

NEW ZEALAND FUTURES TRUST

648

VISIT TO NEW ZEALAND

WELLINGTON, CHRISTCHURCH, DUNEDIN,
INVERCARGILL, ROTORUA & AUCKLAND

APRIL 1987

AUSTRALASIA REVISITED - TOWARDS THE TRANS-TASMAN FEDERATION

NEW ZEALAND FUTURES TRUST

VISIT TO NEW ZEALAND

WELLINGTON, CHRISTCHURCH, DUNEDIN,
INVERCARGILL, ROTORUA & AUCKLAND

APRIL 1987

AUSTRALASIA REVISITED - TOWARDS THE TRANS-TASMAN FEDERATION
The Hon. Justice Michael Kirby, CMG*

AN OPPORTUNITY MISSED

Few Australians and New Zealanders realise how close our two countries came to Federation at the turn of the century. In point of historical fact, New Zealand was originally claimed as part of the British Empire when the Letters Patent of the Governor of New South Wales were enlarged to include New Zealand in June 1839.¹ The Bicentenary of the establishment of the colony in New South Wales (to be celebrated in 1988) and the sesquicentenary of the acquisition of New Zealand (to be celebrated in 1989) should cause thinking citizens on both sides of the Tasman to reflect on the links between the two countries - by their past history and culture, their language and present institutions and their future interests. It should also cause our citizens to consider the relations of each nation with the indigenous people of both lands whose lives were fundamentally altered by the arrival and establishment of British power.

It is the melting away of the British Empire and the rapid change of the world in our region since 1945 which leaves

our two countries, in one sense, as geographical anachronisms in the Southern oceans. Until the Second World War, we both sheltered behind the assurance of the British Empire and the Royal Navy. Until recently, our economic, legal, cultural and emotional dependence on Britain was profound. Now, we suddenly discover that we are down here, alone save largely for each other, in great part outposts of European civilisation in the south seas. This inescapable geographic phenomenon at once requires us to come to terms with our immediate neighbours in the Pacific rim and with each other.

Few Australians and New Zealanders realise that in the Australian Federal Constitution, it is specifically recognised that New Zealand will become part of the Australian Federation.² The procedure could not be more simple. All that is required is the will of the people of both countries. The machinery is already in place. Of course, there are institutional, political, bureaucratic and other impediments. But as a citizen of one country, with a great affection for the other, I hope that I can be permitted to suggest that the next logical stage in the association created by the Closer Economic Relations Agreement (CER) should be planned for both in Wellington and Canberra. The impediment of the distance between us has largely evaporated. The impediments of our separate link to London has also largely become irrelevant. The impediments of tariffs and commercial antagonisms have been whittled away by CER.³ Now the only major impediment is that enduring one of lack of imagination and far sightedness.

The CER Agreement comes up for its five yearly review in 1988. There is every economic and legal reason to begin

thinking now about the next step. If this can be ventured in Europe, despite the centuries of mutual mistrust, wars and occupation how much easier should it be for us in Australia and New Zealand to forge bold political links? What more do you need than a common head of state, a common language, common rather peculiar sports, common economic interests, common legal systems, common history and complementary communities already well accustomed to each other? In North America, such a union was achieved between Canada and Newfoundland at midnight on 31 March 1949. It was only achieved after two referenda which the confederates then only won by a narrow margin. It was achieved there despite a history of completely separate British interests going back to John Cabot in 1497. Like Australia and New Zealand, Newfoundland was surveyed by Captain James Cook. Economic difficulties propelled Newfoundland and Canada together. For Australia and New Zealand, there are no important legal impediments. All we need is a clear sighted realisation of our self interest and a visionary attitude on the part of the leaders of both nations. There is still a "crimson thread of kinship"⁴ running through us. So to the question of the next step after CER, I say it is, or should be, the political links that would be so natural and beneficial to both communities. The first object of CER is the strengthening of a broader relationship between Australia and New Zealand. Who can doubt that at some time in the future - in 10, 20, 50 or 100 years - political links will come?. If they are to come, we should start planning now.

"JUDICIAL COMIC"

This is not the first time that I have proposed revival

of the debate about a trans-Tasman federation. I previously did so at a conference organised by the Legal Research Foundation of New Zealand and held in Auckland in July 1983.

The conference concerned the CER Agreement and its implications for Australia and New Zealand in the long run. I was asked to review the possibility of the establishment of a joint Australian and New Zealand Commercial Court. I explained⁵ that the various options available all foundered on political or constitutional difficulties. In that context, I suggested that the time had come for us both to revive the brave idea which almost came to actuality at the end of the 19th Century. This was an enlarged Australasian Federation in which Australia and New Zealand were combined as one nation. For my efforts I was described as a "judicial comic" by Sir Robert Muldoon, then the Prime Minister of New Zealand. Mr. Jim McLay, then the Attorney-General declared that the idea of Federation was uncongenial to New Zealanders. Dr. Geoffrey Palmer (then Shadow Attorney-General) said at the time that the idea was probably unpopular in both countries. But he conceded that it might have to be reconsidered in a decade or more if New Zealand's economic problems got worse.

Since that time the economic difficulties of both of our countries have become better understood. The advantages of a combined market of nearly 20 million people have become more obvious. The progress towards rationalisation of economic links through CER has been notable. The objective is now a free trade community across the Tasman under conditions of fair competition. Already CER is paying off, particularly in New Zealand. In 1984/5 the increase in the import of New Zealand

primary products into Australia was a staggering 58%. Out of respect for the niceties, the politicians of our two countries largely refrain from speculating about the long term political developments which may follow in the train of these economic links. It therefore falls to citizens, on both sides of the Tasman to revive this debate.

I can think of nothing more beneficial that could come of the Bicentenary in Australia than a revival of interest in a trans-Tasman community. If we can arouse that interest, which is so natural economically, politically, and culturally, the sooner our leading citizens start considering the shape of the future Federation, the better.

A PROPOSAL: TRANS-TASMAN COUNCIL

That brings me to my proposal. It is one which derives from my discussions of this issue throughout New Zealand. In audiences comprising business, professional and academic leaders of New Zealand, I found a significant shift of opinion since I first broached the topic four years ago. The CER Agreement is already having its effect in New Zealand. As well, there are many New Zealanders who see, clear sightedly, the long term future of their country in a yet unspecified political association with Australia.

At a number of the meetings which I addressed, I conducted an informal sampling of the people I spoke to. The results were remarkable for the uniformity of the opinions which were expressed. The results could be summed up in the following proportions:

Those who would 'leave well alone'

and who oppose Federation:

40%

Those who believe a Federation of
some kind will come, although not
themselves particularly enthusiastic: 5%

Those who favour a Federation with
Australia: 50%

Those who are undecided: 5%

One distinguished New Zealander, of great experience, told me that I should not believe that Australasia would come for the hoping of it. After all, there are many impediments. They include the decline of the Englishness in both countries; the endurance of a separate politic existence for nearly a century; and the formidable barrier of institutional and career impediments which would stand in the way. In addition a recurring obstacle to be considered lies in the mortal combat between the two countries on the sporting field. I believe that even this could be sufficiently accommodated. Perhaps most serious of all is the suggested obstacle to Federation provided by the unique and special position enjoyed by the Maori people of New Zealand, as the People of the Land. This too I do not consider to be an insuperable obstacle. We in Australia have much to learn from the relationship even now established between the Maori and the Pakeha. Many Federations have been designed, to give special recognition, in their own area, to people having distinct cultural identities. The consitutional recognition of the unique character of Quebec in the Canadian Federation springs immediately to mind.

The distinguished New Zealander, to whom I refer, wisely said that if the Australasian Federation were to be achieved, it would only come about as a result of careful planning and patient preparation on both sides of the Tasman. The usual way in which English speaking people achieve fundamental change is by an institution. Normally this is a committee. Indeed, Lord Scarman once said that reducing great issues to the normality of temperate debate in a committee was the abiding genius of English speaking societies.

What we therefore need at this time is the creation of an Australasian Council. It should comprise leading citizens on both sides of the Tasman. It should begin the movement necessary for the achievement of the public acceptance of the idea of Federation that is the precondition to the more official, formal and political steps that would be required. In due course the movement, to be acceptable, would require democratic legitimacy. That could come in time. Perhaps, stimulated by CER, our two countries will simply drift into a political association of some kind. But I believe that the process would be more likely to come about if it were stimulated by an Australasian Council of citizens of both countries and of all races who see the future of the two lands as one in which Australia and New Zealand are at last joined. This, after all, is the way the Federal idea was first raised in Australia in the 19th Century - an idea of a small band of visionary people who were not blinkered and bridled by narrow, provincial colonial loyalties.

In human affairs, personal relationships, career decisions and the great issues of nations, it is rare to get a

second chance. Australia and New Zealand lost the first chance of Federation, by a hair's breadth, in 1901. Now, because of CER and our rapidly changing place in the world, our economic difficulties and our national needs we are quickly approaching a second chance.

Let us hope that, this time, we do better.

END NOTES

- * President of the Court of Appeal of the Supreme Court of New South Wales, Sydney. Fellow of the New Zealand Legal Research Foundation. Commissioner of the International Commission of Jurists.
1. D. Williams, "The Annexation of New Zealand to NSW in 1840. What of the treaty of Waitangi." (1985) 2 Australian Journal of Law & Society, 41; See also J. Quick and R.R. Garran "The Annotated Constitution of the Australian Commonwealth", 1901, 75, 79. See also ibid 123, 228, 639.
 2. Australian Constitution, Covering Clause 6 ("The States" shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia and South Australia, including the Northern Territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called "a State").
 3. See Australian Foreign Affairs Record, February 1983, 59.
 4. Sir Henry Parkes, speaking of the link between Australia and New Zealand.
 5. M.D. Kirby, "Closer Economic and Legal Relations between Australia and New Zealand" (1984) 58 Australian Law Journal 383.