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THE AUSTRALIAN AND NEW ZEALAND ECONOMIES HOW MUCH CLOSER?

CHAPTER 6: INTEGRATION OF JUDICIAL SYSTEMS

COMMERCE CLEARING HOUSE NEW ZEALAND LIMITED

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CHAPTER 6: INTEGRATION OF JUDICIAL SYSTEMS

Michael Kirby*

"A NEW POLITY" - HOW MUCH CLOSER

Lawyers tend to be interested in history. Especially constitutional and legal history. That is the grand stage on which are played out the notable political dramas of peoples. Judicial systems, the subject of this chapter, are part of the constitutional machinery of government. Whether a constitution is written and entrenched or not, the judiciary is, typically, the third branch of a nation's government. Tinker with that system and before long you reach constitutional bedrock.

The relationship between the New Zealand and Australian economies is but one aspect of the relationship between the two countries. Harmonise the law and integrate the judicial systems and the result will usually surpass a mere contribution to economic efficiency. It will set the partners upon a course towards a new polity.

So much was recently acknowledged by the New Zealand Prime Minister (Dr G W Palmer). Whilst denying the prospect of a single Australasia, or the return to the two peoples "living separate existences side by side", Dr Palmer repeated his view that we "need to develop an Australian/New Zealand polity and as part of that process to construct institutions to clothe the bare facts of our economic relationship".[1]

It is essential, therefore, that the moves towards harmonisation of laws and institutions related to business competition should be seen in a wider context. A context of history and of national directions. These two are related. History reflects the broad currents of social and economic forces which continue inexorably on their way whilst the eddies of day to day events swirl about them.

I will return to the immediate issue of integration of judicial institutions. But before I do, travel back with me to look at the earliest institutional answer proffered for the integration of the judicial institutions of Australia and New Zealand. It was the answer of an Australasian Federation - nurtured by Imperial bureaucrats to whom it seemed a natural, rational solution for the government of Britain's far-away antipodean colonies. But also, for a time, it was a solution favoured by many of the colonialists themselves, and partly for business and economic reasons.

AUSTRALASIA - LOST OPPORTUNITIES

To know where we are going, we must know where we have

come from. By "we" I mean the present peoples of Australia and New Zealand - Aboriginal and immigrant, Pakehas, Maori and Islanders. I do not refer to the long-running debate over how the Pacific was colonised thousands of years ago.[2] Advances in genetic science are permitting new insights into the way in which the indigenous people of Australia and New Zealand came there. I refer instead to the recent constitutional history which has received something of a fillip in popular imagination from the celebration on 28 January 1988 of the bicentenary of European settlement in Australia and the 150th anniversary of the signature of the Treaty of Waitangi, celebrated on 6 February 1990. Inevitably these anniversaries cause us to turn backwards to the events and the times which are remembered. Remarkably little is known about the detail amongst the populations of Australia and New Zealand. Those populations have changed. The positions of the respective indigenous peoples in each country are different today. They are not inconsequential groups to be carried wherever the European power élite wishes to go. They are of increasing numerical importance, particularly in New Zealand. And in Australia, the influx of migrants since the 1950s has altered radically the ethnic composition of the nation. That influx is continuing. Increasingly, it reflects the geographical place of Australia in South Asia and the Pacific.

In the consideration of the various suggestions for the integration of the judicial systems of Australia and New

Zealand, it is necessary to start with a consideration of the origins of Australia and New Zealand as British colonies. It is convenient to begin with the time, a century ago, when moves were actively afoot to lay down the constitutional arrangements which would take Australia and New Zealand into a high degree of political and economic independence of the United Kingdom.

Before that time, the two colonies had, for a short moment, been part of the one political entity. On 14 January 1840, Governor Gipps of New South Wales issued a proclamation extending the boundaries of the colony of New South Wales to include any New Zealand territory which was then, or might thereafter, be acquired in sovereignty. Thus, when the Treaty of Waitangi was signed in 1840, the newly acquired New Zealand territories became part of the colony of New South Wales founded 50 years earlier.[3] However, in May 1841 New Zealand was officially proclaimed a separate colony. An Imperial statute of 1852 acknowledged this separation. But economic separation was not so easily attained. Most of the colonists came to New Zealand by way of the Australian ports. Australian institutions provided much of the finance for the early economic exploitation of New Zealand. There were common experiences in the development of sheep farming, the establishment of isolated urban societies and the phenomenon of population growth following the discoveries of gold. But from the origin of convict settlements in Australia, a significant proportion of the immigrant

population there was of Irish descent. That proportion was much lower in New Zealand. This affected traditional attitudes to the Crown and to the British connection.

Discussion about common political institutions for the antipodean colonies began again in the 1880s. The result was the Federal Council of Australasia established by Imperial statute in 1885.[4] However, that Council had very narrow legislative powers, no executive, no power to raise revenue and no judicial arm apart from the Judicial Committee of the Privy Council in London. New South Wales never voted to join the Council. The Council passed a few Acts about pearl shells, fisheries and intercolonial service and execution of process. Thereafter it "eked out an inglorious existence till superseded in 1901".[5]

It was the path towards the 1901 constitution for the Australian Commonwealth which provided the most substantial opportunity for a political federation between the Australian and New Zealand colonies. Various forms of political association between them had been talked about since the 1850s. In New Zealand, academic and popular writing in the 1880s turned to a more active discussion of Federation. Some commentators opposed the idea because it was thought that it would probably mean that Maoris would lose the vote, something which most Aboriginal Australians were denied but Maori men had possessed in New Zealand since 1867. Others urged that New Zealanders should not lose the precious privilege of self-government.[6] Yet others argued for

Federation on the ground that New Zealand would otherwise face a hostile Australian tariff. A large exhibition in Dunedin in 1889 attracted many of the leaders of the Federal movement in Australia. Alfred Deakin, soon to become the Australian Prime Minister, urged the people of Dunedin to "carry a fiery cross throughout this land" until New Zealand took its proper place in the [Australian] Federation. There was debate in the colonial Parliament about Federation idea. Opinion was divided; but most were against the idea. The issue of customs tariffs was seen as a key to the success of the Federal movement as much in Australia as in New Zealand. The constitutional meetings during the 1890s attracted representatives of New Zealand. Sir Henry Parkes, to the toast of a "United Australasia", asserted that "the crimson thread of kinship runs through us all".[7]

At the Sydney Constitutional Convention of 1891 the senior New Zealand representative was Sir George Grey. He had been both Governor and Premier of New Zealand. He told the convention that New Zealand was there "as a damsel to be wooed without prejudice, but not necessarily to be won". His colleague, Captain Russell declared that there were twelve hundred reasons why New Zealand should not join - the intervening miles of the Tasman Sea.[8] This much publicized assertion had but a superficial accuracy. Tasmania was likewise separated by sea. The British colonies on the western coast of Australia were further away than were the colonies in New Zealand. Yet the only New Zealand Federation

League which gathered much support was that in Auckland. In Wellington, the Evening Post newspaper responded to the vote in June 1899 in New South Wales in favour of Federation. It was now certain that the Australian colonies would federate. The Post urged that "New Zealand's sleep has been unduly prolonged".[10] Polls were taken of the members of the House of Representatives. Twenty members, as well as the four Maori members abstained from comment. Of those who expressed an opinion, thirty favoured joining Australia. Twenty were opposed. The "poll" was widely reported in Australia and New Zealand. It led Edmund Barton, the first Prime Minister of Australia, to believe that most New Zealanders favoured Federation. Other polls taken at the time showed roughly similar results. Barton was invited to visit New Zealand. Sadly, he found that he was "too busy". According to Sir Keith Sinclair, there was a three month flurry of interest. But by early October 1899, the Federation idea had almost disappeared from the New Zealand news.

An election was held at this time in New Zealand. The government was returned, under Richard Seddon. It was still not certain as to whether New Zealand should, or should not, join. The Australian Commonwealth Bill was about to be debated in the House of Commons in London. The New Zealand Agent General in London, Mr W P Reeves, wrote to the Secretary of State for the Colonies, Joseph Chamberlain on 30 March 1900. He said that New Zealand wanted to preserve the right to join the Australian Commonwealth on the same

terms as the original States. But this and other proposals made would have meant further referenda. The Australians had already had nine Federal referenda since March 1898. The representatives of their colonies wanted no more, particularly because the last referendum in New South Wales had been a close run thing. The Australian delegates in London therefore unanimously refused to agree to the amendments requested by New Zealand. They asserted that the constitution had already made adequate provision for the admission of new States.

Chamberlain supported the Australian delegates. Reeves considered (as I believe history has borne out) that they were "very short sighted not to grant the 'open door' amendment because it would strengthen the hands of the Federal Party in New Zealand ... whereas their rather overbearing and ungracious refusal should, I think, tend to get up New Zealand's back".[10] The result of this rebuff was adverse publicity in New Zealand. The cause of a trans-Tasman Federation was, in Reeves' view, "settled ... for many years to come". As Sinclair puts it:

> "The Australians felt that New Zealand had stood aside from their labours and now demanded what they could have requested before. The New Zealanders felt that it was only now that the Commonwealth Bill had been approved in United Kingdom and it was submitted to the ... Parliament that they knew what was in the constitution and that there was someone to negotiate with."[11]

Nevertheless, a Royal Commission into the Federal

question was established in New Zealand. It took voluminous evidence. Rare for the 1890s there was a coincidence of opinion between management and labour. Whereas farmers and the professions were more evenly divided, manufacturers, merchants and trade unionists were significantly opposed to Federation. Unionists expressed fear that New Zealand wages, working conditions and social legislation would be set back ten years. Fear was also expressed about competition with "coloured labour in Australia".[12]

In 1900 New Zealand exported £470,000 worth of goods to the "protected" Australian colonies and £623,000 to free-trade New South Wales. This success in exports to protectionist colonies reduced the fear in New Zealand of the adverse consequences of a Federal protective tariff barrier surrounding Australia. Moreover, New Zealand was much less dependent upon the Australian market for its exports than were the six Australian colonies. In 1890 New Zealand sent only 16.7% of the value of its total exports across the Tasman. There was thus no concerted business lobby for Federation in New Zealand as there had been in Australia.

Nevertheless, the most frequent arguments against Federation remained political, not economic. One member of the House of Representatives in New Zealand expressed a common sentiment:

> "We have been an individualised nation, and we should keep up our identity and nationality. I think we ought to have a nationality, and that New Zealand should be a country for New-Zealanders. With the wings of Great Britain over us we need look to no other country or

colony for protection ..."[13]

Of the witnesses who appeared before the New Zealand Royal Commission, 61% opposed Federation; 25% favoured it and 13% were noncommittal. In the result, the Royal Commission "unanimously arrived at the conclusion that merely for the doubtful prospect of further trade with the Commonwealth of Australia, for any advantage which might reasonably be expected to be derived ... from becoming a State in such Commonwealth, New Zealand should not sacrifice her independence as a separate colony".[14] The result was that the Australian Constitution came into force in 1901 and established an Australian Federation without New Zealand. As a relic of the discussions of the 1890s, covering clause 6 of the Australian Constitution to this day contemplates a political union between Australia and New Zealand. "The States" it still reads, "shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia and South Australia ... as for the time being are parts of the Commonwealth and such colonies or Territories as may be admitted into or established by the Commonwealth as States ...".

FROM ANZAC TO NAFTA TO CER

Soon after Federation, a common Australian tariff was duly established. It operated against New Zealand. It was regarded there as hostile. In 1906 Prime Minister Seddon visited Australia. He and Deakin agreed on a preferential

tariff. However, Seddon died. The New Zealand Parliament refused to ratify the terms of the agreement.[15] In 1912 the Australia Labor Prime Minister, Andrew Fisher, revived discussion of Federation with New Zealand. He even claimed that a majority of New Zealanders favoured the Federal idea. The New Zealand Herald stimulated strong criticism of Fisher's statement in New Zealand. It asserted "to New Zealanders the question of Federation with Australia is dead".[16] After the formation of the ANZAC Corps and the common suffering at Gallipoli and in Western France (recently remembered) the relations between the two countries improved. But between the two World Wars they were marred by frequent disagreements about tariffs.[17] With a larger population, the Australian economy offered a more significant market to home producers. New Zealand seized the opportunity of refrigerated sea transport to export lamb and dairy products to the United Kingdom. It became a more efficient exporter, although it was later to pay a great price for its dependence on that fickle market. When a balance of payments crisis confronted New Zealand in 1938 it responded by introducing import licensing and exchange control. These, in turn, provoked Australian retaliation.[18]

After the reinforcement of further wartime cooperation during the Second World War, in 1965 the New Zealand/Australia Free Trade Agreement (NAFTA) was negotiated. It grew out of an earlier trading agreement of 1933 which had extended Imperial preferences to trade between

the two countries. It is generally believed that NAFTA produced little overall effect in trans-Tasman trade.[19] But the agreement did provide the forum which, in 1979, led the governments of Australia and New Zealand to search for a new framework for trade liberalisation. It was this search which led to the Closer Economic Relations Agreement (CER) in 1983. The first objective of article 1 of that agreement is expressed in terms wider than economic and business interests. Its objectives are declared to be:

> "(a) To strengthen the broader relationship between Australia and New Zealand."

In July 1988 a Memorandum of Understanding on the Harmonization of Business Law was signed by representatives of the two governments in Christchurch, New Zealand. That memorandum included a record of the mutual benefits which both countries hoped to attain following the changing relationship which had developed after CER. Both government recognised that differences of laws and regulatory practices inhibited the growth of trade and the efficiency of both economies. Both governments recognised that further harmonisation of significant areas of business law would be of mutual benefit. They recognised that a degree of harmonisation had already achieved: in matters such as restrictive trade practices, laws on business and consumer affairs, consumer protection, company and intellectual property law. The Memorandum of Understanding then laid down areas in which the process of harmonisation and co-operation

should be continued. These included further progress in the areas of business law just specified and some other related areas of law. It committed both governments to seek to complete the examination of relevant law and practices and to identify areas appropriate for harmonisation by 30 June 1990.[20]

Neither the CER agreement nor the post-agreement Memoranda of Understanding established an inter-jurisdictional Court or Commission to resolve trans-national disputes arising between parties in Australia and New Zealand. In this regard CER took a course different from the International Joint Commission established by treaty to deal with certain common problems arising between the United States and Canada, for example.[21] Nor did CER establish an interjurisdictional court similar to the Court of Justice of the European Communities created under the Treaty of Rome of 1957. The possibility of new institutional arrangements to provide a joint body to resolve difficulties emerging in the growing economic relations between Australia and New Zealand arose from time to time during the negotiations leading to CER. However, in the event, no provision was made. The consultation process was regarded as essentially one between governments in respect of the initiatives which each government would take within its <u>own</u> jurisdiction. No separate body, designed to take on an institutional life of its own, was created. Nor is one on the drawing boards.

Nevertheless, the whole process of CER, since the first conception in 1979 to the signature of the agreement in 1983 and the follow-up thereafter, has been a story of gradualism. In part, this history of gradualism is forced upon the CER partners by the division of constitutional responsibilities for commercial and business matters within Australia, between the Commonwealth and the States. The delays inherent in securing agreement about law reform entirely within the Australian Federation are notorious. They are one of the reasons which Prime Minister Palmer gave as to why New Zealanders find the Federal idea "uncongenial".[22] But gradualism is also the way of the Parliamentary democracies of English-speaking people. It is part of our shared constitutional, legal and social culture. The bold idea may be forced upon a people in time of war or great crisis. The economic crisis facing two relatively prosperous antipodean countries in the sunshine of the South Pacific is not yet vivid enough to suggest a more vigorous process of change.

Pursuant to the Memorandum of July 1988, and further protocols signed afterwards, parallel initiatives were taken in New Zealand and Australia in 1990 to address the particular problem of anti-dumping measures in relation to goods originating in Australia or New Zealand. Both governments agreed to meet a target date of 1 July 1990 for the operation of a new scheme to deal with that problem. It was recognised that, in a true free trade zone, operating

effectively, it was desirable that differences in the regulation of anti-competitive practices should be removed. Here, at least, was an area of the law which in Australia was already substantially regulated by Federal legislation.[23] It was therefore an area in which relatively quick progress towards harmonization of law might be achieved. The result has been the passage of the Trade Practices (Misuse of Trans-Tasman Market Power) Act 1990 in Australia and the Law Reform (Miscellaneous Provisions) Act 1990 in New Zealand. This legislation is discussed elsewhere in this volume.[24] For present purposes it is important to note only those provisions of the legislation which confer parallel powers on the High Court of New Zealand and on the Federal Court of Australia and enact parallel amendments to evidence law and procedures to facilitate the proof of cases on both sides of the Tasman.[25] It will be necessary to return to this legislation. But before doing so, I intend to examine yet another lost opportunity. To evaluate the achievements of our time, it is necessary to see them in the context of earlier chances which Australia and New Zealand failed to take up.

LESSONS FROM THE PRIVY COUNCIL

Australian abolition - Until very recently, Australia and New Zealand shared a common judicial institution which would have provided a neutral form for the resolution of trans-Tasman legal disputes. This was the Judicial Committee

of the Privy Council. Although, as I shall show, its rôle has now been finally terminated in Australia - and although its future in New Zealand is uncertain - it is possible that lessons are to be derived for any contemporary or future common judicial institution for Australia and New Zealand from the one we shared, even in the recent past.

The Judicial Committee of the Privy Council was constituted by Imperial statute in 1833. It was a development of the ancient right of the English Crown, as the fountain of justice, to dispense justice in the Sovereign's Council.[26] The Australian colonists were, from the start, rather suspicious of a court, on the other side of the world, manned by judges with little or no knowledge of the harsh and special conditions of the antipodean colonies. They considered that it was likely to be sympathetic to English rather than local interests. For this reason, the Commonwealth Bill of 1891 provided that the Federal Parliament of Australia might require that any appeals previously allowed from the colonial courts to the Privy Council should thereafter be brought to a Federal supreme court whose judgments would be final. The possibility was retained that the Queen would have power to grant leave to appeal to herself "in any case in which the public interests of the Commonwealth, or of any State, or of any other part of the Queen's Dominions are concerned". At the Adelaide session of 1897, a proposal was adopted whereby appeals from the State courts direct to the Privy Council were to be

abolished altogether. The only notable supporters of the Privy Council appeals at the Melbourne session in 1898 were those who spoke to petitions from the Chambers of Commerce and Manufacturers and other associations representing mercantile interests.[27]

The Imperial authorities objected to the moves to limit Privy Council appeals. They actually deleted the clause from the Constitution altogether. Australian delegates finally persuaded them to accept a compromise excluding Federal constitutional appeals on so-called inter se questions, without the certificate of the High Court of Australia. Furthermore, the Federal Parliament was empowered to make laws "limiting" the matters in which leave might be asked for appeal to the Privy Council.[28] Once only did the High Court of Australia grant such a certificate under the former provisions. No further certificates are imaginable. The power to "limit" Australian appeals has now been exhausted by successive Federal Governments. Now, no case may be brought on appeal from the High Court of Australia to the Privy Council, nor from any case in a State court exercising Federal jurisdiction.[29]

New Zealand proposals: The moves to control, limit and ultimately abolish Australian appeals to the Judicial Committee of the Privy Council reflect some of the same concerns evidenced in the later New Zealand debates. But they also reflect the special determination of a Federal country to preserve the inherently political determinations

involved in the interpretation of the Federal Constitution, not only to local judges, alert to local conditions, but also to lawyers brought up in the intellectualism and legalism of a Federal polity.[30] Furthermore, in Australia, there had always been since Federation, a second judicial appellate tier. Dissatisfied litigants can have disputes determined by a Full Court or Court of Appeal of a State and then, if the necessary preconditions (including lately special leave) are satisfied, reviewed for a second time in the High Court of Australia.[31] Australia's moves to abolish Privy Council appeals are instructive for New Zealanders. However they are not determinative of the New Zealand debate which has had a somewhat different focus.

The vestigial retention of Privy Council appeals from New Zealand has in recent times agitated public discussion of an issue which, until 15 years ago, was little more than a hardy perennial of academic texts and law conferences.[32] The existence of a right of appeal to the Privy Council was valued by some large financial and commercial organisations, including those having close connections with the United Kingdom and, partly for emotional reasons, by the legal profession as a whole. However a growing number of voices of dissent were heard from 1970 which doubted whether an outside body, however worthy of respect, should determine finally the law of New Zealand.

In 1978 the New Zealand Royal Commission on the Courts examined the issue of Privy Council appeals,[33] although the

actual issue of whether such appeals should be abolished was outside the Commission's terms of reference. The retention of the appeal was urged by many members of the legal profession. On the other hand, politicians gradually came round to the notion of a New Zealand final court. Mr J K McLay QC, then Attorney-General, said in 1983 that abolition should follow a full public debate. He cited the comparatively small number of cases proceeding to London. The President of the New Zealand Court of Appeal, Sir Robin Cooke in 1987 expressed the view that New Zealand had achieved a distinct national legal identity.[34] There was a value in looking more widely than England alone for sources of comparative law. "Australian developments are automatically of close interest and usually influential".[35] He urged that New Zealand should accept responsibility for its own national legal identity and recognise that the Privy Council appeal had "outlived its time". Not to take such an "obvious decision" would amount to a renunciation of "part of our nationhood".[36]

Later that year, the New Zealand Law Commission published its report, The Structure of the Courts.[37] That report followed the announcement of the Labour Government of New Zealand in October 1987 that it proposed to terminate appeals to the Privy Council. The report proposed that the Court of Appeal of New Zealand should become the Supreme Court and be the final Court of Appeal for the country. The High Court of New Zealand would remain the general trial

court for serious criminal cases and large civil disputes. It would also have an appellate function in respect of the District Court.[38] Legislation to implement these proposals has not yet been enacted. In fact, the passage of time has given an opportunity to opponents of abolition to muster their forces. The abolition of Privy Council appeals from New Zealand in the near future now appears uncertain. The prediction of Mr (now Sir Robert) Muldoon in June 1983 still seems apt. He said that Privy Council appeals would be abolished, but not overnight.[39]

An opportunity lost - With the prospect of the declining role and jurisdiction of the Privy Council before so many court systems of common law countries, it was natural that suggestions would be made for alternatives built upon the Privy Council model. Thus the Chief Justice of Fiji, at the Fifth South Pacific Judicial Conference in 1982, long before the military coups in that country, suggested that a regional Court of Appeal for the Pacific might be established to replace the Privy Council. This could include judges from the many countries that would be subject to its jurisdiction.[40] More recently, with the changes of 1997 approaching, suggestions have been made to similar effect by judges and lawyers of Hong Kong. After 1997, appeals to the Privy Council in London will be terminated. What is to be put in its place? Does this urgent necessity provide an occasion for the establishment of a regional common law appellate court suitable to solve (amongst others) the

interjurisdictional disputes arising between parties in Australia and New Zealand?

The history of the Judicial Committee of the Privy Council is a further case of lost imperial 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 institutions of the British Empire. In part, this was probably out of recognition that the old Dominions, 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 trans-national court could be reformed and saved.

It is not as if the idea was never promoted. One after another of the leading Commonwealth judges suggested the establishment of an alternative court for the new Commonwealth. A very early proponent in the 1940s was New Zealand's Chief Justice, Sir Michael Myers.[41] Later in 1965, at the Commonwealth Law Conference in Sydney, a paper was presented on "intra-Commonwealth judicial machinery".[42] It proposed a new Commonwealth Court of Appeal to replace the Privy Council and the House of Lords. The idea did not find much favour. It seemed unlikely that the United Kingdom would take the necessary step of finally

subordinating its judicature to a truly international Commonwealth court. Furthermore, the new Commonwealth countries, freshly independent, were, for the most part, unenthusiastic. On the other hand, the New Zealand Attorney-General, Mr J R Hanan, welcomed the proposal. But other New Zealanders considered the notion "too much behind its time".[43] Chief Justice Barwick of Australia 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.[44] Perhaps it was because he considered the proposal "too late" for the developed countries of the Commonwealth (like Australia and New Zealand) and merely saw it as a service for certain of the new developing countries. Later, he ventured telling criticisms of the Privy Council's mechanics: the expense of litigants travelling ("often twice") to the Board in defiance of the peripatetic tradition of English justice; the unfamiliarity with local conditions and the tendency to give oral judgments where wisdom and local importance might have dictated the need for care and reflection.[45]

In these circumstances, recognising the unlikelihood of converting the Judicial Committee to a general court of appeal for the Commonwealth, proposals of a more modest and regional character were made. Generally, these suggested creation of regional courts of appeal, as mentioned above. But drawing on the very English way by which institutions are

adapted to new needs[46], a new idea was ventured fifteen years ago for an Antipodean Privy Council. The notion was advanced as a relatively simple solution to the complex problem which had arisen in Australia of two ultimate courts of appeal. The Australian Prime Minister, Mr Whitlam, proposed to the United Kingdom authorities that an entirely Australian Judicial Committee of the Privy Council should be created to hear Australian Privy Council appeals.[47] At that time, many members (and past members) of the High Court of Australia and of the Court of Appeal of New Zealand were members of the Judicial Committee of the Privy Council and sat from time to time in London. Mr Whitlam's proposal did not find favour with the United Kingdom Government. The main reason for opposition appears to have been less the division of the Crown's judicial advisers (for the division of the Crown had long since been accepted) so much as concern that the procedures for frank amendment of the Australian Constitution should not be circumvented without the participation either of the States or of the people. The full details of these negotiations have not yet been revealed. It is mentioned here, in the context of this chapter, because it provided what (at least in machinery terms) would have been the simplest method of creating a trans-Tasman or South Pacific Court of Appeal of high authority.

The difficulties in the way of the idea became, ultimately, "practical politics".[48] Having taken so much

time and trouble to abolish Privy Council appeals, it is now unthinkable that Australia could be persuaded to return to this distinguished imperial anachronism. It would involve breathing new life into an institution all but dead, with a dwindling number of qualified Australian personnel. Even if its jurisdiction were limited to non-Australian regional appeals, it would be demeaning for countries to submit appeals to a regional Privy Council largely made up of judges from a country which did not do so. This was always the essential vice of the sittings of the Board in London. In short, the proposal to create an interjurisdictional court for the Asian and Pacific common law countries, by a convention that such appeals would be heard only by qualified members of the Privy Council in the region, is an idea whose time has passed. If there had been the imagination to create such a court even twenty years ago, it might have flourished. It could certainly have made a significant contribution to harmonisation of at least some common law principles in the region. But it did not come about. It has now no part to play in the institutions of CER.

APPEAL TO THE HIGH COURT OF AUSTRALIA

An alternative solution for the resolution of trans-Tasman commercial disputes ultimately in the one court would be to confer jurisdiction in all such disputes upon an ultimate appellate court of one of the contracting parties to the CER agreement. Because of the inflexible requirements of the Australian Constitution, this would mean, in practical

terms, providing for appeal to the High Court of Australia.

The simplest legal way that this result could be achieved in relation to New Zealand would be by Federation with Australia. On Federation it would plainly be necessary to enlarge the High Court of Australia [or Australasia] to include additional justices from New Zealand. The Australian Constitution places no limitation in the way of such enlargement. There is no doubt that the Court could be greatly strengthened by the appointment of two eminent New Zealand Justices. Federation under appropriate "terms and conditions"[49] would resolve, in a stroke, the transborder legal disputes for there would then be an ultimate court of appeal with full authority throughout Australia and New Zealand. Section 92 of the Australian Constitution, guaranteeing that trade between the States shall be absolutely free, would greatly enlarge the access of New Zealand primary products to Australia.[50]

Federation might seem to some to be a rather extreme solution for the resolution of what is still a comparatively small number of trans-Tasman legal disputes. Alternatively, appeals to the High Court of Australia could, theoretically, be allowed from New Zealand courts, possibly limited to defined matters, such as matters involving the interpretation of "harmonised" statutes on tax, trade practices, corporations, exchange control and the like. A possible precedent exists in the little-known provisions of the Nauru (High Court Appeals) Act 1976 (Cth). That Act relies upon

an agreement between Australia and the Republic of Nauru, under which appeals may 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 of Nations. Australia acceded to the expressed wishes of Nauruan leaders that provision should be made for that appeal when Nauru, a former Trust Territory administered by Australia, gained its independence. Introducing the Bill, the then Attorney-General, Mr R J Ellicott, pointed to its novelty: "The Bill represents a novel and significant step in that for the first time the High Court will function as a final court of appeal from the Supreme Court of another independent sovereign country. Generally, newly emerging countries establish their own judicial institutions. In this case the Nauruan Government took ... the initiative in seeking to have the High Court of Australia being given an extra-Australian jurisdiction.[51] There are certain constitutional problems associated with the legislation. It is difficult to reconcile it with any of the categories of appellate jurisdiction contained in s 73 of the Australian Constitution. Quite possibly, the High Court's jurisdiction is original rather than appellate, in that it arises under a law made under the external affairs power.[52] However, this constitutional problem would appear to present no significant difficulty in practice.

Speaking then in Opposition, Mr Lionel Bowen (later Attorney General in the Hawke Government) supported the

legislation but only on the basis that the jurisdiction of the Australian High Court was not to be seen as "neo-colonial",[53] was enacted at the specific request of Nauru and could readily be terminated by that country. Mr Bowen pointed to the fact that Papua New Guinea, whose appeals ran to the High Court of Australia during Australian administration of that country, had chosen not to continue appeals after independence.

So far, only one appeal has been heard in the High Court of Australia under the 1976 Nauru Act.[54] It dealt with the admissibility of evidence in a criminal trial. It cannot therefore be said that this super-national jurisdiction of the High Court of Australia has resulted in substantial work, giving the Australian Court an opportunity to demonstrate its capacity to deal imaginatively with legal problem arising in a non-Australian context.

Outside Federation, it must be said that there are insurmountable difficulties in suggesting that 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. As presently constituted, it would not even have the advantage, which the Privy Council enjoys, of specially including a New Zealand or other relevant judge to hear an appeal connected with New Zealand. There are other problems, including some doubts about the constitutional validity of conferring an external

appeal on the High Court of Australia, as such, and the already heavy Australian workload of the High Court. 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.

A TRANS-TASMAN COMMERCIAL COURT

When the bold design of multi-jurisdictional courts for the region is put aside, is there any prospect of a special trans-Tasman court of more limited jurisdiction? Could such a court of limited jurisdiction be established, at least to hear particular cases of mutual concern to parties in Australia and New Zealand? Suggestions for the creation of a trans-Tasman court, set up to fulfil CER, are made from time to time. Dr Warren Pengilley, a past member of the Australian Trade Practices Commission, urged a meeting at the Ninth Commonwealth Law Conference in Auckland in 1990 to consider the advantages of a "Trans-Tasman Competition Court". He suggested that such a court, with a strictly limited jurisdiction, could be created by each Parliament. It would be created by the Australian Parliament under the external affairs power.[55]

Clearly, there would be 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 rapidly 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, that court acts as an interjurisdictional "court of appeal". However, it is not 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 art 177 of the Treaty of Rome of 1957. References under art 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 art 177.[56] So far, the English courts have been willing to make references under art 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 remains a number of residual technical and constitutional problems so far as Australia at least is concerned. However, in general, it is accurate to say that the decisions of the European Court of Justice have had a significant impact in a variety of areas of domestic law in member countries, such as industrial property law, customs law and sex discrimination law.

A second interjurisdictional court which should be mentioned is the European Court of Human Rights. That Court is established pursuant to the European Convention on Human Rights of 1950. Again, no provision is made for an appeal to be brought to that court from a domestic court in a member country. Cases are brought in the first instance to the European Commission, either by a member State or by individuals. They may then be brought before the European Court of Human Rights by member States which have accepted the Court's jurisdiction or by the Commission itself. Individual litigants are not, as such, parties to cases before the European Court of Human Rights. However, in practice, their views are put by the Commission as part of the presentation of the case.

Decisions of the European Court of Human Rights have had important indirect effects upon the municipal law in member countries, including the United Kingdom. One case which was tantamount to an appeal, was the Sunday Times

Case.[57] The European Court of Human Rights held that a decision of the English House of Lords on the law of contempt was inconsistent with the European Convention on Human Rights. An important difference of opinion emerged about the proper function of contempt law. The decision of the European Court of Human Rights was instrumental in initiating statutory changes to the United Kingdom law on the law of contempt.[58] In other areas, English courts have been sensitive to the implications of their decisions under the European Convention on Human Rights. However, the European Court of Human Rights is not, strictly, an interjurisdictional court of appeal. There is no plan to allow direct appeals to that Court from municipal courts. It remains simply a special court established pursuant to a treaty to operate, effectively, as a stimulus to municipal courts in a limited area of defined, and agreed, jurisdiction.

For completeness, it should be said that there is no appeal from any municipal court to the International Court of Justice. It sometimes happens that cases which start as municipal cases become matters of international litigation by separate application. The "transfer" of such cases from municipal and international fora can be a difficult one, raising local constitutional problems. An interesting example in recent years was the termination of the cases involving claims concerning Iran in the United States. This was done in the United States by Presidential Order made

pursuant to the settlement in January 1981 of the hostages crises between Iran and the United States. The Supreme Court of the United States held that the "transfer" of these cases to an international arbitral claims tribunal at the Hague was permitted by the United States Constitution[59]

Although the establishment of a special and limited trans-Tasman court or commercial court would be feasible, pursuant to a treaty between Australia and New Zealand, and although precedents for the successful operation of such interjurisdictional courts exist, numerous problems would have to be faced in the context of CER. Quite apart from the theoretical and practical problems mentioned in relation to the earlier options, these include, in the case of Australia, the constitutional inability to exclude the prerogative review of the High Court of Australia of all courts and tribunals established by the Australian Parliament. They also include 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.[60] 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 proposals for such

amendments in the history of Australian Federation is discouraging, particularly in recent times.[61]

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 exactly in such circumstances that it might be expected that parties would seek the authoritative determination of the constitutional supreme courts. In the case of the High Court of Australia, the prerogative writs provided under the Constitution[62] would effectively transfer such jurisdictional determination into the High Court of Australia. This would thereby subordinate the wished-for interjurisdictional independence of the international court or tribunal 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 its court structure than is the written language and specific design of Chapter III of the Australian Constitution.

PRACTICAL AND MACHINERY PROVISIONS

Dual commissions. Without taking the bold path of Federation on the uncertain path of establishing new courts and associated institutions, there are a number of more

limited steps which could be contemplated to facilitate better legal servicing of the problems likely to arise from closer economic relations between Australia and New Zealand. In the context, of the courts, one possibility is that of providing judges of the two countries with commissions to sit in each other's courts. The notion has some complications. However, these are not insuperable. The idea was mentioned in the New Zealand Royal Commission on the Courts.[63]

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

That conclusion is eminently sensible as a statement of general application. But the idea deserves further exploration. The manner in which the Privy Council (avowedly an interjurisdictional court) invites ad hoc judges provides a precedent. Already the issuance of interjurisdictional commissions has begun between Australia and New Zealand. Justice D Stewart, then a Judge of the Supreme Court of New South Wales, received a commission as a Royal Commissioner from the Governor-General of New Zealand, as well as from the Governor-General of Australia and the Governors of three Australian States. His report on aspects of narcotic drug activities in both countries was released simultaneously in Australia and New Zealand.[64]

Within Australia, the issuance of such multijurisdictional Royal Commission warrants is becoming more common following the precedent established in the inquiry on drugs by Justice E Williams of the Supreme Court of Queensland. A like issue of joint commissions occurred in the case of Commissioners of the current Australian Royal Commission into Aboriginal Deaths in Custody. More recently it has been proposed in respect of organised crime.

In tribunals it was announced in June 1983 that Justice J T Ludeke, then a Deputy President of the Australian Conciliation and Arbitration Commission, had received a commission as a Deputy President of the Tasmanian Industrial Appeals Tribunal. This was designed to facilitate resolution of interjurisdictional Federal/State industrial concerns in Tasmania. In May 1990 it was announced that Federal and State Ministers for Industrial Relations in Australia had agreed to the appointment of members of State industrial tribunals to the Federal Industrial Relations Commission, thereby taking the 1983 precedent to its logical conclusion.

Judges of the Federal Court of Australia hold personal commissions as Presidential Members of a number of Federal tribunals in Australia, notably the Administrative Appeals Tribunal. Justice A J Barblett, Chief Judge of the State Family Court of Western Australia holds a commission as Deputy Chief Justice of the Family Court of Australia, a Federal Court. This allows him to sit on appeals from the Family Court of Western Australia and thereby to provide

local knowledge and experience to the Full Court of the Family Court of Australia, acting in its appellate capacity.

Admittedly, the issuance of additional commissions as justices of the High Court of Australia or New Zealand Court of Appeal would provide special problems, not least because of the significant constitutional functions of both courts in their own countries. But at a lower level in the judicial hierarchy, the possibility of developing a trans-Tasman court or a trans-Tasman division of the respective superior courts, with judges holding commissions from the Executive Council of both countries, should not be ruled out. I have always thought that this methodology of reconciliation of jurisdictions was more likely to be fruitful, in the short term at least, than the creation of entirely new courts with the additional problems which are involved in that change.[65]

International arbitration. The second practical possibility for the resolution of interjurisdictional disputes, or some of them, would be the activation or creation of agencies of international arbitration. New Zealand, for example, has ratified the Convention on the Settlement of Investment Disputes between States and nationals of other States. That Convention, drawn up under the auspices of the International Bank for Reconstruction and Development (the World Bank) establishes the International Centre for Settlement of Investment Disputes.[66] There are many similar interjurisdictional agencies for the settlement

of such disputes. The International Joint Commission between the United States and Canada has already been mentioned.[72] In our region there are already international bodies which could be developed to provide facilities for arbitration of at least some international disputes. The South Pacific Forum might be one such body. Arising out of the CER Agreement, an arbitral body specific to legal and other disputes between Australia and New Zealand might in due course be created. Of course, arbitration is, in some ways, not as satisfactory as authoritative judicial determination. In the trade and commercial fields, arbitration has never been as successful in our region as it is in the United Kingdom and North America. Nevertheless, the development of international commercial arbitration should be examined as an alternative means for the resolution of at least major interjurisdictional disputes arising from CER. Such voluntary arbitration would have the advantage of avoiding many of the constitutional and institutional problems listed in this chapter.[67]

Common service and execution of process. A very practical contribution to the reduction of interjurisdictional difficulties between Australia and New Zealand would be the extension of facilities for the service and execution of legal process throughout the two countries. The chief source of specific Federal legislative power in the Australian Constitution appears to contemplate only legislation with respect to intra-Australian service of

process and execution of judgments.[68]. The intra-State situation within Australia is sufficiently distinguishable from the international situation to warrant separate treatment. A more liberal and streamlined procedure should be developed, both within Australia and in relation to New Zealand, if the latter could be secured on a reciprocal basis.

At present, if Australian process is to be served in New Zealand, or New Zealand process in Australia, resort must usually be had to the rules of the several courts of the two countries. Generally speaking, service out of the jurisdiction is only possible with respect to superior court process. Accordingly, inferior courts in Australia or New Zealand cannot serve their process out of the jurisdiction at all. In relation to the enforcement of foreign judgments, all Australian States and Territories and New Zealand provide by law for the enforcement of foreign judgments. There are also common law rules governing such enforcement and in all Australasian jurisdictions there is now relevant legislation.

In recognition of the special relationship between Australia and New Zealand, their close physical proximity and high levels of shared crime, the countries have been dealt with differently for the purposes of extradition law. Thus, New Zealand is given special treatment in the Extradition (Commonwealth Countries) Act 1966 (Cth).[69] Courts have given effect to these differences.[70] In Bates v McDonald[71] Justice Samuels explained:

> "It is obvious ... that Part III takes account not only of the geographical proximity of Australia and New Zealand and the ease and frequency of travel between these two countries, but also of their close economic and political relationship and, no less important, of their common legal and political tradition ... It is plainly the legislative purpose that the enactment shall enable the authorities in New Zealand to apply with only modest formality in Australia for the surrender to New Zealand and for trial there of persons alleged to have committed offences against the law of that country."[72]

In the same case, Justice McHugh (now a Justice of the High Court of Australia) emphasised that there were limits to this integration:

> "[H]uman liberty is too precious an attribute for any court to allow a person to be extradited to another country, even a country as close as New Zealand, except under the authority of and in strict compliance with the law of Australia."[73]

The new Trade Practices (Misuse of Trans-Tasman Market Power) Act 1990 (Cth) includes a number of novel provisions for the service and execution in New Zealand of process of the Federal Court of Australia and in Australia of process of the High Court of New Zealand. Such extensions of power are limited to proceedings under those provisions of the applicable legislation dealing with misuse of market power. In such proceedings, subject to various procedural protections, a New Zealand subpoena and injunction may be served in Australia and enforced there.[74] Certain judgments of the High Court of New Zealand may be registered

in the Federal Court of Australia and enforced in Australia as a judgment of that Court.[75] Provision is made for judicial notice to be taken of certain New Zealand statutes, signatures, seals and stamps in proceedings concerned with alleged misuse of market power.[76] Simplified provisions are enacted for the proof of New Zealand documents and Acts. There are reciprocal provisions under New Zealand law.

These are notable and practical steps forward. But they are limited in their application to proceedings of a very particular kind under restrictive trade practices law on both sides of the Tasman. They do not have general application. They fall far short of the facilities which were provided under the Australasian Civil Process Act 1886 (Imp) and the Australasian Judgments Act 1886 (Imp). Those Imperial statutes were adopted by the Federal Council of Australasia. They extended the régime for the service of civil process, the enforcement of judgments and of criminal process equally among the member jurisdictions of Australia and New Zealand.[77] It is reported that New Zealand has proposed a return to such a régime by uniform legislation of the Australian and New Zealand Parliaments.[78] So far, the legislative response has been much more modest and particular. The New Zealand proposal, if adopted, would go far beyond the traditional areas of integration such as defence and beyond the new area of harmonisation of business law. Yet perhaps it illustrates the way in which integration tends to follow the flag and trade and, once started, to

gather a momentum leading to more and more changes.

Harmonised business and commercial laws. There are many other practical steps which could be taken to reduce the barriers of inconvenience that exist between the legal systems of Australia and New Zealand post CER. First, harmonised laws, so desirable from the point of view of business and commerce, will not come about of their own motion. The experience of Australia's painful moves to uniform corporation and securities laws demonstrates the difficult process of interjurisdictional negotiation. The enhanced power of the Australian Parliament under the external affairs power conferred by s 51 (xxix) of the Australian Constitution may facilitate the development of interjurisdictional uniform laws in the context of CER.[79] However, it seems obvious that disparate commercial laws will remain for some time as an impediment to trans-Tasman trade, unless something positive is done. The position is complicated by the fact that, whilst New Zealand has a single legal system, New Zealand traders dealing with Australia must acquaint themselves not only with Federal commercial laws but also with the relevant laws of the States. Accordingly, any interjurisdictional body for the harmonisation of commercial laws will need to include representatives of the Australian States. The sooner such "second generation" machinery of intergovernmental consultation is established, the better. In 1988, the then Minister of Foreign Affairs of New Zealand (Mr Marshall) raised the possibility of establishing a

Trans-Tasman Council.[80] He said that this could involve consultation at the level of Prime Ministers. Under its umbrella, "it should be possible to take the process of inter-action at a political level a step further". There have been other like suggestions. They deserve attention at the highest political levels in both countries

New Zealand already takes part in the Australasian Law Reform Agencies Conference. Indeed, the most recent such conference was held in New Zealand, as are meetings of the Standing Committee of Attorneys General and other Ministerial meetings of Australian Ministers. National uniform law reform prospects have been undertaken in Australia to promote uniformity of laws in the areas which are of prime importance for the success of CER. It is obviously highly desirable that New Zealand should play a participatory part in the operations of such bodies.

Common admission of legal practitioners: Fresh consideration has been given to the admission of legal practitioners to practise before the courts in Australia and New Zealand. In Australia, a barrier against the interstate admission of legal practitioners has recently fallen following a decision of the High Court.[81] Not without some rearguard resistance in Queensland, the moves are now well advanced for the interstate admission of Australian legal practitioners with minimal impediments. This move was stimulated by earlier Federal legislation permitting interstate practitioners to appear in Federal courts and also

conferred a right of audience in State courts exercising federal jurisdiction.[82] In the recent Market Power legislation, it is provided for proceedings under that Act that a New Zealand practitioner has a full entitlement to practise as a barrister, solicitor or both before the Federal Court of Australia, including in a video-link or telephone hearing held pursuant to the amendments to the Federal Court of Australia Act 1976 (Cth) effected by that Act.[83]

A number of State Supreme Courts in Australia are now altering their admission requirements to permit New Zealand practitioners virtually automatic admission to their rolls.[84] There is no doubt that CER has stimulated these changes. Clearly, they must advance on a reciprocal basis. Stimulated further by special statutory provisions in relation to Market Power cases, there seems little doubt that courts throughout Australia and New Zealand will move quite quickly towards common admission provisions. This will enhance the importance of regular consultations between admitting authorities and law teachers about matters of legal instruction.

Developing a trans-Tasman jurisprudence: With the growing harmonisation of law and the increasing integration of legal institutions, it is highly desirable that lawyers on both sides of the Tasman should come to know more of their shared legal tradition as well as the points of difference which may enrich their own jurisprudence. The courts themselves have a function to stimulate the search for

comparative law material from across the Tasman. In Australia it is clear, at least since Cook v Cook[85], that, with the possible exception of Privy Council decisions at a time when Australian courts were subject to appeals to that court, no decision of a foreign court has greater legal authority than another. The judgments of the courts of England are now of no higher standing in Australian law than those of New Zealand. Commonly, because barristers and judges have English case books on their shelves, it is usual to look to those case books for comparative law material. Even today it is less usual to look across the Tasman. In New Zealand there is an added reason for the persistence of this tendency. It is the survival of appeals to the Privy Council. Such appeals maintain the formal link of New Zealand and English jurisprudence. In the post-CER decade it provides an additional reason for abolition. There is a need for courts to insist upon provision of trans-Tasman (and for that matter Canadian and other) authority. This tendency is beginning. It has the support of the courts of highest authority on both sides of the Tasman.[86]

There is also a need for reconsideration by the courts themselves, stimulated by legal argument, of some of the rules of the common law which need modification in a specifically trans-Tasman context. All of the reforms should not be left to Parliament or the Executive Governments. To wait for them may sometimes involve waiting too long. The common law has its own dynamic. Its capacity for change is

one of the reasons for its successful survival, post-Empire.[87]

One area which springs to mind as ripe for reform in this regard is that of the law on forum non conveniens. In a wider context, the New Zealand courts have recognised the need to adapt some of the rules formulated in earlier times to the current needs of modern conditions. Thus in CBI New Zealand Limited v Badger BV[88] Cooke P observed that "the growing dependence of the New Zealand economy on international trade means that an increasing number of international commercial contracts have at least one New Zealand party". One consequence of this development, true also of Australia, has been that, in many cases before the courts, one party is a foreigner. Alternatively, the dispute may concern events or a subject matter which occurred outside Australia or New Zealand.[89] This is not the place for a full review of the radical developments which have occurred in England in the approach to assigning the appropriate legal jurisdiction to hear an determine such interjurisdictional disputes.[90] In Australia, despite encouragement from a minority opinion of my own[91] the High Court has, by a majority, adhered to a traditional approach.[92] The Australian position has been both criticised[93] and defended[94] in academic writing. It has proved difficult of application because of different expressions of the rule in the High Court of Australia. A definitive re-statement is awaited.

The matter is not without importance in the present context and for the resolution of trans-Tasman legal disputes. So much was shown in Reese Bros Plastics Limited v Hamon-Sobelco Australia Pty Limited.[95] That case concerned a challenge by a company incorporated and resident in New Zealand to proceedings commenced by a party in the Supreme Court of New South Wales claiming breach of contract. The contract concerned the supply of equipment for a power station in New Zealand. Multiparty proceedings relating to the dispute were already on foot in the High Court of New Zealand. A question arose as to where the contract had been made. But beyond that, the performance of the contract, a provision for arbitration, the presence of witnesses and the commencement of litigation in New Zealand all argued for a stay of the New South Wales proceedings so that the dispute might, in its entirety, be resolved in the New Zealand High Court. By majority[96] the stay was refused.

In the course of my minority reasons, I suggested a particular role for the courts of Australia and New Zealand in the context of CER:

> "[T]here is ample material which is notorious from which a court today would take note, at least, of the closer economic and other relationships between [Australia and New Zealand]. Courts on both sides of the Tasman should be sensitive to these realities. They should not be blinkered by legal categories more appropriate to other international relationships. Within the common law rules of flexible content Australian courts should play a realistic and constructive part in facilitating and not impeding the closer economic relationship with New Zealand."[97]

I am encouraged by the fact that similar observations have been made by Cooke P and Casey J in New Zealand[98] and by Wilcox J in the Federal Court of Australia.[99] Perhaps a value of this book will be to raise the level of appreciation in the judiciary and legal profession on both sides of the Tasman Sea of the important developments which have occurred, and are occurring, in trans-Tasman legal relationships.

Personal and other connections: It is clearly desirable that there should be enhanced contact between trans-Tasman legal practitioners and their organised societies. There is already communication at the level of law societies. Informal, specialised associations have also been created, such as the Maritime Law Association of Australia and New Zealand. It would be a beneficial development if lawyers habitually practising in trade and other matters of concern to trans-Tasman clients could form a special association not only to pool knowledge and share experiences, but to provide stimulation to law reform and judicial reform and an ongoing dialogue about harmonisation of laws and institutions. These and other practical problems could be considered. True, they do not have the historical attractiveness of the revival of the Privy Council or the fascination of the substantial reconstitution of courts or the creation of an interjurisdictional tribunal and so on. However, the adoption of a number of specific and attainable targets might be more likely to bear fruit, at least in the short term. The history of the relationships of Australia

and New Zealand has demonstrated repeatedly a certain shyness when it comes to bold schemes.

CONCLUSIONS - TOWARDS A NEW POLITY

This chapter has reviewed the past, present and possible future institutional rearrangements of the judiciary in New Zealand and Australia. For a time, when the new New Zealand colony was part of the New South Wales colony, their governmental institutions (including the judicial) were, theoretically at least, common. For a longer time they shared the Judicial Committee of the Privy Council as their common ultimate court of appeal. Although the Privy Council survives in New Zealand, its role is limited and its future role uncertain. Had only the Imperial authorities in London been more imaginative, in facilitating the development of a regional sitting of the Privy Council, even in the 1960s, it is possible that that institution would have survived into the post-Imperial era for the common law countries of the Pacific, including Australia and New Zealand. But the chance was missed. Despite nostalgic proposals and urgent needs in some jurisdictions, it will not recur.

Inevitably, as trade between Australia and New Zealand increases following CER, so will interjurisdictional disputes. Many of the disputes will be settled for commercial reasons or because the cost, delay and inconvenience of litigation are just not worth it. Some will be referred, by agreement, to international commercial arbitration. But there will remain a hard core which have to

be resolved by legal process.

This reality raises the urgent necessity of harmonising business law at least, so that public regulation and private agreement within Australia and New Zealand are carried on within a legal framework having a high degree of common features. The alternative is confusion, uncertainty, unfairness and inefficiency. This has led to the slow process of harmonisation of substantive law. In the particular area of the misuse of market power and restrictive trade practices law an important achievement has been secured in Australia and New Zealand in 1990. Progress towards harmonisation of other areas of the law is continuing. However it moves forward necessarily at a slow and careful pace. Identity of laws is not the immediate objective. Harmonisation allows room for non-essential differences.

This development of similar substantive laws leaves the question of the forum in which trans-Tasman disputes may be determined according to law. The conferral of final appellate jurisdiction upon the ultimate court of one of the contracting parties to CER is not a practical solution. The Nauru model will certainly not be followed by New Zealand. The creation of a trans-Tasman commercial court is often advocated. There is a precedent for such a court in the European Communities. But the idea runs into a formidable constitutional obstacle in Australia. No order of such a court, if created by the Australian Parliament, could be immune from review in the High Court of Australia.

This conclusion poses both short-term and long-term questions to be solved in the context of CER. The short-term questions confront every branch of government as well as the business and general communities of both countries. Initiatives such as the recent innovative legislation on both sides of the Tasman can help adapt the judicial institutions of each country to the particular needs of enforcing transnational law and providing means by which that can be done with fair efficiency. Many other practical steps can be taken to facilitate legal representation across borders and to enhance knowledge and use of the jurisprudence of both countries. The courts themselves have a role to play in this. The special status of New Zealand in the context of extradition has been clearly recognised both by Australian legislation and by court decisions. Its special status for the application of the forum non conveniens rule is less certain. Its status more generally is even more problematic.

The long-term question posed by CER is much more fundamental. Where will it lead us? What is the "new polity" to which the New Zealand Prime Minister referred? Is it mere economic self-interest which forges this new link between Australia and New Zealand? Will politics follow the flag and trade as so often it has in other places and other times? Recent opinion polls on both sides of the Tasman show healthy majorities against full political union at this stage.[100] Yet there are majorities for a full economic union. And even bigger majorities in each country for a full

defence union. These opinion polls, the suggestions of a common currency,[101] common airline policies,[102] and growing economic ties have stimulated, virtually for the first time in seventy years, a renewed public discussion about the long-term objective of a Federation of some kind.[103] Books are now beginning to appear on this and related subjects.[104] The issue is again on the agenda. It slipped away for a want of energetic discussion nearly a century ago. Since then, events have occurred which both favour and restrain the revival of the debate.

The restraints are more obvious. So let them be stated first. They include the better part of a century in separate nationhood. They also include the changing racial composition and cultural identities of both countries. But the pressures for revival of the issue are strong. And they will grow stronger. We remain together, stable Parliamentary democracies, English-speaking, common law countries which respect the rule of law, judicial independence and basic human rights.[105] We have a common head of state, almost common language, sports and flag. The "protective wings of Great Britain", first given as a reason for New Zealand to resist Federation, protect neither country any longer. The Fleet has gone home. We are here, together, in this part of the world, a left-over of British imperialism - a kind of ethnic, cultural, political and geographical anachronism. CER is part of the belated endeavour of our societies to map out their place in the world and in the future. It seeks to

do this by making our common economic interests more closely integrated and harmonised.

It would be a bold writer who would predict where CER will take our two countries. But it will certainly be beyond commercial law and even economic concerns. That is why it is essential to see the CER issue in its wider historical content. Whether it leads to a new political association can be safely left to the future. Professor John Farrar is probably right.[106] Stimulated by CER and the growing integration of our societies, economies, legal systems and people, greatness might (despite ourselves) be thrust upon us.

FOOTNOTES

* The Hon Justice Michael Kirby CMG. President of the Court of Appeal of New South Wales, Australia. Personal views. This chapter draws on but adapts, updates and elaborates an earlier essay by the author, "Closer Economic and Legal Relations Between Australia and New Zealand" (1984) 58 ALJ 383.

1. G Palmer, "International Trade Blocs: New Zealand and Australia Beyond CER", address to the Ninth Commonwealth Law Conference, Auckland, New Zealand, 20 April 1990, mimeo, p 18. See also G Palmer, Commentary on CER and a Trans-Tasman Court in New Zealand Legal Research Foundation, CER - The Business and Law Essentials, 1983, 38 at 31.

2. See S Sergeantson and A Hill, Colonisation of the Pacific - The Genetic Version, OUP, Melbourne, 1989.
3. The story is well told in J H Farrar, "Harmonisation of the Business Law Between Australia and New Zealand", (1989) 19 Vic Uni Wellington L Rev 435, 437.
4. Federal Council of Australasia Act 1885 (Imp).
5. R Garran, Prosper the Commonwealth, 1958, 89.
6. See K Sinclair, A Destiny Apart, Allen and Unwin, 1985, 111.
7. Cited Garran, n 5 above, 91.
8. Ibid, 93. Cf Quick & Garran, The Annotated Constitution of the Australian Commonwealth, 1901, 233, 251.
9. Cited Sinclair, n 6 above, 113.
10. Quoted Sinclair ibid, 116.
11. Id, 116.
12. Cited Loc cit.
13. Quoted Sinclair, n 6 above, 119.
14. New Zealand, House of Representatives, Appendix to the Journals, 1901, vol A-4 noted Farrar, n 3 above, 439.
15. Sinclair n 6 above, 121.
16. Loc cit.
17. Recorded by Sinclair, loc cit.
18. Farrar, n 3 above, 440.
19. Ibid.
20. The text of the Memorandum is set out in Farrar 442 ff.
21. M Cohen, "The Régime of Boundary Waters - the

Canadian-United Stated Experience" in the Recueil of the Hague Academy of International Law, 1975, III, vol 146, 267 ff.

22. G Palmer n 1 above, 3.

23. Trade Practices Act 1974 (Cth).

24. See R Baxt, Chapter 5.

25. See Trade Practices (Misuse of Trans-Tasman Market Power) Act 1990 (Cth) (hereafter Misuse of Power Act), s 11.

26. Act 4 and 4 Wm, IV, c 41. Cf Quick and Garran, above n 7, 751.

27. Quick and Garran, above n 5, at p 751. See also R de Garis, "The Colonial Office and the Constitution Bill" in A Martin (ed), Essays in Australian Federation (1969) at p 104.

28. Australian Constitution, s 74. Note that constitutional cases, other than inter se cases, were frequently taken on appeal to the Judicial Committee until 1969.

29. Privy Council (Limitation of Appeals) Act 1968 (Cth); Privy Council (Appeals from the High Court Act 1975 (Cth); and Australia Act (Cth), s 11.

30. Cf Sir Garfield Barwick in [1972] NZLJ 550.

31. Judiciary Act 1903 (Cth), s 35(2).

32. B J Cameron, "The Judicial System" in J L Robson (ed) New Zealand - The Development of its Laws and Constitution, 1957, 85.

33. See the New Zealand Royal Commission on the Courts, Report, 1978, p 80.

34. R B Cooke, "The New Zealand National Legal Identity", (1987) 3 Canterbury L Rev 171, 182.

35. Ibid.

36. Id.

37. New Zealand Law Commission, The Structure of the Courts, NZLCR 7, 1989, Wellington NZ.

38. Ibid, 202.

39. Cited in the New Zealand Herald, 30 June 1983, 1.

40. T Tuivaga, "A Regional Court of Appeal for the Pacific", unpublished paper for the Fifth South Pacific Judicial Conference, Canberra, May 1982, 171.

41. Sir Clifton Webb cited A M Finlay, "A Court of Appeal for the South Pacific Region" in Convention Papers for the First Fiji Law Convention 1974 pp 1-2. Cf Sir Richard Wild in [1972] NZLJ 554.

42. E Gardner and R G Page, "Intra-Commonwealth Judicial Machinery", in Record of the Third Commonwealth and Empire Law Conference, Sydney, 1975, p 36.

43. B J Cameron, "Appeals to the Privy Council - New Zealand" (1970) Otago L Rev 172 at 178.

44. See G E Barwick, "A Regional Court of Appeal: [1969] NZLR 315 at pp 320, 322.

45. Barwick, above n 30, p 550.

46. Barwick, above n 414, n 322.

47. See E G Whitlam in G J Evans (ed), Labor and the Constitution 1972-1975 (1977) at 130.

48. Barwick, above n 44, 320.

49. The phrase used in s 121 of the Australian Constitution.

50. AA and R Burnett, Australia-New Zealand Economic Relations - Issues for the 1980s (1981) 5. The authors discuss the feasibility and problems of Federation.

51. Cth Parl Debs, H of R, 7 October 1976, 1647.

52. See Australian Constitution s 76(ii) and J Crawford, Australian Courts of Law (1982) at 149, 164.

53. Cth Parl Debts, H of R, 2 November 1976, 2227.

54. Director of Public Prosecutions of Nauru v Fowler, unreported, High Court of Australia, 20 August 1984.

55. See eg W Pengilley, "On Trans-Tasman Banter and Things CER", mimeo, Auckland, New Zealand, 17 April 1990, p 7.

56. See eg H P Bulmer Ltd v J Bollinger SA [1974] Ch 401; Customs and Excise Commissioners v ApS Samex (Hanil Synthetic Fiber Industrial Co Ltd, third party) [1983] 1 All ER 1042; Garden Cottage Foods Ltd v Milk Marketing Board [1984] AC 130 (HL).

57. See Attorney General v Times Newspapers Ltd [1974] AC 273, (HL) the Sunday Times Case itself (1979) 2 EHRR 245 (noted in 53 ALJ 793), and Attorney-General v British Broadcasting Corporation [1981] AC 303 (HL).

58. See Contempt of Court Act 1981 (UK), noted in 55 ALJ 835.

59. Dames and Moore v Regan 453 US 654 (1981).

60. See also The Commonwealth v Queensland (1975) 134 CLR 298.

61. Four proposals in 1988 for amendment of the Australian Constitution were defeated by overwhelming majorities. The percentages voting in favour of the amendments scarcely rose above 30% and the proposals failed in every State of Australia.

62. Australian Constitution, s 75(v).

63. New Zealand Royal Commission on the Courts, 88.

64. Royal Commission of Inquiry into Drug Trafficking, Report, (1983). As to certain difficulties involved in interjurisdictional commissions see R v Winneke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25.

65. Cf article by Justice F M Neasey in (1983) 57 ALJ 335 and the observations noted in (1982) 56 ALJ, 503.

66. See as to this Centre, Bowett, The Law of International Institutions (1982) 282, 285.

67. Cf C Reynold, "The New Swiss Uniform Arbitration Act and International Commercial Arbitration (1977) 7 Georgia Journal of International and Comparative Law, 85.

68. Australian Constitution, s 51(xxiv) ("service throughout the Commonwealth").

69. See s 27 (Part III).

70. See eg Willoughby v Eland (1985) 59 ALR 147 (NSWCA).

71. (1985) 60 ALR 245 (NSWCA).

72. Ibid, 253-4.

73. Id, 258.

74. See s 28 inserting ss 32R and 32 S in the Federal Court of Australia Act 1976 (Cth).

75. Under s 32W of the Federal Court of Australia Act 1976.

76. See s 25 amending the Evidence Act 1905 (Cth), s 11E.

77. For a note see Australian Law Reform Commission, Service and Execution of Process, ALRC 40, AGPS, 1987, 2.

78. See report "Courts to Treat N Z as Seventh State" in Australian, 29 June 1988, 3.

79. See Tasmania v The Commonwealth: The Tasmania Dams Case (1983) 158 CLR 1.

80. C R Marshall, address to Institute of International Affairs, Dunedin, New Zealand, reported New Zealand Herald, 25 March 1988, 1.

81. Street v Queensland Bar Association (1989) 63 ALJR 715; Re Robertson (1989) 63 ALJR 769.

82. Judiciary Act, 1903 (Cth), s 55B(4).

83. See s 26. The provision appears as an amendment to the Federal Court of Australia Act 1976 (Cth), ss 32D and 32E.

84. In New South Wales there is now direct reciprocal admission of New Zealand practitioners: Legal Profession Act, 1987, Barristers and Solicitors Admission Rules (NSW) 1989, Part XI, Rule 94(b), and

Part XII, Rule 105(b)(i).

85. Cook v Cook (1986) 162 CLR 376, 390.

86. See R B Cooke, n 34 above, 182.

87. See R B Cooke, "Dynamics of the Common Law" in Papers, Ninth Commonwealth Law Conference, Auckland, NZ, 1.

88. [1989] 2 NZLR 669.

89. See R J Paterson, "Forum Non Conveniens in New Zealand" (1989) 13 NZ Uni L Rev 337.

90. See Spiliada Maritime Corporation Limited v Cansulex Limited [1987] 1 AC 460, 488 (HL).

91. See Oceanic Sun Line Special Shipping Co Inc v Fay (1987) 8 NSWLR 242 at 258 (NSWCA).

92. See Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197.

93. See eg M Pryles, "Judicial Darkness on the Oceanic Sun: (1988) 62 ALJ 774.

94. See eg J McLachlan, "Conflicts of Laws - Forum non coveniens and stays or proceedings" (1990) 64 ALJ 219.

95. Court of Appeal (NSW) unreported, 23 December 1988, 417 of 1988.

96 Gleeson CJ and McHugh JA; Kirby P dissenting.

97. Ibid, 26-27.

98. See Cooke P in Taylor Bros Limited v Taylors Engineering Limited [1988] 2 NZLR 1, 39. See Casey J cited in Paterson above n 89, 360.

99. Best Australia Limited v Aquagas Marketing Pty Limited (1989) 83 ALR 217, 223 (FCA).

100. Sydney Morning Herald, 17 October 1989, 13. In Australia those in favour of full political union were 25%; 64% against. In New Zealand the figures were 20% and 75%. The remainder were undecided.

101. G Palmer, 28 August 1989, 3.

102. The Age (Melbourne) 25 May 1990.

103. See eg B Stannard, "Why New Zealand Should Become the Eighth and Ninth States of Australia" in The Bulletin, 12 April 1988, 48.

104. J Ridley, "The Tasman Challenge", Moana, 1989 (with a Foreword by Sir David Beattie).

105. See P Brazil, "The Developing Closer Economic Relationship Between Australia and New Zealand" in Australia, Attorney General's Department, Fifteenth International Trade Law Conference, Papers, 1988, AGPS Canberra, 309 at pp 312, 337.

106. Farrar, above n 3, 463.