NEW ZEALAND LAW SOCIETY

LAW CONFERENCE, ROTORUA, NEW ZEALAND

WEDNESDAY 25 APRIL 1984

LAW, BUSINESS AND CER

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The Hon Justice MD Kirby CMG*

INCREASED TRADE, INCREASED DISPUTES

In July 1983, at the invitation of the New Zealand Legal Research Foundation, I presented a paper to a seminar in Auckland on the Closer Economic Relations Agreement ('CER Agreement') between Australia and New Zealand.[1] In my paper[2] I called attention to the terms of the agreement signed in Canberra on 28 March 1983, shortly after the election of the Hawke Government. The terms were those negotiated, on the part of Australia, by the Fraser Government, notably by Mr JD Anthony. The agreement deals principally with the reduction and elimination of tariff and non-tariff barriers to trade between the two countries. Wider initiatives of co-operation between Australia and New Zealand are referred to in provisions which, for example, state that an objective of the Agreement is 'to strengthen the broader relationship between Australia and New Zealand'.[3] The CER Agreement goes well beyond traditional concerns of trade agreements between sovereign countries. Deliberately, it establishes a basis for moving beyond the treatment of goods at national borders to trade-related issues, wherever arising as between the two countries and their residents. Specifically a number of 'second generation' issues are identified, including harmonisation on matters such as restrictive trade practices[4], co-operation in investment, marketing, movement of people, tourism and transport and taxation and company law.[5]

The CER Agreement does not establish an interjurisdictional court or tribunal to resolve disputes having connections with both jurisdictions. Such interjurisdictional bodies are not uncommon in agreements of this kind.[6]

Three things at least are clear from a consideration of the CER Agreement. First, it is simply a start on the road to the harmonisation of laws and practices affecting business in the two countries. On paper, it is no more than that, although the Australian Financial Review has said that there would have been no point to having such an agreement 'if it does not represent a first step towards an economic union between Australia and New Zealand'.

Secondly, as Dr Geoffrey Palmer has pointed out, such efforts to improve trading relationships and abolish legal and administrative impediments, tend to underwrite rather broader social and security relationships.[7]

Thirdly, the object of the CER Agreement, in the short-run and certainly in the long-run, is the increase in trade between Australia and New Zealand. Such an increase in trade will undoubtedly result in an increase in disputes having trans-national characteristics. The modern technology of informatics and fast travel means that such trans-national disputes are likely to arise anyway. Reinforced by CER, they will expand in number and complexity. It is premature to judge the early impact of CER on trans-Tasman trade. But estimates ventured at the time of negotiation suggested that Australia would import between 21 and 23% more goods from New Zealand. New Zealand would import 37 to 40% more goods from Australia.[8] In the wake of this increased trade come increased problems and disputes requiring resolution. In the baggage of such disputes come lawyers, their rules and institutions, to help resolve the disputes.

TRANS TASMAN COURT

Self-respecting countries tend not to welcome submitting disputes involving their residents to courts of other countries. There are many reasons. Other courts may be biased, however unconsciously, in favour of their own citizens. They will be familiar with their own rules and approaches to the interpretation of those rules, sometimes to the exclusion of legitimate alternative approaches with which another party is familiar. They may be inconvenient or expensive to the local residents, required to retain lawyers and take witnesses overseas. Though courts are normally independent, even the measure of accountability provided by procedures for judicial selection and appointment in countries such as in Australia and New Zealand are lost when disputes are submitted to a foreign court over the selection and appointment of whose personnel local people have had no say. Foreign courts may be slower. They may provide fewer ancillary privileges (such as the right to interest pending judgment). Their procedures (as for example for the reception of expert testimony) may be more limited. Their rules of evidence (for example as to the admission of computer or computer-generated material) may be more restrictive. All of these entirely rational reasons, when supplemented by a dash of modest nationalism, may be sufficient to persuade countries to endeavour to find a means of bringing disputes their own courts — or at least before courts which are mutually acceptable to both parties.

This was the context in which I explored the various possibilities for a mutually acceptable court to resolve, as between residents of Australia and New Zealand, the increasing number of commercial disputes likely to arise as a consequence of increased trade following the CER Agreement. What were the possibilities?

- The Privy Council. The first was to revive Australian participation in the one court which Australia and New Zealand still share, namely the Judicial Committee of the Privy Council. Although participation in the Privy Council has been questioned in New Zealand, the questioning has gone much further in Australia to the point of virtual abolition. Appeals from the High Court of Australia or State courts exercising Federal jurisdiction are now terminated.[9] By agreement of the States, the Australian Federal Government is also negotiating with the United Kingdom Government the final termination of residual State appeals. Though promised for the end of 1983, this ultimate severence of the judicial umbilical cord to London is still awaited.[10] But it now seems certain to come. In New Zealand the debate has been more ambivalent. Lawyers have sprung to the defence of this splendid imperial anachronism. David Baragwanath has written a valiant apology to the Privy Council in the December 1983 issue of Recent Law[11]. For present purposes, it is sufficient to say that, whatever New Zealand decides to do on this issue, and whatever might have been done at an earlier time, it is now unthinkable that Australia will reverse direction. As a trans-national court for resolving commercial disputes in a neutral forum as between Australia and New Zealand, the Privy Council is not feasible. Had the United Kingdom Government shown more creativity 20 years ago, a truly international court of the common law might have been created. But it did not. And it is now too late.

- Regional Privy Council. The second possibility would be the creation of a special judicial committee of the Privy Council for Commonwealth countries in the Pacific basin. Various suggestions to this end have been urged over the years.[12] Mature, advanced countries such as Australia and New Zealand have a contribution to make to assist common law countries in the region, of which there are many. However, for the provision of a neutral jurisdiction for Australia and New Zealand, this notion is also unacceptable. The numbers of judicial members of the Privy Council in Australia are dwindling. Labor Prime Ministers decline appointment to the Privy Council in Australia. It is inconceivable that a Labor Government in Australia would breath life into the Privy Council by appointing judges (assuming they were willing) to the Privy Council in order to constitute a regional Board. Like the notion of reviving appeals to London, this is an idea whose time has passed.

The fact that the Privy Council would sit in Canberra or Wellington would make it no more attractive to those Antipodean politicians who believe that the time has come to sever, not reinforce, imperial institutions.

- Use of the High Court of Australia. The further possibility is suggested by the provision of appeals to the High Court of Australia from the Supreme Court of Nauru.[13] However, it is unthinkable that the High Court of New Zealand and Court of Appeal of New Zealand would submit to the decisions of a purely Australian High Court, made up of Australian lawyers unfamiliar with New Zealand constitutional and legislative traditions and unaided by New Zealand participation. At least in the case of the Privy Council, arrangements are made for a local participant to take part in most appeals. This could not be done for appeals to the High Court of Australia, as such. In any case, such a facility would not achieve the object in view, namely the creation of a totally neutral trans-national court for disputes having a trans-national character. Whatever the dignity and reputation of the High Court of Australia, it would remain an Australian court, composed of Australian judges. The objective of a forum, neutral in reality and appearance, would not be achieved by this expedient.

- Trans-Tasman Commercial Court. The final possibility is the creation of a special court comprising experts in areas of law likely to arise in disputes between commercial people in Australia and New Zealand. There is something of a precedent for this in the European Court of Justice established under Article 177 of the Treaty of Rome. Many business people and their lawyers considered this to be the most likely possibility for providing a prompt, specialised and efficient service for business disputes, possibly by judges seconded from superior courts in each country to the joint court. However, this suggestion, though deserving further exploration, is almost certainly misconceived. It is not possible, under the Australian Constitution, to exclude constitutional prerogative review by the High Court of Australia of any court created by the Australian Parliament (save the anomalous exception of residual Privy Council appeals). Accordingly, any such trans-Tasman commercial court would be subject to having its judgments and orders regarded not as final but as subject to the review of the Australian High Court justices. True it is, the Australian High Court might develop a convention that its discretionary relief would not be granted against the trans-Tasman court except in special circumstances. Inevitably, as a generalist appeal court, it would tend to show deference to specialised judges dealing with specialisted legislation and practices. But the offence to principle would remain. Although in New Zealand such an interjurisdictional court could be made final, in Australia it could not.

THE ISSUE OF FEDERATION

It was these conclusions, together with the unsatisfying nature of the other possibilities (dual commissions for judges, formal international arbitration, improvement of service and execution of process etc) that led me to sugget that Australia and New Zealand should reconsider opening the debates about an Australasian federation. Of course, such discussion would not arise simply because a few commercial lawyers had difficulty in finding an acceptable neutral forum for the settlement of a number of disputes about business law matters arising in the wake of the CER Agreement. The coming together of two nations, long sovereign and independent, into the one polity is rare, although it has happened.[14] Something either terrible or wonderful is needed for two countries, enjoying all the privileges of separate sovereign independent personality, to unite. War can do it. Bankruptcy, as in the case of Newfoundland, can do it. Profound economic adversity over an extended time might do it.[15] No-one would deny that both Australia and New Zealand face economic difficulties. With the rapid progress of the economies of Japan, Korea, Singapore and Malaysia, it is likely that our economic difficulties will increase. According to reports, unemployment in New Zealand since 1976 has risen faster than in any other OECD country. Our two countries remain English-speaking parliamentary democracies, still basically of European culture, in a part of the world from which the imperial carpet has been suddenly rolled back. Although the 'crimson thread of kinship' between Australia and New Zealand to which Sir Henry Parkes referred may be getting a little thin and diluted, the things we have in common are still profoundly more important than the points of difference when we compare our two countries to any others in this region, indeed most others in the world. Above all, at the moment, we have a common head of state, largely similar political institutions and traditions, and common problems to some of which the CER Agreement is now addressed. The point that we must both realise is that our nations are now beginning to undergo critical changes from within. Unless seized, an instant of history may pass when closer political association is feasible.

From the very beginning Australia and New Zealand were closely linked. It was James Cook who reported the discovery of both countries to England. In 1783 James Matra, a midshipman on the Endeavour, pressed for the colonisation of New South Wales and drew attention to the advantages that it would gain from trade with New Zealand, particularly the flax trade which did develop and prospect after the colony was established.[16]

The notion of a political association between Australia and New Zealand came closer to acceptance at the turn of the century than most people realise. New Zealand was entitled to membership of the Federal Council of Australasia, established under the Imperial Act of 1885, though like New South Wales, it never participated. There were New Zealand representatives in all of the Australian Constitutional Conventions in the 1890s. Covering Clause 6 of the Australian Constitution includes New Zealand among the colonies which might make up the new Australian Commonwealth. Although there was never a chance of New Zealand becoming a State at the establishment of the Commonwealth, the possibility of joining after Federation was to be the subject of a Royal Commission in 1901.[17] Australia and New Zealand have been closely associated in peace and war. The retreat of the British Empire leave us as almost identical cultures in a largely alien region.

The reactions to my proposal for a revival of the Federal debate were mixed but mainly negative on both sides of the Tasman. The Prime Minister of New Zealand (Sir Robert Muldoon) said that he did not think much of the idea, declaring that 'New Zealanders wouldn't wear it'. Indeed, he described the idea as a 'bad joke' and me as a 'comic'. The Attorney-General and now Deputy Prime Minister of New Zealand, Mr J K McLay, in commenting on the address, said that it 'always seemed inevitable that we should move closer together at least economically'. But he did not believe 'that such movement will ever reach the stage of complete union'.[18] In memorable words, Mr McLay declared:

> I want immediately to lay to rest any suggestion of some sort of Australasian political union. Mine is not a jingoistic reaction from a politician in a small state. I simply do not believe that any balance or advantage has been demonstrated. Indeed, the only benefit would be that they'd get a good cricket team; we'd get a good rugby team; and an Australian horse would win the Melbourne Cup![19]

Dr Geoffrey Palmer, in his comment on my paper, was similarly cautious:

> Federation is not congenial to the New Zealand political experience. I do not think we would take kindly to it and I am doubtful that we would benefit from it. The only chance of New Zealand merging with Australia would be if we faced a further 20 years of sustained economic adversity. We could be drive to it by the poverty of our economic performance.[20]

It is useful to collect the editorial comments that were offered upon the suggestion of reconsideration of the trans-Tasman federation. The New Zealand Herald was negative, at least for the time being:

> Closer economic relations, yes; a defence alliance, certainly; general co-operation, by all means. But New Zealand as a State, or even two States of Australia? Well, thanks all the same ... Several countries have tried unions that have come unstuck; and examples are known — Newfoundaland for one (and Tasmania for another?) — of offshore Provinces or States that find themselves all but ignored ... No-one can know what people will think in 25, 50 or 100 years. Today's distance may become tomorrow's togetherness.[21]

In Australia, the Melbourne Age took a similar theme:

> Mr Justice Kirby's ... ideas about a trans-Tasman federation are below his usual standard ... The Australian federation is an imperfect instrtument in any event when it comes to ordering the lives of those who live in its component States. Do we need the complication of additional States from across the Tasman represented by politicians who would be no less perverse than their Australian counterparts? Do we need Mr Muldoon at a Premiers' conference?[22]

The Auckland Star thought the union of the two countries was 'no answer"

> While sharing a common heritage, the two countries have inevitably grown in different directions. Australia has a three or four-generation affinity to homelands that are not our own; a diversity of foreign investment has set many Austraian enterprises on a different course. Australia talks of becoming a republic, an idea far from the hearts of many New Zealanders who see in their traditional ties, stability and a sense of identity.[23]

The Nelson Mail saw the two countries as actually drifting apart, with federation becoming less likely than ever:

> In a world in which federations have had little success, it is odd that the unification of Australia and New Zealand should now be advanced as a credible political goal. Those accused or provincialism and pettiness could, in fact, have been more pragmatic in outlook than Mr Justice Kirby. We share a language and to a large extent a common origin, it is true. But for 150 to 200 years we have lived more than a thousand miles apart, shaped by different environments and now, increasingly, influenced by different geopolitical considerations. Australia is learning to live with Asia, whilst this country, at long last, is coming to terms with being partly Polynesian and lapped by the Pacific.[24]

The Waikato Times declared that the merger idea was a 'dead duck':

> Surely the need now is to sort out the problems, to get CER into top gear and running smoothly rather than to indulge in pipe dreams about a trans-Tasman merger. That just isn't on and all the indications are, never will be.[25]

The Sydney Morning Herald was distinctly negative, even a little acid:

> The tendency to want to solve problems with one-stroke can lead to solutions that become part of the problem. Life is complex. There are few simple solutions to its problems, no matter what the politicians, economists, lawyers, doctors, engineers and leader writers might claim.[26]

Not all of the commentary, however, was negative. Some New Zealand editorials urged a more serious debate about the fundamental issues. Thus, the New Zealand Evening Post asked whether the idea should not be explored more deeply:

> [R]evival of the familar suggestion of New Zealand merging into Federal union with Australia will be easily dismissed by many. But shouldn't we explore this relationship more deeply? The popular thing for New Zealand politician or newspaper editorial to say would be to reject giving up our independence to become a small, distant voice as part of the Australian Commonwealth. While that argument is crucial, it is about time the people in both countries had some fresh facts and a modern look at the advantages and disadvantages of even closer associaion, including the ramifications of political union. An authoritative New Zealand and Australia joint commission with a wide-ranging brief should examine such a proposition and any lesser options ... Humorous references playing to our sporting rivalries are good for the day. But future relationships between our two countries are of more long-term and comprehensive significance.[27]

The New Zealand Listener devoted half a page to the issue under the editorial heading 'Divided We Stand':

> Mr Justice Kirby's Federal union proposal deserves serious consideration, not outraged rejection. Mr Palmer left room for debate when he commented that only a further 20 years of adversity might bring us to the altar; but he predicted that the future would look kindly on our part of the world. Whether that future is kind or cruel, it is to be hoped that it brings with it some internal reunion of our divided nation. Only then, whole and strong, could we consider a marriage — a partnership of equals.[28]

Talk-back radio, letters to the editor and the usual barrage of citizen opinion in the free society, show divisions of view in Australia, as acute as those evidenced in New Zealand. Shortly after my paper was delivered, Mr P McGuinness, Editor-in-Chief of the Australian Financial Review, addressed the New Zealand National Press Club in Wellington. Commenting on my paper he said:

> It is unlikely that the required constitutional procedures for admission as two States of New Zealand are feasible. While there is specific provision in the Australian Constitution for admission of New Zealand as a single 'original' State, any more is hardly a realistic proposition — far from enthusiasm for political union with New Zealand, the Australian electorate's view of your country is best described as one of benevolent indifference ... I should add that Judge Kirby's speech was a wide-ranging review of the possibilities of legal co-operation between Australia and New Zealand in the context of CER. The debate concerning political union was only touched upon glancingly. While the problems of New Zealand with the idea are understandable, I think everyone should realise that this is a theme that will recur as an undercurrent in all the future discussions about closer political, economic, judicial and foreign policy co-operation between us both.[29]

In an editorial in the Australian Financial Review, Mr McGuinness pointed to the absence in New Zealand of the checks and balances that exist in economic and business matters in Australia:

> The likenesses between the two countries ... obscure the fact that in economic matters, Australia tends to operate under a checks and balances system, in which the rule of law is predominent. By contrast New Zealand has no written constitution, no courts with standing independent of the wishes of Parliament, no limits on the legislative authority of Parliament and not even a second chamber of the Parliament with powers of review and delay. The result is that a government with a majority of one and with virtually unlimited powers to act by regulation, that is by decree, can establish a reign of terror in the economic sphere.[30]

Although the New Zealand Prime Miniter did not describe Mr McGuinness as a 'comic' he did describe him as 'an extraordinary fellow' and expressed regret that the New Zealand Government had paid his fare to deliver his speech.[31]

The debate continues. According to reports, the former Leader of the National Party, Mr JD Anthony, visiting New Zealand in January 1984, expressed the view that a merger of some kind between Australia and New Zealand was 'inevitable in the long term'.[32] He said that the economies of Australia and New Zealand would inevitably become 'more and more locked' into one another. He said that the CER Agreement, of which he was a principal architect, would become more significant in the years to come. It seems that comments to a similar effect were included in a written speech which Mr Anthony was to deliver in New Zealand in January but deleted from the oral presentation when he was advised that the subject was 'too hot to touch publicly'.[33] Nonetheless, the same report indicates that Mr Anthony canvassed his views 'privately' in New Zealand and found 'a willing acceptance of them'.34

Non issue? Inevitable? Comic? Oversimplistic? Provincial pettiness? Crimson threads? The issue will remain with us. It is a far grander issue than the context of business law and trans-national courts. It is an issue about which some politicians at least are speaking. It is an issue upon which thoughtful judges on both sides of the Tasman are urging proper scrutiny.[35] Scholarly articles are beginning to emerge on the legal problems of admitting New Zealand as a new State under s.121 of the Australian Constitution.[36] The idea may seem many years off. It may seem something to be postponed into the indefinite future and unlikely to come about in our lifetime. On the other hand, when the Sydney/Melbourne rail link was celebrated in 1883 commentators then spoke of the 'far-off divine event' that would be an Australian federation. History shows our political affairs progressed rapidly so that within 18 years the Australian federation was to become a reality.[37] But political will is needed. The development of such a will normally requires a catalyst. Trans-Tasman business law disputes are an unlikely candidate for the catalyctic role. But the CER Agreement provides an occasion for friends on both sides of the Tasman, who still feel the pull of the 'crimson thread' to revive a thoughtful debate. It is a blessing of our common heritage that under the protection of our similar institutions, we can raise such issues in free and sober debate, without worrying about calumny (on the one hand) or giving way to mindless zeal (on the other).

COMMERCIAL COURTS

If the ambitious objective of a specialised trans-Tasman commercial court is rejected, either for constitutional, political or practical[38] reasons, even those who have no 'philosophical or conceptual objection to the basic idea of a trans-Tasman commercial court or specialised CER tribunal'[39] will acknowledge the need to get our domestic laws, institutions and procedures into better shape.

This was the approach urged by Mr McLay in 1983 when he accepted 'the need to concentrate attention on harmonising our commercial and trade practice laws'.[40] I made the point, which I repeat, that such harmonisation will not come about by wishful thinking or a feeling of good will. It will need a great deal of tedious preparatory work, painstaking negotiation and institutions that will promote the harmony.

In terms of institutions, the CER Agreement, and the likely increase in trade and trade disputes between Australia and New Zealand, calls attention to the fact that New Zealand has still not established a commercial court or commercial causes jurisdiction of the High Court, to deal in a specially expeditious and expert way with business law disputes. There is a commercial list in the common law division of the Supreme Court of New South Wales. In charge of the list is Justice Andrew Rogers, one of the most innovative and venturesome of Australia's judges. The special treatment of commercial causes originates in New South Wales from an Act of 1903.[41] This legislation essentially copied the English procedures, by that time long established. There is an interesting history of the origin and development of the commercial court in England in a recent text by Anthony Colman, 'The Practice and Procedure of the Commercial Court'.[42] Mr EW Thomas has commented, from a New Zealand perspective, on the impressive features of the New South Wales list:

> The first is the practical approach of the court in getting down to the commercial realities and the second is the tendency for cases to be settled after the opposing parties have heard what the other has to say.[43]

A somewhat similar commercial causes jurisdiction was established in Victoria by the Victorian Supreme Court (Commercial Causes) Rules 1978.

In addition to these initiatives in the two busiest jurisdictions of Australia, having the great part of the Australian population and of its industry and commerce, an important Federal initiative must be noted. Federal authorities have long dominated the field of taxation in Australia. However, it is only lately that they began to venture into the range of business law concerns, with the establishment of the Trade Practices Commission, the National Companies & Securities Commission and other relevant agencies. The Federal Court of Australia was created in 1976. It is vested with original and appeal jurisdiction having a distinct bias in favour of what may loosely be called 'business law' jurisdiction. A new national Australian court has been created, having judges who, by background and jurisdiction, tend to have and develop expertise in business, tax, industrial and administrative law. The jurisdiction of the Federal Court continues to expand apace under successive Governments of differing political persuasion.

It has been reinforced by new understandings about its pendant jurisdiction. By way of the Copyright (International Protection) Regulations, one judge of the Court recently had to give meaning to s 9 of the Copyright Act 1962 (NZ) in respect of a claim for copyright by an author of a work resident in New Zealand. Specifically, he had to consider whether a resident in New Zealand might sue in Australia for infringement of copyright and secure an injunction and damages, including exemplary damages, for the alleged infringement of the copyright in Australia.[44] The case is an illustration of the way in which resort may be had by New Zealand litigants to an Australian court for relief which includes interpretation of a New Zealand law applicable to parties in Australia.

If Australia is providing specialised courts or special arrangements within its busiest superior courts for the handling of business law disputes what is New Zealand doing so that it can provide equivalent speed, quality and priority of service to business law disputes, such as may be expected to arise as a consequence of the CER Agreement? The answer to this question appears to be, so far, not much.

A proposal for the special provision for commercial cases in what is now the High Court of New Zealand was made in March 1974 by the New Zealand Contracts & Commercial Law Reform Committee.[45] The New Zealand Law Society endorsed the committee's recommendations, referring to the 'twin evils of delay and expense' which had led to the creation of commercial courts elsewhere.[46] There was some opposition to the proposal on the basis that it would give an unfair priority of advantage to commercial cases. But the Royal Commission on the Courts, in its report, pointed to the special urgency of many commercial disputes and the particular complexity and difficulty that could be raised which would be assisted to resolution by the assignment to such matters of 'judges with commercial experience'.[47] The Royal Commission recommended in favour of a commercial cases list. So far, the list has not been established.

Champions have entered the debate in favour of the proposal. None has been more indefatigable than Mr EW Thomas.[48] The arguments for and against the commercial list are rehearsed in Dr Sealy's paper.[49] It is not for me to resolve them. But I can add an interesting post scriptum. Mr Thomas has now informed me of a Damascus Road conversion against the commercial court. In his view, such a list could probably only be justified in one centre of New Zealand, almost certainly Auckland. His concern now is whether, for want of a separate Bar, the legal profession in New Zealand could arrange its organisation adequately so that it could service a separate commercial court. He expresses concern that the result might be that commercial issues would become a 'captive' market for barristers within law firms, particularly large law firms.

The lack of ready candidates for the judiciary with deep and wide-ranging experience in commercial law may also be a problem. Additionally, Mr Thomas expresses the view that the new code of civil procedure in New Zealand should first be given an opportunity to be tried. He suggests that the move to a commercial court might be premature. In the end, it might result in no great improvement for the commercial community, such as to justify the proposal at this stage.

Special weight must be given to these views because expressed by a person who until lately was such an important, vocal and persuasive advocate of the commercial list. Yet many of the arguments previously urged by Mr Thomas still seem relevant. Above all we are living in an age of specialisation in the law. In both Australia and New Zealand, multinational insurance companies, banks and others are daily engaged in the intricacies of commercial transactions, including an increasing number with a trans-national component. Such bodies, not unreasonably, expect to have access, in local jurisdiction, to courts in which they can test the application of local laws, local notions of due process and local perspectives of proper commercial practice. In such cases it does seem appropriate for a jurisdiction to endeavour to provide a judge who will be both swift and correct. Swiftness alone or correctness alone will not be adequate for such litigants. Both qualities must be present at once.

In most jurisdictions, certainly in Australia, there has been a move away from the general list, in recognition of the growing specialisation, sophistication and complexity of the law, particularly burgeoning statute law. These are developments which began in the last century but which have gathered momentum in the past decades. It is for this reason that Vice admiralty courts were created. It is for this reason that Equity divisions have survived the judicature system. It is for this reason that criminal lists, probate lists, building lists, commercial lists and so on are established. They are simply a recognition of specialisation in the law, in legal practice and hence in the courts. Questions of great complexity can arise in the commercial sphere. There is, for example, an enormous body of law on letters of credit. A good lawyer can generally master this body of mixed common law and statute law quickly. In the future, computers will assist in this regard. But the lawyer, even so instructed, will not deal with a case involving the law on letters of credit with quite the same assurance as a lawyer who has a detailed and up-to-date knowledge of the body of the law in question. In the case of the judge, he will not perhaps know immediately the issues to which evidence is being directed. He may not appreciate fine points on the relevancy of evidence. He may experience difficulty in ruling as to relevance. He will not himself be able to direct questions with precision towards matters raised by the issues for trial. If he is not entirely familiar and comfortable with the law in question, he will move more cautiously and hence more slowly.

It is a commonplace to say that judges behave differently when they are comfortable and confident in handling issues. It is impossible to ignore the feeling that it is held in commercial circles that business people should be able to place even a difficult and complex problem before a superior court judge and secure a swift and correct decision from a person having the highest expertise in the field and able to master the intricacies of law and fact with facility, economy and assurance.

For Australia and New Zealand, there is an additional consideration. With the suggestion of the establishment of commercial centres in Australia and possibly in New Zealand[50], to seize the opportunities that may be created by the haemorrhage of business activities from Hong Kong, it is more than usually vital that the business community, including the international business community, be provided with the judicial system in both countries with something more than independence, integrity and workmanlike mastery of a wide range of legal problems. The multinational business community will fairly demand from the judiciary the same qualities of specialist expertise that it will insist upon from its lawyers. Lawyers can be changed. They can even be trained and prepared to offer service of a highly specialist kind. But the parties have no control over the choice, training and preparation of the judge. It is for the community, through its court organisation and laws, to provide the facility the parties expect. If the community fails to do this, the problems will not go away. The parties will. They will look elsewhere for the swift and correct decisions that they require.

Skill in the New Zealand legal profession and judiciary may only develop if the institutions and facilities are there to permit them to be honed and refined. Though the workload may not be great at first, the provision of a specialist facility by people of high talent will tend to attract legal business. The starting point is the provision of the facility. If it is not provided in New Zealand, common sense suggests that parties, recognising this vacuum, will settle upon a jurisdiction of convenience, where speedy and correct decisions can be provided. So it has been for a very long time in London. This point is made in the first paragraph of Dr Sealy's paper. In England it is recognised in the composition of the Commercial Court Committee set up by the Lord Chancellor in 1977. In recognition of the international clientele of the commercial list in London, an American lawyer is made a member of the committee. There is also a member for Continental Europe.[51] Colman explains it thus:

> The fact that the Committee membership includes representatives of foreign legal and commercial interests underlines the facts that the Court is now consciously performing a function which is in substance much wider than that of a mere domestic court. Indeed, it is in effect now providing a forum for the

> litigation of disputes between overseas trading, banking and shipping organisations and corporations which often do not carry on business in London and whose disputes are often wholly unconnected with London or with Britain save for the incorporation of English law or a reference to London arbitration in the underlying contracts. If, as may well be true, this is the only domestic court in the civilised world whose administration is fashioned in regular consultation with and on the advice of foreign legal and commercial interests, that is because the Commercial Court is performing a unique function in providing a venue for the conduct of a very substantial proportion of all the world's mercantile litigation. Indeed, in a recent judgment in Amin Rasheed Shipping Corporation v Kuwait Insurance Company [1983] 1 WLR 228, Sir John Donaldson MR referred to the Commercial Court as 'the curia franca of international commerce' and being far more than a national or domestic Court but rather an international commercial Court, most of whose judgments were concerned with the rights and obligations of foreign nationals.[52]

It cannot be expected that a commercial list in New Zealand or Australia will divert litigation of this kind, in any great number, to our courts. However, it may be anticipated that the provision of a like facility, with speed, expertise, independence and correctness, will soon catch the eye of discerning business people, especially in Australia and New Zealand. It is likely that, for convenience, such a court would begin to attract, admittedly in smaller measure, the same variety of interjurisdictional business as has long been attracted to the commercial list in London. If people doing business as between Australia and New Zealand can point to an expert and specialist facility in Sydney or Melbourne, but no comparable facility in New Zealand, is it not likely that they will propose, and have it agreed, that the forum for the litigation of disputes shall be in Australia? Would that not be the sensible thing to do? Unless New Zealand and its lawyers are to watch with resignation the loss of this potential market in legal services, virtually by default, it may be time to consider once again the report of the Law Reform Committee, the recommendation of the Law Society and the proposal of the New Zealand Royal Commission on the Courts. The establishment of a commercial court may be an expensive way, at first, to centralise expertise and develop a special skill and facility. But the process has to begin somewhere. The suggestion that there would only be the requisite volume of business in Auckland rings somewhat hollow in the ears of a Federal judge in Australia. With much greater distances to cover, those judges simply practise the lesson which Henry II introduced in England in Plantagenet times. Justice must be taken to the litigants. After all, there are now many modern ways that this can be done, without gross inconvenience to judicial officers and their staff:

. Travelling judges. New Zealand is linked by excellent domestic airline services. Apart from occasional difficulty in getting away from Wellington because of the wind, it would be relatively simple for circuits to be organised for a specialist judge at relatively short notice so that he or she could sit where needed. This is a commonplace in Australia, with much great distances to cover.. Sir David Beattie, when a judge, evidenced just such a willingness to travel. Once, when argument on a change of venue arose, to move a trial from Wellington to Auckland, he resolved the difference by indicating that he would hear the 14 witnesses from Auckland in that city and allow the ten witnesses in Wellington to be called there.[53] To the objection of cost, one must offset the cost of witness travel and the provision otherwise of the specialist personnel in numerous jurisdictions. The imposition of a regime of travel for a lengthy period may be unreasonable. In Victoria it is understood that judges are appointed to duties in the commercial list for a given period of five years. Such an arrangement might even be attractive to a lawyer with the right temperament and interests, contemplating appointment.

. Telemotions. A second innovation which must be tried relates to the use of telecommunications. Reports now to hand indicate that arguments in appeal leave applications to the Supreme Court of Canada are being taken by telecommunications from Vancouver to Ottawa via the satellite.[54] In Australia, the Administrative Appeals Tribunal has for a long time been using telephone hookups for direction hearings and the taking of some witnesses in remote country towns. Now the Social Security Appeals Tribunal is doing the same thing. In the United States, so-called 'telemotions' are long established in a number of the States.[55] A hundred years after Alexander Graham Bell invented the telephone, lawyers and the judiciary are coming to terms with the invention. Injunctions may be sought and granted in urgent circumstances by telephone. Arrest and search warrants may now be authorised by telephone in some parts of Australia.[56] Although New Zealand does not suffer from the tyranny of distance to anything like the extent of Australia, the problem of dealing with urgent motions before a commercial judge resident in another city could, with proper facilities and under rules laid down by the court, quite readily submit to the convenience, speed and cost advantages of teleconferencing. Is there any doubt that courts of the 21st Century will be so organised? Certainly in respect of preliminary hearings which are such a feature of commercial litigation and where the evidence of witnesses is not taken, telemotions provide an obvious means of maximising the use made of a specialist judge in a distant part of the country.

. Written argument. In any case the pressure on courts generally (and on commercial judges in particular) is likely to become so great that the facility of open-ended oral argumentation is likely to be replaced by very limited oral argument supplemented by precise written briefs or argument. This process is already well developed in the United States. On a minor scale, it has been introduced in appeal courts in Australia where an outline of argumentation must now be filed with the court. I do not at all exclude the possibility of communication with the court by procedures of teletext so that word processors in lawyers' officers will inform facilities in the judges' chambers and the opponents' office of the written arguments offered on points of law. Lawyers must quickly come to terms with the implications of the revolution in information technology. The courts too must adapt or they will run the risk of losing their relevance to the community, including the business community, they serve.

EXTRA CURIAL REMEDIES

Generally speaking, the courts in Australia and New Zealand have failed adequately to serve the business community in the resolution of its disputes. The ordinary businessman on both sides of the Tasman does not understand and so cannot sympathise with the procedures of the courts : their costs and delay. These procedures are entrenched by tradition, reinforced by conceptions of 'due process', cemented by stereotyped approaches to problems, embalmed in rules of evidence which reflect a fascination with oral testimony and a mistrust of documentation. They are reinforced by professional training and conservative attitudes on the Bench and at the Bar table.

For these reasons it is probable that whatever is done to improve the courts, by the provision of a commercial list, a specialist commercial judge and improved and simplified procedures, most businessmen will still regard the courts as a place of last resort. They will look elsewhere for extra judicial mechanisms which are cheaper, quicker, less technical and less stressful and time-consuming to the business people involved. It is for these reasons that it is likely that more use will be made in the future of arbitration, reference to trade associations, the use of umpires, references and court-appointed experts and other means of getting business law disputes to a swift resolution without reference to the courts of law. This development will happen anyway. It is likely to be promoted by the failure of particular jurisdictions to provide specialist commercial judges and by the presence of multi-jurisdictional elements in disputes that make reference to the courts of one country unacceptable in one place or other.

Lawyers concerned with a proper servicing of the business community will not resist these developments. They will encourage them and seek to find a proper, supportive role in them. In New South Wales, this is already happening. In Maschinenfabrik Augsberg-Nurnberg Aktiengesellschaft v Altikar Pty Limited (unreported, 4 August 1983) Justice Rogers made an innovative use of the facility of an expert arbitrator to deal with particularly highly technical issues that arose in a commercial case before him. He placed his orders in the context of the purpose of specialised commercial courts:

> Ever since the turn of the century, the Parliament has sought to facilitate litigation between commercial men by allocating special facilities by way of a commercial list, designed to enable as speedy and hopefully as inexpensive as possible resolution of the dispute as is possible in the given circumstances. With the advance of technology, to some extent the facilities so provided have proved deficient, because no matter how knowledgeable a judge might be in commercial practices, generally speaking his ability to follow the technical details of disputes must be limited. This is particularly so in relation to disputes involving matters such as computers or other highly technical disputes which from time to time come to the courts. It is no doubt with thoughts such as these in mind that the High Court has recently indicated its surprise that the provisions of s 15 of the Arbitration Act have not been more frequently used. Cf Buckley v Bennell Design Constructions Pty Limited (1977-78) 140 CLR 1. Although the provision has its built-in limitations, it does provide an opportunity for the court, either with the consent of the parties or otherwise ... to order the proceedings or any question or issue of fact arising therein, to be tried before an arbitrator agreed on by the parties, or before a referee appointed by the court for the purpose.[57]

The innovations did not finish with this order, which might, in any case, be seen as no more than the appointment of a court-chosen expert. The judge made it plain that the procedure had to be 'moulded to the requirements of the moment'. In particular he said:

> It seems to me that the section provides an opportunity for an arbitrator and a judge to work in a very real sense in partnership, in order to ensure that as quickly as possible and as cheaply as possibly the arbitrator is seized of the technical aspects of the dispute, whilst the judge assists in the resolution of such questions of fact and law as may arise. This necessitates that the arbitrator would have an opportunity of approaching the judge for assistance in any respect which may become necessary. There is no room, in my view, in such

> proceedings for the dispute to be delayed by requirements for special cases or for stated cases. Equally there should be no need for the judge to have to formulate with great specificity the subject of the matter to be resolved by the arbitrator. Ideally, a judge should have the opportunity of sitting with a technical expert as an assessor. The legislature has not yet been able to bring itself to allow for such method of trial, but as I see it, it should be possible to utilise s 15 [of the Arbitration Act] in that fashion.[58]

Following this decision, Justice Rogers wrote to the President of the Law Society of New South Wales, making a number of suggestions for the improvement of the commercial list procedures.[59] In this, he repeated the suggestion of the use of the expert:

> At [the] first directions hearing, in the discussion of the issues for trial, consideration will be given to alternative means of dispute resolution. Thus, if the proceedings involve questions of a highly complex and technical nature, more readily, speedily and inexpensively decided by an expert, the parties should be ready to discuss whether or not some or all of the issues should be remitted to a Court-appointed expert or to arbitration or in some other way resolved leaving only the legal issues for determination by the Court. Consideration would need to be given as to which should come first, the Court hearing or the determination by the expert. Again, consideration should be given to the question of whether ... the matter is one which could more appropriately be resolved in the District Court.

As a check against dilitariness, incompetence or lack of attention to the interests of the parties in swift and expert service, Justice Rogers lays down some rather firm guidelines, evidencing a forthright and vigorous judicial participation and activism. Whilst this might be considered out of place in the traditions of the criminal trial, it would almost certainly be welcomed by all but the unjust in most business law disputes where time and inflation, to say nothing of inconvenience and legal costs, operate against the interests of the business disputants before the court.

Justice Rogers has even raised the spectre of lawyers regularly in breach of interlocutory orders in the commercial list being made themselves liable for the costs:

> The amount of money thrown away in costs is scandalous ... The consequential orders for costs must have run into thousands of dollars. From the point of view of the community such costs of litigation is unacceptable ... The consequent increase in costs is presently borne by the litigants, but I do not think that this situation can long continue. The duties of a solicitor in relation to discovery are clearly set out in the authorities and it is an obligation that is owed to the Court not just to the client.[60]

I am not saying that all the innovations proposed by Justice Rogers are beyond debate. Some lawyers resist the notion of splitting cases, as he contemplates between the respective functions of the expert and the judge. Some lawyers suspect that this procedure may actually tend to add to costs and uncertainty.[61] Other lawyers will be cautious about accepting 'experts', given that in particular areas of expertise there may be conflicting 'schools' of opinion. Without exposing entirely the expert's view to scrutiny in the courts, the choice of the expert may sometimes determine an issue upon which there is a genuine controversy. Still others will be cautious about out-of-court, informal consultation between judge and expert. Some will question the suitability of professional bodies to nominate 'experts', given the general orthodoxy and conservatism of such bodies. Still others will be cautious about the compliance of the expert with obligations as to confidentiality and convention, matters second nature to a judge after a lifetime in the law.[62] Doubtless some practitioners resent the goading of the commercial list judge and the peril of an opinionated judge is clearly to be kept in mind.

For all these reservations, it is plain that the languid way in which the normal civil courts deal with disputes is inappropriate to much litigation and specially inappropriate to business disputes. None but the very rich or the legally-aided very poor can afford such a pace. That is why the efforts of specialist commercial judges to improve their through-put, including by the adoption of novel techniques, is to be welcomed.

Other ideas deserve exploration but cannot be elaborated here. They involve the creation of a specialised panel of arbitrators, including some who have international reputations, for use in arbitrations of trans border disputes; the improvement of Antipodean procedures for arbitration which have tended to replicate court hearings without the advantages they offer; and the use of retired judges for the purpose of arbitrations of this kind. The growth in the size of superior courts in Australia and New Zealand and the current depressed levels of judicial salaries in both countries, have tended to result in appointment of judges at much earlier ages than in times gone by. It seems likely to me that these comparatively young judges will retire, in increasing numbers, upon reaching the minimum age for the receipt of a judicial pension.

In Australia, this is normally at the age of 60 after ten years of service. The backlog in the courts and the desire of some people for the privacy and informality of arbitration, including international arbitration will almost certainly encourage the use of what has been called in the United States 'rent-a-judge'.[63] This is not necessarily a bad thing. Particularly if a skilled arbitrator can demonstrate expertise in a given area of law and business practice and can enjoy the confidence of all parties, his judgment may be more satisfactory in the resolution of a business dispute, than the order of a court, commercial or otherwise, in Sydney or Auckland.

CONCLUSIONS

The CER Agreement is designed to promote increased trade between Australia and New Zealand. Increased trade will mean, inevitably, more disputes. There appears to be no realistic possibility of establishing a neutral trans-Tasman court to which residents in Australia and New Zealand could refer their disputes for trans-national judgment by trans-national judges. The Privy Council in London, a Privy Council of the Pacific, appeals solely to the High Court of Australia or creation of a trans-Tasman Commercial Court, all fall to the ground as unviable proposals in 1984.

The readist solution to this problem, as to many others, is the final accession of New Zealand to an Australasian Commonwealth. This was contemplated at the federation of the Australasian colonies in 1901. Although there are constitutional problems in the way of federation, the existence of the will to federation would solve all. No-one would suggest federation simply to overcome the nice problems of trans-Tasman commercial jurisdiction. But the CER Agreement may be the precursor to and catalyst for a revival, before it is too late, of consideration of an appropriate form of union of the English-speaking remnants of Empire in the South Pacific.

Short of this, there are things to be done. New Zealand has shown ambivalence and inactivity in the creation of a specialist commercial court. Numerous excuses have been offered. Meanwhile, Sydney and Melbourne, and to some extent the Federal Court of Australia, have begun to offer greatly improved procedures for the resolution of business law disputes in a quicker and more expert jurisdiction. Unless New Zealand is willing to abandon this business to Sydney and Melbourne, it must give thought to the creation of a competing commercial list in its High Court. Otherwise it would seem inevitable that patriotism will be set aside and business on both sides of the Tasman in CER disputes will assign their resolution to the enhanced facilities offered, particularly in Sydney.

To the suggestion that there is neither the talent nor range of legal experience in New Zealand, the answer must be given that until the facility is provided, there will be no opportunity for such talent to be honed and experience to be gained. To the suggestion that there is insufficient business in any one particular centre of New Zealand, the answer is offered that the aeroplane circuit and the use of telecommunications and written arguments present opportunities for bringing expert cost-effective justice to the service of the business community which will otherwise look elsewhere.

In fact, a good commercial judge will offer the cost-intensive services of the court not in competition with other facilities but to supplement them in areas where courts can do a better job than trade associations, arbitrators, assessors, referees and court-appointed experts. A symbiotic relationship between the courts, adhering to their proper expert role and these supplementary instruments of dispute resolution must be worked out. Such a relationship is now being developed in a most innovative way in Sydney by the judge there in charge of the commercial list of the Supreme Court. Courts do some things better than other institutions of dispute resolution. The task in the decade ahead will be to clarify what courts do better and to seek to enhance the role of other institutions where courts are less useful — whether for reasons of lack of expertise, endemic formality, rigid rules of evidence, the formalism of lawyers and the like.

In the context of the CER Agreement, consideration needs to be given to supplementing the formal court with a pool of internationally accepted and highly skilled arbitrators. Some of these may be retired judges. Some may not be lawyers at all. But it is my hope that our courts, judges and lawyers will find a useful role ministering to the improved relationship between Australia and New Zealand. The 1200 reasons for our legal separation have become little more than two hours in an armchair on a windy day and less than a second as computers chatter away to computers via satellite. The physical distance has been bridged. But can our hearts and minds catch up?

FOOTNOTES

* Chairman of the Australian Law Reform Commission. Judge of the Federal Court of Australia. The views expressed are personal views only. The author acknowledges the suggestions of Justice Andrew Rogers of the Supreme Court of New South Wales concerning the latter part of this paper.

1. For details on the Closer Economic Relations Agreement between Australia and New Zealand, see Australian Foreign Affairs Report, February 1983, 59.

2. MD Kirby, 'CER — A Trans-Tasman Court?' in NZ Legal Research Fouocation, CER — The Business and Law Essentials, Uni of Auckland, 1983, Part I, 18. See summary [1983] NZLJ 303.

3. Article 1(a).

4. Article 12(1).

5. Article 22(3).

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

7. Dr G Palmer, reported NZ Herald 24 August 1982.

8. Australian Foreign Affairs Report, February 1983, 59.

9. Privy Council (Limitation of Appeals) Act 1968 (Cth); Privy Council (Appeals from the High Court Court) Act 1975 (Cth).

10. Reported Sydney Morning Herald 11 July 1983, 8.

11. WD Baragwanath, 'The Privy Council' [1983] NZ Recent Law 414.

12. T Tuivaga, 'A Regional Court of Appeal for the Pacific', Paper for the Fifth South Pacific Judicial Conference, May 1982, 171. See also AM Finlay, 'A Court of Appeal for the South Pacific Region' in Convention Papers, First Fiji Law Convention, 1974, 6.

13. See Nauru (High Court Appeals) Act 1976 (Cth).

14. In 1949 Newfoundland was admitted to Canada as the tenth Province. However, Newfoundland had never adopted the Statute of Westminster 1931 and had relinquished its dominion status before the referenda leading to incorporation.

15. This was pointed out by JK McLay in his comments on the author's paper now published in the Legal Research Foundation seminar papers.

16. This was pointed out by Mr McLay.

17. Cf New Zealand, Report of the Royal Commission on Federation, NZPP, 1901.

18. McLay, 3.

19. ibid, 1.

20. Comments by G Palmer, ibid. See [1983] Reform 155.

21. NZ Herald, 25 July 1983.

22. Melbourne Age, 26 July 1983.

23. Auckland Star, 25 July 1983.

24. Nelson Mail, 6 August 1983.

25. Waikato Times, 26 July 1983.

26. Sydney Morning Herald, 27 July 1983.

27. NZ Evening Post, 28 July 1983.

28. NZ Listener, 13 August 1983.

29. PD McGuinness, Address to the New Zealand National Press Club, Wellington, 9 August 1983, mimeo.

30. Australian Financial Review, 16 August 1983.

31. NZ Herald. 20 August 1983.

32. JD Anthony, reported Melbourne Age, 10 January 1984, 5.

33. As reported in the Auckland Star, 3 January 1984. See comments of Mr W Cooper, reported Auckland Star, 3 January 1984.

34. ibid.

35. Cf Justice Ian Barker, Address to Annual Dinner, Australasian Universities Law Schools' Association, 1983, mimeo, 13.

36. DN Perry, New Zealand : A 'New State' Under Section 121 of the Commonwealth Constitution? Monash University, November 1983, mimeo.

37. Perry, 7. See J Quick & R Garran, Annotated Constitution of the Australian Commonwealth, 1901, 107.

38. McLay, n 18, 8.

39. ibid, 9.

40. id, 9.

41. Commercial Causes Act 1903 (NSW).

42. Lloyds of London Press, London, 1983.

43. EW Thomas, 'The Courts Delays : Commercial Cases', Paper for the Auckland Chamber of Commerce, July 1982, mimeo, 12. Cf by the same author, Memorandum to the Minister of Justice including explanatory note relating to legislative measures for the more expeditious disposition of commercial litigation.

44. See Lockhart J in Enzed Holdings Limited & Ors v Wynthea Pty Limited & Ors, unreported, Federal Court of Australia, 26 March 1984 (WAG 39 of 1983).

45. New Zealand, Contracts & Commercial Law Reform Committee, Report No 17, Commercial Causes, 1974, para 2 (page 2).

46. New Zealand Law Society, First Submission to the Royal Commission on the Courts, March 1977, para 6.27 (page 33).

47. New Zealand, Report of the Royal Commission on the Courts, Rec 7 (page 97).

48. See EW Thomas, n 43 above.

49. L Sealy, 'The Business Community : Is it Being Served?', Paper for the 1984 New Zealand Law Conference, 1.

50. See MA McPhee, 'A 'Time Window' Could Open to Opportunity' in NZ Herald, 5 September 1983.

51. AD Colman, The Practice and Procedure of the Commercial Court, n 42, 19.

51. id, 20.

53. Beattie J cited Thomas, n 43, 21.

54. See report, Canadian Bar Association, National, July 1983, 3.

55. See eg 'Videotaped Murder Trials in Ohio' in Trial, May 1982, Vol 68, 536. The possibility is discussed in MD Kirby, The Judges, Boyer Lectures 1983, ABC, 75f.

56. See Police Administration Act 1978 (NT); Australian Law Reform Commission, Criminal Investigation (ALRC 2), 1975, Interim, 128f.

57. Rogers J in Maschinenfabrik Augsberg-Nurnberg Aktiengesellschaft v Altikar Pty Limited, unreported, Supreme Court of New South Wales, 4 August 1983, mimeo (No 15094 of 1982), 1-2.

58. ibid, 2-3.

59. See note 'Commercial List — Supreme Court', NSW Law Society Journal, December 1983, 548.

60. ibid, 549.

61. Cf Barwick CJ (dissenting) in Buckley v Bennell Design & Constructions Pty Limited (1977-78), 140 CLR 1, 6 ('Courts of first instance need, in my opinion, to be chary of dividing a case ...').

62. The role of assessors is laid down by a number of authorities. See Richardson v Redpath Brown & Co [1944] AC 62, 70; Adhesives Pty Limited v Aktieselskabet Dansk Gaeringsindustri & Anor (1934-35) 55 CLR 523, 529. See also the letter of Rogers J to the President of the NSW Bar Association, unpublished, 7 February 1984, setting our proposals for the use of experts and/or assessors in cases of a complex and technical nature, made available to the author.

63. R Millikin, 'Where the Rich Can Rent a Judge', National Times, 8 March 1981, 18.