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THE 'AUSTRALASIAN IDEA'

If there is nothing more powerful than an idea, whose time has come, the issue for New Zealanders and Australians in 1983 is whether the ideal of a trans-Tasman federation is one whose time has come or one whose time came and went or whose time is yet to come.

The Closer Economic Relations Agreement ('CER') came into force between Australia and New Zealand in March 1983. It provides for an extension of free trade arrangements between the two countries. It contemplates a number of 'second generation' issues, including harmonisation of tax, customs, trade practices and corporation laws in the commercial sphere. There is nothing in the Agreement about an interjurisdictional court or the resolution of interjurisdictional questions, let alone federation. Indeed, there is even dispute amongst commentators as to whether CER will significantly increase trade between the two countries at all.

Assuming that trade is increased, such increased trade will inevitably produce legal disputes requiring resolution in neutral and mutually trusted courts. The need for a transnational court for New Zealand and Australia comes at the precise time when the one court shared by the two countries (the Judicial Committee of the Privy Council) is being finally abolished in Australia and seriously questioned in New Zealand. This paper will explore the various possibilities of an acceptable trans-Tasman court. But it is best to state the conclusion at the outset. No acceptable trans-Tasman court is in prospect, short of federation between Australia and New Zealand. It was this conclusion, as well as the author's deep affection for New Zealand, that took him to explore the history of earlier discussions of federation. Many present-day Australians and New Zealanders do not realise how close the two countries came, at the turn of the century, to a federal union.

No-one would seriously suggest federation as a means of solving a few legal disputes. Nor could it be justified for purely economic reasons. Political, emotional, cultural and racial reasons must motivate moves between sovereign countries towards closer political association. The CER Agreement at least requires New Zealanders and Australians to consider where CER is taking us. Is it towards federation?

The Australian signature of the CER Agreement in March 1983 came 82 years after the Australian colonies established their federation without New Zealand. Newfoundland, originally an entirely separate dominion of the Crown, finally joined the Canadian federation in 1949. That great English-speaking federation was established in 1867. It therefore took exactly 82 years for the anomalous relationship between Newfoundland and Canada to be finally sorted out. Newfoundland now enjoys full membership of the Canadian federation. For all the problems of the Australian federation, I believe it is fair to say that the Australian federal union has been a greater success than the Canadian. Now, New Zealand is no Newfoundland. The population is far greater. The country boasts greater resources and the economic situation is nowhere near as unhappy as was that of Newfoundland in 1949. But there are parallels which a simple examination of history, language, allegiance, culture, institutions, laws and economics require us to address in the South Pacific, just as they ultimately did in the North Atlantic.

Having stated my principal conclusion, I concede that it is not possible to go back to a reconsideration of an Australasian federation on precisely the same terms as were being discussed exactly 100 years ago between Australians and New Zealanders. Each country has now gone its own separate ways for nearly a century. The CER Agreement requires us to reconsider our divergent paths.

It is my view that Australia should consider an act of generosity, such as admitting New Zealand as two States of the Australian federation, perhaps on terms providing special guarantees of respect for local institutions, laws and practices. The creation, even 100 years late, of an Australasian federation, could make economic and political sense. In the past, only a fear of bold ideas, provincial attitudes and petty jealousies prevented the union of Australia and New Zealand. Though it would require generosity on the part of Australians and some sacrifice on the part of New Zealanders, the final entry of New Zealand into an Australasian Commonwealth would remove many problems for both countries, including growing legal and economic problems. It would, for example, assure New Zealanders, under section 92 of the Australian Constitution, of absolutely free access by its products to Australia.

Furthermore, it would remove the 'unnatural' political division of the two main English-speaking countries in the South Pacific. Entry procedures under section 121 of the Australian Constitution are simple, if the political and popular will exists. The Constitution provides that the Federal Parliament:

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

This is a simple formula because in 1901 it was not expected that Western Australia would have joined the federation before it was formed. Furthermore, at that time it was still hoped that New Zealand would subsequently join, a fact underlined by the inclusion of New Zealand as one of the federating States in covering clause 6 of the Constitution Act. Unlikely so many other things in the Constitution, there is a swift and easy path to federation, if the will exists. No referenda are necessary. The concurrence of the other States is not necessary. The machinery is there. It is simple in the extreme.

These remarks about the federal idea will be read by some New Zealanders as an impertinence. Already the New Zealand Prime Minister has described them as 'comic' and 'a bad joke'. Yet before they are too readily dismissed once again, a number of considerations should be borne in mind:

* New Zealand chose not to join the federation in 1900 because it wished to remain a separate unit of the British Empire. The Empire and the Royal Navy have now retreated. Our two English-speaking European cultures are left on the far side of the world, with much more in common with each other than with other nations of the region.

* The economic travails of Australia and New Zealand are accentuated by the competition from highly efficient economies in the region. The bigger our internal market for free trade and economic development, the greater the chances of efficiency and inventiveness. Free trade arrangements of themselves rarely succeed. Only when they lead on to closer political ties are major economic efficiencies secured.

* Though New Zealanders have cherished their independence and often find the federal system of government unattractive, they could profoundly influence Australasian political and constitutional developments for the better. New Zealand lawyers and law makers have often been bolder and more innovative than Australians. Sometimes this has been precisely because of the absence of Federal constraints. But entry into an enlarged Australasia would enhance Australian public life. It would also widen the horizons for New Zealanders, including New Zealand lawyers.

* Although Australia has embraced the social philosophy of multiculturalism, New Zealand is itself increasingly a multicultural society. Talk of New Zealand as an English community in the Pacific is no longer accurate.

* There is an element of urgency. At the moment both Australia and New Zealand have a common Sovereign, largely compatible economies and strong memories of shared history and experience. Dr Palmer has said that New Zealand might have to consider federation in 20 years, if its economy continues to decline. But this provoked the response of one Christchurch lawyer at the CER seminar that in 20 years Australia might not be willing. There is a tide in the affairs of nations.

Returning from his tour of North America in 1890, Sir Henry Parkes, the father of Australian federation, referred to the 'crimson thread of kinship' which ran 'through us all' in Australia and New Zealand. The crimson thread was evidenced in the Federal Council of Australasia established in 1885. It was evidenced in New Zealand participation in all of the Australian Constitutional Conventions. It was evidenced in the provisions of the Constitution Act. It was fortified by ANZAC and by common endeavours of War. It has lately been strengthened by the CER Agreement. But a critical question mark still hangs over the relations between Australia and New Zealand. In the retreat of the British Empire, leaving two countries of similar culture, institutions, laws and traditions in the South Pacific, is it not sensible, looking to the long term, to reopen the debate about political association?

I ask New Zealand readers to forgive these remarks if they appear impertinent or insensitive. Few politicians on either side of the Tasman would feel able to discuss the issue frankly. Lawyers led the constitutional debates 100 years ago. Reconsideration of the Australian Constitution is now a lively topic of the coming Bicentenary of British Settlements. A hundred years has been lost; but it is not too late and the idea of Australasia may yet do its powerful work.

ALTERNATIVE COURTS

Short of federation between New Zealand and Australia, a number of much more limited possibilities exist to address the problem of the need for an interjurisdictional court to resolve the likely increase in trans-Tasman legal disputes.

A regional Privy Council. The history of the Judicial Committee of the Privy Council is, like the history of Australian and New Zealand relationships, a 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. In 1965, at the Commonwealth Law Conference in Sydney, a paper was presented urging new 'intra Commonwealth judicial machinery'. The New Zealand Attorney-General, Mr Hanan, welcomed the proposal. But other New Zealanders considered the notion 'too much behind its time'. 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.[1] Perhaps it was because he also 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.

Recognising the unlikelihood of converting the Judicial Committee to a general court of appeal for the Commonwealth, proposals of a more modest character have been made. Generally, these suggested creation of regional courts of appeal. But 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. 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 proposal 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 of Australia, 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 those of practical politics. 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.

Using the High Court of Australia. A second possibility might be to confer jurisdiction to hear transnational appeals upon the High Court of Australia. Short of federation, appeals to that court 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. So far, no appeals have been filed.

There are 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. 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. A South Pacific/Asian Court of Appeal could provide a 'third principal nucleus of development of the common law, comparable with England and America'.[2] The former Attorney-General of New Zealand, Dr Finlay, however, asked whether such a regional court would be anything more than a group of Australian and New Zealand judges 'set up under some nominating format and operating under another name'.[3]

The chief protagonist for the idea in recent years has been the Chief Justice of Fiji. But, 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. 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.[4] 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.

There are other interjurisdictional courts that could be considered as models, including the European Court of Human Rights established under the European Convention of Human Rights of 1950. For completeness it should be said that there is no appeal from any municipal court to the International Court of Justice.

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 do 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. 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. 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. This would subordinate 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 much more readily adaptable to modification of the court structure than is the written language and implied design of Chapter III of the Australian Constitution dealing with the judicature.

PRACTICAL MEASURES TO IMPROVE LEGAL RELATIONS

Having come to these gloomy conclusions, there are nonetheless a number of practical measures which should be considered if we are serious about improving the legal relations between Australia and New Zealand in the context of CER. In summary, they are:

* Provision of dual commissions to certain judges in both countries to permit them in certain circumstances to sit in each other's courts or tribunals. This process has already begun. Sir Owen Woodhouse was commissioned by the Australian Government in 1974 to report on accident compensation. Mr Justice Stewart has commissions as Royal Commissioner to enquire into drug trafficking on behalf of the New Zealand and Australian Governments. I am told that in the early 1970s there was serious discussion about a Joint Courts Martials' Appeals Tribunal;
* development of international arbitration for the voluntary settlement of large commercial disputes between parties in both countries;
* Simplification of the service of process and the execution of judgments handed down by Australian and New Zealand courts. For this purpose, New Zealand could, with its consent, be given a special, reciprocal status with the Australian Federal and State courts. At present, there are complicated procedures for the enforcement of foreign judgments. They apply only to superior courts. They exclude certain judgments and others may be attacked behind the record;
* Creation of permanent institutions to actively to promote harmonisation of business law between Australia and New Zealand. Harmonisation of such laws will not come about by prayer or wishful thinking. To be achieved they will need interjurisdictional institutions, personnel, hard work and political support;
* Participation of New Zealand in the proposed National Uniform Law Reform Advisory Council in Australia. The appointment of this Council was announced in July 1983 at the Eighth Australian Law Reform Agencies Conference in Brisbane. Representatives of the New Zealand Law Reform committees were present at this conference;
* New Zealand legal practitioners, representing New Zealand clients in disputes in Australia, should have, at least in certain circumstances, a right to appear before Australian courts[5];
* Establishment of associations of lawyers having interests in the problems of trans-Tasman trade law; and
* Exploration by courts in Australia and New Zealand of improvements in the administration of justice, including the use of telecommunications in court hearings to reduce the problems of distance and cost. The Administrative Appeals Tribunal in Australia has begun using the telephone for hearings and conferences, 100 years after Alexander Graham Bell invented it. Perhaps trans-Tasman court hearings by telecommunication will be achieved in the second century of Bell's invention.

REVIVING THE FEDERAL DEBATE

The creation of an interjurisdictional court for Australia and New Zealand (unless it be the enlargement of the High Court of Australia by the appointment of, say, two New Zealand judges upon full federation) is just not feasible. Even the creation of a specialised commercial court seems to present problems that are virtually insuperable. The catalogue of practical reforms is uninspiring yet difficult of achievement in the context of separate sovereignties.

That is why I am driven back to a revival of the Federal debate. The CER Agreement, legal problems and even economic problems are not justification for the reconsideration of a federal union. But they may provide the occasion for rekindling the old debate.

Exactly a century ago, Australian and New Zealand lawyers and citizens were debating the precise form of their post colonial 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 require our re-exploration of the lost opportunities? Pending that reconsideration we should put aside talk of transnational courts. We should get to work on the practical tasks of harmonisation of laws. But the bold amongst us will continue looking to the long-term, when the crimson thread of kinship may finally and indissolubly be joined again.

FOOTNOTES

* This is a revised and shortened version of a paper delivered by the author to a seminar on the CER Agreement held at Auckland University, 22-23 July 1983 under the auspices of the Legal Research Foundation Inc. The views expressed are personal views of the author. Mr Justice Kirby is Chairman of the Australian Law Reform Commission.

1. G E Barwick, 'A Regional Court of Appeal' [1969] NZLJ 315, 322. See also G E Barwick, [1972] NZLJ 549.

2. B J Cameron, 'Appeals to the Privy Council — New Zealand' (1970) 2 Otago Law Review, 172.

3. A M Finlay, 'A Court of Appeal for the South Pacific Region' in Convention Papers for the first Fiji Law Convention, 1974, 5.

4. 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.

5. G Walker, 'Reforming Inter-state and Overseas Admission Rules in Australia : A Strategy for New Zealand', [1983] NZLJ 188.