australian Law Reform Agencies' Conference, Brisbane, 2 July 1983. The Standing Committee of Attorneys-General agreed on 16 July 1983 to the establishment of a Council.
74. See Record of the Eighth Australian Law Reform Agencies' Conference, Brisbane, 2 July 1983. The New Zealand representatives were Judge D Sheppard and Mr C I Patterson.
75. F C Hutley, The Legal Traditions of Australia as Contrasted with those of the United States, (1981) 55 ALJ 63, 69.
76. Finlay, 1.
77. Barwick, 1972, 551.
78. T Tuivaga, 'A Regional Court of Appeal for the Pacific', Paper for the Fifth South Pacific Judicial Conference, May 1982, 171.
79. Australian Constitution, s.74.
80. Nyali v Attorney-General, [1956] QB 16-7.
81. Barwick, 1969, 319.
82. Tuivaga, 179.
83. Mr Justice Callan, cited by Haslam, 547.
84. Tuivaga, 172.
85. Beth, 52.
86. Haslam, 548.

87. Godfrey, Commentary on Haslam, 552.
88. Finlay, 1.
89. *ibid*, 5.
90. R Cooke, 'Divergencies — England, Australia and New Zealand', Paper for 22nd Australian Legal Convention, 1983, mimeo, 3,
91. *ibid*, 35.
92. Barwick, 1969, 322.
93. L Street, 'Towards an Australian Judicial System', (1982) 56 ALJ 515. See also F Burt, 'An Australian Judicature', (1982) 56 ALJ 509 and F M Neasey, Comment Upon Proposals for an Australian Judicial System (1983) 57 ALJ 335.
94. See eg Fletcher v Seddon Atkinson (Aust) Pty Ltd, [1979] 1 NSW 169; Arturi v Zupps Motors Pty Ltd, (1981) 33 ALR 243.
95. Barwick, 1969, 319.
96. Deane J, reported Australian Financial Review, 8 June 1983.
97. Royal Commission on the Courts, 76, 87.
98. Barwick, 1969, 315, 318.
99. Barwick, 1972, 549.
100. Finlay, 6.
101. Royal Commission on the Courts, 87.
102. *ibid*.
103. *id*, 74-8.
104. Sir Clifton Webb, cited Finlay, 1-2. Cf. Sir Richard Wild, [1972] NZLJ 554.

105. E. Gardner and R. G. Page, 'Intra-Commonwealth Judicial Machinery', in Record of the Third Commonwealth and Empire Law Conference, Sydney 1975, 36.
106. B. J. Cameron, 'Appeals to the Privy Council — New Zealand', (1970) Otago Law Review.
107. Barwick, 1969, 320, 322.
108. Barwick, 1972, 550.
109. Barwick, 1969, 322.
110. G. J. Evans (ed), Labour and the Constitution.
111. Barwick, 1969, 320.
112. A. A. and R. Burnett, Introduction : And an Antipodean Hybrid, in Australian National University, Australia-New Zealand Economic Relations — Issues for the 1980s, 1981, 4. The authors discuss the feasibility and problems of federation.
113. Australian Constitution, s.121.
114. Burnett, 5.
115. R. J. Ellicott, Commonwealth Parliamentary Debates (House of Representatives) (Australia), 7 October 1976, 1647.
116. See Australian Constitution, s.76(ii). See J. Crawford, Australian Courts of Law, 1982, 149, 164.
117. L. K. Bowen, Commonwealth Parliamentary Debates (House of Representatives) (Australia), 2 November 1976, 2227.
118. Sir Harry Gibbs, Report on the State of the Australian Judicature, 22nd Australian Legal Convention, Brisbane, July 1983. Cf Barwick, 1969, 318.
119. Gardner and Page, 38.
120. Cameron.

121. ibid.
122. Finlay, 5.
123. ibid, 5.
124. Barwick, 1969, 318.
125. Finlay, 6.
126. See eg H P Bulmer Limited v J Bollinger SA, [1974] 2 All ER 1226; Customs and Excise Commissioners v Samex [1983] 1 All ER 1042.
127. See Attorney General v Times Newspapers Ltd, [1974] AC 273, the Sunday Times case itself, (1979) 2 European Human Rights Reports 245, and Attorney-General v British Broadcasting Corporation, [1981] AC 303.
128. Contempt of Court Act 1981 (UK).
129. Dames and Moore v Regan, 69 Lawyers Ed (2d) 918 (1981).
130. See also The Commonwealth v Queensland, (1975) 134 CLR 298.
131. See above, n.93.
132. Royal Commission on the Courts, 88.
133. Royal Commission of Inquiry into Drug Trafficking, Report, 1983. As to the effectiveness of interjurisdictional commissions, see Re Winneke; ex parte Gallagher, (1982) 44 ALR 577.
134. Cf F M Neasey, (1983) 57 ALJ 335 and M D Kirby, noted (1982) 56 ALJ at 503.
135. Cf Amerasinghe, 'Jurisdiction Ratione Personae Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States',
136. See n.13 above.
137. Cf C Reynold, The New Swiss Uniform Arbitration Act and International Commercial Arbitration, 7 George JI Intl & Compn Law, 85 (1977).

138. Australian Constitution, s.51(xxiv).

139. For a case where an Australian judgment was impeached in New Zealand for fraud, see Svirskis v Gibson, [1977] NZLR 4.

140. See Sykes and Pryles, Australian Private International Law, 1979, 74-5.

141. See G Walker, 'Reforming Inter-State and Overseas Admission Rules in Australia : A Strategy for New Zealand', in [1983] NZLJ, forthcoming, June 1983.

142. Cf In re Goldberg (1981) 28 SASR 472.