

Trans - Tasman Relations: Towards 2000 and Beyond.

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TRANS - TASMAN RELATIONS

TOWARDS 2000 AND BEYOND

BY

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[Justice Kirby requested that the order of the authors' names appear as shown as acknowledgment of their relative contributions - *Editor*.]

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A. INTRODUCTION

This essay rekindles ideas of trans-Tasman union, beyond the "Closer Economic Relations" agreement (hereafter C.E.R.).¹ In 1983, Justice Michael Kirby called on New Zealanders and Australians to reflect where the C.E.R. accord "was taking us".² "Is it towards Federation?"³ Australia, he believed, should offer to admit New Zealand as two States of the Australian federation, perhaps on terms providing special guarantees of respect for local institutions, laws and practices. He wrote:⁴

"Though it would require generosity on the part of Australians and some sacrifice on the part of New Zealanders, the final entry of New Zealand into an Australasian Commonwealth would remove many problems for both countries, including growing legal and economic problems."

Ten years on, Philip Joseph wrote that New Zealand would never entertain surrendering its national sovereignty by joining with Australia.⁵ He wrote⁶ that trans-Tasman union would involve, for New Zealand, the adoption rather than birth of a Constitution: "Federation would ... subsume New Zealand within the larger political entity, rather than redefine its existence."⁷ Even as two constituent States of a federation, New Zealand would lose its international identity as a South Pacific nation. Its Prime Minister would assume the much-attenuated title "State Premier".

We revisit those views in light of economic and international events since 1983. Two things have happened: the balance of international trade has shifted with the massive growth of the East-Asian economies, and the European Community now presages a truly supra-national union, with membership yielding more than simply economic and trading advantage. It is timely to ask, "What lessons (if any) from Europe?", and to explore closer trans-Tasman ties for securing access to global markets, including the developing Asian/Pacific markets.

1 The full acronym is ANZCERTA (Australia-New Zealand Closer Economic Relations Trade Agreement). C.E.R. was signed in Canberra on 23 March 1983 but took effect retrospectively on 1 January 1983.

2 "CER, Trans-Tasman Courts and Australasia" [1983] N.Z.L.J. 304. See also "C.E.R. - A Trans-Tasman Court?" in *C.E.R. - The Business and Law Essentials, Part I*, Legal Research Foundation Seminar Papers, University of Auckland 22-23 July 1983, at pp. 16 et seq.; "Integration of Judicial Systems" in *CER and Business Competition - Australia and New Zealand in a Global Economy* (K.M. Vautier, J. Farmer Q.C. and R. Baxt eds), at pp. 15 et seq.

3 *Ibid.* at 304.

4 *Ibid.*

5 P.A. Joseph, *Constitutional and Administrative Law in New Zealand* (Law Book Company, Sydney, 1993), p. 112.

6 *Ibid.*

7 *Ibid.*, p. 106.

The element of compromise in co-authorship forces a conciliation of views. Trans-Tasman initiatives must reflect perception on both sides of the Tasman for there to be meaningful dialogue. We (the writers) share differences (some marked), and perhaps too the peoples whose perceptions we signal and claim to represent. But there is also much common ground. We dwell on initiatives for closer trans-Tasman ties devolving from our regional interests and the existing free-trade arrangements under C.E.R. We anticipate a strengthening of the institutional bonds between the countries, although we discount short or medium-term prospects of New Zealand joining with Australia or of forging supra-national bonds, modelled on European Union and the Maastricht accord.

Thoughts of political union belong to the future. We propose a more modest trans-Tasman initiative - a combined umbrella organisation exercising facilitative functions for Australian and New Zealand industry. Its objectives would be two-fold: building upon existing free trade arrangements under C.E.R. and establishing an Australasian trade-presence in the expanding Asian markets, as part of the ASEAN free trade bloc. This initiative would present to the developing economies a distinctively "Anzac" identity, drawing upon our similar culture, histories, language, allegiance, institutions and laws.

B. THE CRIMSON THREAD OF KINSHIP

To evaluate our regional interests and the achievements of C.E.R., we must place them in the context of earlier proposals for trans-Tasman union. Australasian federation was once a live issue, and recent anniversaries have stimulated interest in the constitutional histories of both countries. On 28 January 1988, Australia celebrated the bicentenary of European settlement and, on 6 February 1990, New Zealand celebrated the 150th anniversary of the signing of the Treaty of Waitangi. These anniversaries cause us to turn back to the events and the times which they commemorate. Both countries have had to reassess the legitimacy of European settlement and the impact on their aboriginal peoples. The courts of each country have revitalized concepts of aboriginal title and the good faith and honour of the Crown,⁸ and New Zealand has given explicit legislative recognition to the promises exchanged under the Treaty of Waitangi.⁹ The greater public introspection unifies and enriches. Neither country now takes for granted its colonial origins but rather elevates them in the search for national identity.

⁸ See *Te Wehi v. Regional Fisheries Officer* 1986] 1 N.Z.L.R. 680 (H.C.); *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641 (H.C. and C.A.); *Mabo v. Queensland (No.2)* (1992) 175 C.L.R. 1; 66 A.L.J.R. 408; 107 A.L.R. 1 (H.C.A.). For discussion of the New Zealand decisions and the doctrine of aboriginal title, see Joseph, *op. cit.*, pp. 69-78. For discussion of *Mabo*, see the Symposium Issue "Mabo v. State of Queensland" (1993) 15 Syd. L. Rev. 119 et seq.

⁹ See the legislation listed by Joseph, *op. cit.*, pp. 59-61.

The shared experience of the two countries predates Australian federation. When Sir Henry Parkes (the "father of Australian federation") returned from his tour of North America, he referred to the "crimson thread of kinship" which ran "through us all" in Australia and New Zealand.¹⁰ The Crimson thread was evidenced in the Federal Council of Australasia established by Imperial statute in 1885.¹¹ And it was evidenced by New Zealand's participation in the Australian Constitutional Conventions for agreeing upon a Commonwealth Constitution. The federal movement in both countries preyed on the issue of protective trade tariffs, with the prospect of a hostile Australian tariff urging some in New Zealand to extol federation. When a large exhibition in Dunedin in 1889 attracted many of the leaders of Australian federation, future Australian Prime Minister, Alfred Deakin, urged the people of Dunedin to "carry a fiery cross throughout the land", until New Zealand took its proper place in the Australian Commonwealth.¹²

For all the obstacles to political union, there is still a lingering sense of shared history and experience. Many things are held in common - the influence of physical environment and pioneer circumstance,¹³ a dependence on sheep farming and primary produce, isolated urban societies and population growth following the gold discoveries, similar colonial histories and Westminster institutions, an uninspiring journey to independence and nationhood, a dislike of "theorising" and an aptitude for practical solutions, common endeavours of war and the ANZAC tradition, shared defence and foreign relations commitments, mutual trade arrangements under C.E.R., and intense sibling rivalries in cricket, netball, racing and the two rugby codes. All Black captain, Sean Fitzpatrick, captured the indeterminable spirit of ANZAC: "I don't say I enjoy beating Australia more than other teams, but they are our main rivals."¹⁴ Even political union between the countries would not dampen the intensity of trans-Tasman sporting encounters.

C. THE DECISION TO STAND ALONE

New Zealand delegates attended three conferences between 1883-1891 to debate Australasian union. At the Sydney Constitutional Convention of 1891, former Governor and Premier of New Zealand, Sir George Grey, told delegates that New Zealand was there "as a damsel to be wooed without prejudice, but not necessarily to be won".¹⁵ His colleague, Captain Russell, claimed twelve hundred reasons - the intervening miles of the

10 Sir Henry Parkes, cited by R.R. Garran, *Prosper the Commonwealth* (1958), p. 91.

11 *Federal Council of Australasia Act 1885* (Imp.).

12 See M.D. Kirby, "Integration of Judicial Systems", op. cit., p. 17.

13 See A. Brady, *Democracy in the Dominions* (1952), Ch. 20.

14 From "A Tasman Marriage", *TIME* magazine, 14 September 1992.

15 See M.D. Kirby, "Integration of Judicial Systems", op. cit., p. 17.

Tasman Sea - why New Zealand should not join. His argument had but superficial force. Tasmania was likewise separated by sea and the western-most Australian colonies were more distant and isolated from the main population centres, than was, for example, New Zealand.

The decision of the Australian colonies to federate without New Zealand forced the colony to reconsider its destiny apart. When New South Wales finally voted in June 1899 to support federation, the *Evening Post* urged New Zealanders to action, that "New Zealand's sleep has been unduly prolonged".¹⁶ Pember Reeves, a member of the Liberal government under Ballance and then Seddon, expressed surprise at the sudden interest in joining with Australia.¹⁷ Polls were taken of the members of the House of Representatives: thirty members supported joining Australia, and twenty were opposed. Twenty-four members (including the four Maori members) abstained from comment.¹⁸ Federation had earlier been opposed because it was thought that Maori would lose the vote, a right most Aboriginal Australians were denied but which Maori males had possessed since 1867.

During the middle months of 1899, the Seddon government remained undecided and sought insurance against being closed out of the Australian union. New Zealand Agent-General in London (and former Liberal Minister), Pember Reeves, sought an amendment to the Australian Commonwealth Bill to preserve New Zealand's right to join on the same terms as the original States. But the Australian delegates in London successfully opposed Reeves' proposal. The Australians had already had nine federal referenda since March 1898 and were in no mood for further polls. The Australian delegates also believed that the Commonwealth Bill had made ample provision for admitting new States. Even today, New Zealand remains listed as a federating State of "The Commonwealth" under the *Commonwealth of Australia Constitution Act* 1900.¹⁹

Seddon also appointed a Royal Commission to test public opinion. The federation proposal cut across factional and political interests, producing for the times an unprecedented management-labour alliance. Whereas farmers and the professions remained divided, manufacturers, merchants and trade unionists implacably opposed federation. Trade unionists feared competition from "coloured labour in Australia" and argued that New Zealand wages, working conditions and social legislation would be set back 10 years.²⁰ Only 26 per cent of those giving evidence supported federation. The Commission unanimously concluded that "merely for the doubtful prospect of further trade

¹⁶ Cited by Sir Keith Sinclair, *A Destiny Apart* (1986) p. 113.

¹⁷ *Ibid.*, p. 112 (n.13).

¹⁸ See M.D. Kirby, "Integration of Judicial Systems", *op. cit.*, p. 17.

¹⁹ See cl. 6 of the Constitution.

²⁰ See Sinclair, *op. cit.*, p. 116.

with the Commonwealth of Australia, New Zealand should not sacrifice her independence as a separate colony".²¹

There were doubtless many reasons why New Zealand elected to stand alone. Looking eastward, it may have been simply a fear of bold ideas, provincial attitudes and petty jealousies.²² But looking westward, there were compelling reasons. Sixty-one percent of those who appeared before the Seddon Royal Commission (some representing large constituencies of business people, farmers and labour unionists) gave political, economic and geographical reasons for opposing federation.²³ But the most compelling reasons were political. Federation would forsake New Zealand's "political identity, its independence, its right to nationhood".²⁴ When Australian folk affectionately refer to the "shaky isles", they acknowledge New Zealand's economic and political independence and relative isolation. New Zealand chose its existence apart despite the accessible entry procedures written into the Australian Constitution.

D. THE FEDERATION DEBATE REKINDLED

(a) The Path to Federation

Unlike many other things in the Australian Constitution, there is a swift and easy path to federation, if the will exists. No referenda are needed, nor is the concurrence of the other States. Section 121 of the Constitution provides that the Federal Parliament:

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

This simple formula was for accommodating Western Australia which was not expected to join the federation from the outset. But hopes were also held that New Zealand, too, would join at some later stage. Thus cl. 6 of the Australian Constitution took the precaution of listing New Zealand as a federating State. "The States":

²¹ *Appendices to the Journals of the House of Representatives*, 1901, A.4.

²² Suggested by M.D. Kirby, "CER, Trans-Tasman Courts and Australasia" [1983] N.Z.L.J. 304.

²³ *Op. cit.*

²⁴ Sinclair, *op. cit.*, 119.

"[S]hall mean such of the colonies of New South Wales, *New Zealand*, Queensland, Victoria, western Australia, and South Australia ... as for the time being are parts of the Commonwealth, and such colonies and territories as may be admitted into or established by the Commonwealth as States..."²⁵

The simple mechanics of joining with Australia make cl. 6 of more than historical interest. New Zealand could take either of two routes: contrive a breach of continuity for breaking with the legal past and starting afresh, or join through the existing constitutional channels. New Zealand has a sovereign legislature. All constitutional amendment is by ordinary Act of Parliament.²⁶ Parliament, therefore, could repeal the *Constitution Act* 1986²⁷ and pass a "suicide" statute ending its own existence. Or it could facilitate New Zealand's entry by reconstituting itself into a subordinate (State) legislature, limited by the Commonwealth Constitution. It could also repeal the *Royal Titles Act* 1974 defining Her Majesty's Royal style and titles as Head of State. And the government could prevail upon Her Majesty in Council to promulgate new Letters Patent for replacing the Governor-General²⁸ with a Governor, as befitting an Australian State.

The partly entrenched sections of the *Electoral Act* 1993 present no difficulty for replacing New Zealand's electoral system. Section 268 prescribes a 75 per cent parliamentary vote or a referendum for repeal of the Act's key provisions. But the entrenching section (s. 268) is not itself entrenched and protected from simple repeal. The government could repeal s. 268 by simple majority, then introduce substantive legislation to remove or supersede the reserved sections. Under the Australian voting system, New Zealand's population would give it 39 members (almost a quarter) of an expanded Australian House of Representatives and 20 Senators.²⁹ The New Zealand High Court could be phased into a new Australasian High Court, and administrative departments divided between the new State (or States) and the central government in Canberra.

²⁵ Emphasis added.

²⁶ With the one exception of s. 268 of the *Electoral Act* 1993 which entrenches key parts of the electoral statute. However s. 268 represents only "single", not "double", entrenchment since the section is not itself entrenched and protected by its own procedures (discussed below).

²⁷ This statute does not constitute the New Zealand Parliament but provides for its continuance at law. Section 32 of the *New Zealand Constitution Act* 1852 (U.K.) established Parliament (formerly the "General Assembly") and the *Constitution Act* 1986 preserved this body intact when it ended the effective operation of the 1852 statute as part of New Zealand law.

²⁸ See the Letters Patent Constituting the Office of Governor-General of New Zealand, issued 28 October 1983 (S.R. 1983/225).

²⁹ "A Tasman Marriage", op. cit. citing political scientist, John Craig, of Deakin University.

(b) Will politics follow trade?

The C.E.R. accord and Australia/New Zealand free trade arrangements are but one aspect of the relationship between the two countries. Harmonising Australia/New Zealand business laws under C.E.R. may, in time, surpass increased economic efficiencies and entice the partners towards a new polity. In 1990, New Zealand Prime Minister, Sir Geoffrey Palmer, accepted the 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."³⁰ Harmonisation of laws and institutions affecting trade may draw on a wider context - a context of history and of national directions. Will politics follow the flag and trade as so often it has in other places and at other times? Consider:

(i) *The retreat of "Empire"* New Zealand chose not to federate in 1900 because it wished to remain a separate part of the Empire, secure under the "protective wings of Britain". New Zealand proudly reflected on Britain's colonial conquests and the indelible quality of being British subjects under a single and indivisible Crown.³¹ But conceptions of Empire have passed. With the evolution of a divisible Crown,³² Australians and New Zealanders owe allegiance to separate Heads of State - to the Crown in right of New Zealand, and to the Crown in right of Australia. Australia in 1993 entered upon a republican debate following a State visit by the Queen. The Prime Minister, Mr Keating turned an embarrassing but harmless breach of protocol ("ushering" the Queen) into an issue of nationhood and destiny. The republican issue exported, predictably, across the Tasman, with National Prime Minister, Mr Bolger, speculating on an elective Head of State by the year 2000.³³ It is uncritically held that, if Australia moves towards a republic, New Zealand will follow. The two countries are, in a sense, remote outposts, "a left-over of British imperialism - a kind of ethnic, cultural, political and geographical anachronism".³⁴ Australia and New Zealand have demonstrably more in common than with other nations of the region. Their peoples have always enjoyed freedom of movement, to live and to work in each others' country and to partake of its political rights and welfare services. Only of recent times have their peoples required passports to enter the other's country.³⁵

³⁰ G. Palmer, "International Trade Blocs: New Zealand and Australia Beyond C.E.R.", address to the Ninth Commonwealth Law Conference, Auckland, 20 April 1990., mimeo, p. 18.

³¹ See *Theodore v. Duncan* [1919] A.C. 696 at 706 per Viscount Haldane; *Re Silver Brother Ltd; Attorney-General (Quebec) v. Attorney-General (Canada)* [1932] A.C. 514 per Lord Dunedin affirming the Imperial unity of the Crown.

³² See *Re Ashman and Best* [1985] 2 N.Z.L.R. 224(n.) per Wilson J.; *R. v. Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta* [1982] 2 Q.B. 892 (Eng. C.A.); *Attorney-General for the United Kingdom v. Wellington Newspapers Ltd* [1988] 1 N.Z.L.R. 129 (H.C. and C.A.). For discussion of the divisible Crown, see Joseph, op. cit. pp.492-494.

³³ The Prime Minister first issued the republican call in a speech to the House on 8 March 1994. Although Mr Bolger expressed his view as his own ("it is a personal view, not the government's"), several of his government colleagues criticised his stance.

³⁴ M.D. Kirby, "Integration of Judicial Systems", op. cit., p. 40.

³⁵ See also now Australia's *Migration Reform Act 1992* (Cth) which imposes a visa requirement for New Zealanders entering Australia. The Act establishes a special category visa which issues automatically to New Zealand citizens who do not fall

(ii) *Political union and the single market concept* Political union would maximise free trade between the two economies. The bigger the internal market for free trade and economic development, the greater the chances of efficiency and inventiveness. If New Zealand joined with Australia, s. 92 of the Australian Constitution would guarantee unimpeded free access of New Zealand products into the Australian States. A "domestic" trans-Tasman market is underscored by the geographical proximity of New Zealand, which is closer to the main population centres (Sydney, Melbourne, Brisbane) than is Western Australia and parts of the interior and the Northern Territories.

(iii) *The Closer Economic Relations accord* The 1983 accord transformed trans-Tasman trade relations and profoundly affected the two economies. C.E.R.'s 1995 objective is realising the "single market" concept across the entire range of the Australia/New Zealand trading and economic relationship. In the period 1983-1992, total bilateral trade grew from \$NZ2.5 billion (\$A1.99 billion) to \$NZ6.3 billion (\$A5 billion).³⁶ The 1988 review of C.E.R. recorded an average annual growth rate in trade of 15 per cent, higher than either country had recorded with the rest of the World.³⁷ In the 12 months to May 1994, New Zealand exports amounted to \$NZ4.2 billion which made Australia New Zealand's largest export market. Export receipts were 12 per cent higher than for the previous 12 months, while Australian exports to New Zealand grew seven per cent to \$NZ3.66 billion.³⁸ New Zealand was Australia's fourth largest market in 1990-1993,³⁹ and recent figures suggest that it will continue as Australia's fourth largest market in 1994.⁴⁰

C.E.R. is more than just a free trade agreement. Its commitment to harmonising Australian/New Zealand business laws has brought fundamental changes to trade practices, tariffs, competition, commercial laws, taxation, customs and quarantine arrangements. C.E.R. has injected new reason for developing "the common law of Australasia",⁴¹ and it is now leading towards joint Australia/New Zealand marketing initiatives. The Australia-New Zealand Business Council draws its membership from the business community with the objective of promoting trans-Tasman trade. Although independent of government, it has dual executives and holds annual conferences

Australia's health or criminal law requirements. But cf. M.D. Kirby's criticisms of the visa requirement, "Migration Reform and the Rule of Law", *Migration Reform Act Forum*, Sydney, 15 June 1994, pp. 12-13, emphasising the two countries' "specially intertwined history" and reinforced economic ties under C.E.R.

36 *Joint Statement: 1992 Review of C.E.R.*, Wellington 7 October 1992 (New Zealand Minister for Trade Negotiations, Hon. Philip Burdon, and Australian Minister for Trade and Overseas Development, Hon. John Kerin).

37 See *New Zealand and Australia: Closer Economic Relations*, Information Bulletin No. 42, May 1993, Ministry of External Relations and Trade (N.Z.), p. 6.

38 *THE PRESS*, Christchurch, 28 February 1994.

39 *New Zealand and Australia: Closer Economic Relations*, op. cit., p. 3.

40 Information provided by the Ministry of Foreign Affairs and Trade, 8 July 1994.

41 See *Dominion Rent A Car Ltd v. Budget Rent A Car Systems (1970) Ltd* [1987] 2 N.Z.L.R. 395 at 407 per Cooke P. See also the New Zealand decisions *Vicom New Zealand Ltd v. Vicom Systems Ltd* [1987] 2 N.Z.L.R. 600 at 605 per Cooke P.; *Taylor Bros Ltd v. Taylors Group Ltd* [1988] 2 N.Z.L.R. 1 at 39 per Cooke P. (H.C. and C.A.); *Wineworths Group Ltd v. Comité Interprofessionnel du Vin de Champagne* [1992] N.Z.L.R. 327 at 331 per Cooke P.

alternately in Australia and New Zealand. The Business Council has entertained multilateral trade proposals through joint operations in Asia and the APEC forum. At the Opening Address to the 1993 Joint Conference, New Zealand's Minister for Trade Negotiations, Mr Philip Burdon, conveyed the importance of C.E.R. "as a springboard for both economies into Asia".⁴²

The 1988 Review of C.E.R. widened the agreement to include trade in services, thereby making C.E.R. the first major international agreement to cover services, and deepened it into areas such as business and competition law, customs and quarantine procedures, standards and industry assistance. Under the 1992 Review, the two countries began extending the "harmonisation" and "single market" concepts to taxation, aviation and shipping, and mutual recognition of standards and occupational qualifications/registration. Companies on both sides of the Tasman have reaped the advantage of reduced trade barriers and expanded markets. Many manufacturers now view Australia and New Zealand as a single domestic market. Industry leaders believe "the goal of rationalization has been largely achieved", and that "Asia is the new challenge for both countries".⁴³

(iv) *The Asian economies* The Asia-Pacific region has become, for Australia and New Zealand, a strategic trade bloc. The phenomenal growth of the Asian economies is redefining global economic power and throws down the gauntlet for the world economies, especially for regional Pacific countries. Australia and New Zealand have the economic infrastructure to capitalise on marketable technologies, services and products. The Asia-Pacific countries (the "Super Seven")⁴⁴ are their own best customers: around 65 per cent of Asia-Pacific trade is intra-regional, exceeding even the 62 per cent of the European Community.⁴⁵ Around 70 per cent of the "Seven's" population is under 30 years and, like young people elsewhere, are voracious consumers. These former producers of "junk jewellery" and "throwaway toys" now lead the world in economic growth. Over the past decade, the output of developing Asia grew by 90 per cent, while that of Western Europe and the United States grew by about one-third, and that of Japan by about one-half.⁴⁶ 1992 statistics projected the following growth figures in exports and gross national product:⁴⁷

42 "Opening Address to the Australia-New Zealand Business Council's Joint Conference", Sydney, 13-15 October 1993. New Zealand's Secretary of Foreign Affairs and Trade, Richard Nottage, delivered the address but conveyed the Minister's message by request.

43 "A Tasman Marriage", *TIME* magazine, 14 September 1992.

44 From the "Seven Dragons of East Asia" (sometimes the so-called "Little Dragons").

45 "A Year For Crowing", *TIME* magazine, 22 February 1993, p. 12.

46 *AUSTRALIA - Corporate Review 1992-93*, p. 14.

47 "Global Economy: Growing, Growing ...", *TIME* magazine, 14 September 1992, p. 23 at 26.

	Population in millions	Growth projected 1992 GNP increase	Exports projected 1992 growth
HONG KONG	5.7	5.4%	18.0%
INDONESIA	184.5	6.4%	14.3%
MALAYSIA	18.7	8.5%	18.0%
SOUTH KOREA	44.3	7.5%	11.4%
SINGAPORE	2.8	6.0%	9.5%
TAIWAN	20.8	6.8%	9.2%
THAILAND	56.3	8.6%	12.3%

Projected real growth (after inflation) in the following Asian economies for 1994 is respectively: Singapore, Malaysia, and Thailand each 8 per cent, Korea 7-8 per cent, Indonesia 7 per cent, Taiwan 6 per cent, Hong Kong 5.5 per cent, and the Philippines 5 per cent.⁴⁸ With China's transition from a controlled to a market economy, its economy expanded a massive 13 per cent in 1992 and 1993.⁴⁹ By the year 2000, it is estimated that the Asia-Pacific region will account for almost a half of global commerce.⁵⁰ This injects an element of urgency since the Australasian countries must move quickly to secure the trade opportunities. Asian export-led growth has created lucrative markets for imported raw materials, investment goods, technology and services, and building infrastructure. New Zealand's range of export goods and services has increased steadily, although forest products, wool and milk powder remain its major exports.⁵¹ A distinctive trans-Tasman identity could spearhead regional trade and attract Asian investment locally. Already, 60 per cent of Australia's goods-exports goes to Asia, with nine of its top 12 export markets located in the region.⁵² New Zealand currently exports 34 per cent of its total exports to East Asia.⁵³ We return to Asia-Pacific trade opportunities below.⁵⁴

48 *The Dominion*, 7 October 1994.

49 Ibid. (but with an August 1994 estimated inflation rate of 27 per cent). Compare "A Year for Crowing", op. cit. which listed China as recording a 12 per cent gross national product gain for 1992, and projected a "modest" 9 per cent gain for 1993.

50 "A Year for Crowing", ibid., at 12.

51 See TRADENZ's Corporate Review, *Stretching for Growth: Building an Export Strategy for New Zealand 1993/94*, p. 16.

52 AUSTRALIA - Corporate Review 1992-93, p. 14.

53 See *Stretching for Growth: Building an Export Strategy for New Zealand 1993/94*, op. cit. The TRADENZ publication lists the lesser fraction of 19 per cent for East Asia (p. 16) but this figure does not include Japan which accounts for 15.2 per cent of New Zealand's total exports (p. 19). The comparable AUSTRALIA figure of 60 per cent of total Australian exports going to the region includes exports to Japan.

54 See pp. XXX-XXX.

(vi) *Enhancement of public life* New Zealanders could profoundly influence Australasian public life. Their entry into an enlarged Australia would foreseeably enrich public life and promote opportunities for New Zealanders. New Zealand lawyers and law-makers have often been bolder and more innovative than their Australian counterparts. Sometimes the abruptness of change in New Zealand government has been precisely because of the absence of federal constraints. New Zealand's three great reform periods registered wholesale shifts in government policy - under the Ballance/Seddon Liberal government from 1890, under the first Labour government from 1935, and under the Lange/Palmer Labour government from 1984. These governments attracted the eyes of the world with their ambitious reforms. There may even be institutional resistance from Australian public figures. In 1991, a New Zealand political scientist surveyed 113 Australian Members of Parliament on their view of political unification.⁵⁵ Of the 50 per cent who responded, over half agreed (or agreed strongly) with the proposition of political union. But they lacked enthusiasm. The survey concluded: "They tended to think of union with a degree of inevitability. Not with any great joy, but they assume it is going to happen."⁵⁶

(vii) *The ANZAC spirit* At the bottom of all trans-Tasman relations and joint exercises is the spirit of friendship and co-operation. There is a sense of shared history and experience in the tide of affairs of both nations. Defence imposes reciprocal regional obligations. Close co-operation binds the Australian and New Zealand forces. There are around 24 annual joint exercises and over 200 New Zealanders train at Australian military colleges each year.⁵⁷ It is official policy to standardise equipment and training. New Zealand entered the \$NZ4.7 billion ANZAC frigate project for providing eight ships for Australia and two for New Zealand, with an option for New Zealand to purchase two further frigates. The ANZUS rift has not blighted trans-Tasman defence relations. For one Australian Defence Minister, unification of the defence forces seemed "inevitable".⁵⁸ For the Australian military: "It will become an economic imperative anyway."⁵⁹

(viii) *Inter-governmental links* The closer economic relationship has necessitated closer contact between the governments and officials of both countries. The first objective of Article 1 of C.E.R., "(a) To strengthen the broader relationship between

⁵⁵ The survey was by John Henderson, noted in "A Tasman Marriage", *TIME* magazine, 14 September 1992.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* (Hon. Robert Ray).

⁵⁹ *Ibid.* (Brigadier Keith Rossi, Melbourne).

Australia and New Zealand", embraces more than merely economic and trading interests. The extent of trans-Tasman co-operation in decision-making often passes unnoticed. Australian Foreign Minister, Mr Gareth Evans, described New Zealand's "routine participation" in Australian Ministerial Councils as fostering a "reflexive kind of relationship";⁶⁰

"[New Zealand's involvement] does not have a high public profile. It is not very visible even to us in the political system outside our own particular areas but it gives weight to what I said ... about it being a reflexive kind of relationship. [A]s issues arise, be they trans-Tasman travel or social security agreements or aviation agreements, I think they can be relatively comfortably settled within the framework of that ministerial dialogue."

Both countries have worked closely together in international fora such as GATT, APEC, the United Nations and the OECD. Formal inter-governmental links reach back to the Federal Council of Australasia which was set up in 1885 for promoting political cohesion among the antipodean colonies. Today New Zealand Ministers attend 22 different Commonwealth and State ministerial conferences.⁶¹ Australian and New Zealand Prime Ministers are in weekly contact and Foreign Affairs and Trade Ministers meet informally every six months. In 1992, the Australian and New Zealand Trade Ministers agreed to meet annually to review the operation of C.E.R., and for senior trade officials to review the trade relationship. The officials' talks would provide a "mechanism for regular, co-ordinated advice to [the Ministers] on C.E.R. issues, including the timing of, and agenda for, a general review of the Agreement not later than 1995".⁶²

Much inter-governmental contact involves international trade and trading blocs affecting Australian-New Zealand interests. C.E.R. was itself preceded by a series of inter-governmental trade agreements dating from 1906, when Seddon visited Australia to object to a hostile Australian tariff. He and Australian Prime Minister Deakin agreed on a preferential tariff, but the New Zealand Parliament refused to ratify the agreement when Seddon died. The two governments concluded preferential trade agreements in 1922 and 1933, and the New Zealand Australia Free Trade Agreement (NAFTA) in 1965. NAFTA took the first steps towards bilateral free trade but it covered only a limited range of goods. Its successor, C.E.R., signed on 23 March 1983, mandated full free trade in all sectors. The 1988 review of C.E.R. accelerated the phasing-in mechanisms for sensitive sectors, so that since 1 July 1990 there has been free trade in all goods across the Tasman.

⁶⁰ *THE PRESS*, Christchurch, 24 February 1994.

⁶¹ Joint Prime Ministerial Statement by Hon. Bob Hawke and Rt Hon. Geoffrey Palmer, 2 July 1990.

⁶² *Joint Statement: 1992 Review of C.E.R.*, Wellington, 7 October 1992, p. 4. (Hon. Philip Burdon and Hon. John Kerin).

New Zealand and Australia share common bonds in the international trade arena. Both countries joined the GATT (General Agreement on Tariffs and Trade) after World War II. In the Uruguay Round of multilateral trade negotiations, both countries vigorously argued for the extension of multilateral disciplines to agriculture, services, and intellectual property, as part of the broadening of the global trading system. Both countries are members of APEC (Asia-Pacific Economic Co-operation) formed in 1989 to trade in the Asia-Pacific region, and both have entered into SPARTECA (South Pacific Regional Trade and Economic Co-operation Agreement) - a non-reciprocal trade agreement with Pacific Island countries. Each country grants LDCs/LLDCs (Less/Least Developed Countries) preferential access to their domestic market under the Generalised System of Preferences. Harmonisation of laws and integration of the economies, coupled with geographical proximity and mutual trade benefits, have entrenched the trans-Tasman relationship.

E. AUSTRALIA/NEW ZEALAND OPTIONS

There are perceptibly five options open to the trans-Tasman countries as they move towards the 21st century: (a) Remain as separate independent sovereign States; (b) Enter into political union under an enlarged Australian Commonwealth; (c) Establish a South Pacific political alliance; (d) Unite the two sovereignties under a supra-national entity (as in Europe); or (e) Develop a looser institutional structure for facilitating multilateral trade.

(a) The Status Quo

It is easiest to stay with what we know best, for minimising the unknown factors and insecurities in our world. The following observation was directed at legal positivism, but it also encapsulates our accustomed ways of thinking about Australian/New Zealand statehood:⁶³

"Conceptual structures [doctrines, discourse, ways of thinking etc.] come to be held unconsciously and uncritically. Once their presuppositions are embedded, their speculative status is obscured; they are perceived no longer as structures but as self-evident truths."

⁶³ See P.A. Joseph and G.R. Walker, "A Theory of Constitutional Change" (1987) 7 *Oxford Journal of Legal Studies* 155 at 173.

Inertia feeds the status quo - preserve our independent sovereignties intact. But the tide of events may be more overwhelming. C.E.R. signals change beyond reciprocal trade arrangements. It may matter little whether we care for change, if Australian/New Zealand trading interests force a coalition for farther-reaching institutional change. At the least, we should begin examining how our societies might respond to changing expectations; that we might reconstruct our institutional objectives to accommodate a broader community of interests. One option is political union within the Australian federation.

(b) Political Union

Full political union would maximise the economic efficiencies of a domestic Australasian market. But the popular and political will seems lacking. New Zealanders are tenaciously independent and would not lightly forsake their "destiny apart",⁶⁴ short of military takeover or economic collapse. And Australasian union presupposes a generous and willing Australia, able to shake off fiercely contested State interests and the complications of federal-state politics.

A decade of C.E.R. has not inculcated ideas of a united Australasia. A 1989 Australian poll found that only 25 per cent of Australians and 20 per cent of New Zealanders supported political union.⁶⁵ A 1992 Morgan Poll recorded even less support, with only 11 per cent of Australians and 10 per cent of New Zealanders supporting full political union.⁶⁶ At the inception of C.E.R., New Zealand's political leaders encouraged closer political ties but dispelled suggestions that C.E.R. would lead to full national union.⁶⁷ Any political initiative is unlikely to come from New Zealand. By joining with Australia, its political leaders would lose status and control. And Australian politicians have expressed no greater enthusiasm, although more of their number may begrudgedly entertain union as a distant "inevitability".⁶⁸ Political union is not an issue precisely because there is neither popular nor political will.

Both countries may suspect that each would have much to lose through political union - Australia because New Zealand would share the benefits of guaranteed free access to Australian markets, and New Zealand because its free-market reforms and removal of subsidies have left it perceptively leaner and more competitive than the Australian States. In the 1992 Morgan Poll, about 30 per cent of Australians and 47 per cent of New Zealanders favoured a bilateral free-trade arrangement (the rest remaining undecided or

64 The reference is to Keith Sinclair's, *A Destiny Apart* (1986).

65 *Sydney Morning Herald*, 17 October 1989. In Australia, those against political union were 64 per cent, and in New Zealand 75 per cent. The remainder were undecided.

66 See "A Tasman Marriage", *TIME* magazine, 14 September 1992.

67 See Hon. J.K. McLay, then Minister of Justice and Attorney-General, and Geoffrey Palmer, then Deputy Leader of the Opposition, "Commentaries on C.E.R. - A Trans-Tasman Court?" in *C.E.R. - The Business and Law Essentials*, Part III, pp. 26 and 38, Legal Research Foundation Seminar Papers, University of Auckland, 22-23 July 1983.

68 See the conclusion of the Henderson survey, quoted op. cit.

wanting to remain completely apart).⁶⁹ The greater preponderance of New Zealanders favouring bilateral free-trade may reflect New Zealand's cautious optimism about economic growth and recovery, following government-led restructuring from the 1980s. New Zealand has reshaped its economy to meet the exigencies of regional and world competition and, in particular, to maximise the benefits of increased trans-Tasman trade. Reforms such as the *Reserve Bank of New Zealand Act* 1989, the *Employment Contracts Act* 1991 and the state-owned enterprises⁷⁰ and privatisation programmes have reduced state-dependency and encouraged sustainable economic growth within the Reserve Bank's mandatory 0 - 2 per cent inflation band.⁷¹ The Bank has forecast 5.3 per cent economic growth for the March 1994 year, with 3.7 per cent for 1995 and 3.3 per cent for 1996, and fiscal surpluses of \$690 million in 1995 and \$NZ2.4 billion in 1996.⁷² Statistics New Zealand recorded an even higher economic growth rate of 6.1 per cent in the year to June 1994.⁷³ New Zealanders may support C.E.R. and increased trans-Tasman trade, while wishing to retain independent economic programmes and public spending.

On the other hand, Australians, too, may pique at ideas of New Zealand joining with Australia. Already there is some resentment about New Zealand's open access to the lucrative Australian markets. According to one Australian shadow Minister for primary industry: "C.E.R. has given New Zealand the privileges of federation without having to sacrifice its name or independence in defence or foreign policy."⁷⁴ In Australia, reservations about political union are tied less to emotion than basic economics. With many unemployed, there is resentment about Australia's open work policy and access to welfare assistance. Visiting New Zealand shearers have focussed the public attention, with some union and Australian Labor Party officials arguing for the introduction of work permits. For one former Minister of Immigration: "Australia should put its own workers first."⁷⁵ Such parochial differences may appear trivial, but they can prove distracting. Ideas of political union must rise above base parochialism if there is to be meaningful debate.

Developments involving the indigenous peoples of Australia and New Zealand have compounded cultural differences between the countries. In New Zealand, increased cultural awareness under the Treaty of Waitangi has fostered a deep introspection about the legitimacy of European settlement. "The elevation of the Treaty is driven by anxiety from broken promises and the quest for national identity ... The rush to recognise the

⁶⁹ Op. cit.

⁷⁰ See the *State-Owned Enterprises Act* 1986.

⁷¹ New Zealand's mandatory inflation band is negotiated by the Minister of Finance and the Governor of the Reserve Bank under s. 9 of the *Reserve Bank of New Zealand Act* 1989.

⁷² *THE PRESS*, Christchurch, 24 March 1994.

⁷³ *THE PRESS*, Christchurch, 5 October 1994. In the same report, Australia's growth rate was given as 4.9 per cent, the United States' as 3.5 per cent, and Canada's as 3.3 per cent, compared to the OECD average of 1.4 per cent.

⁷⁴ "A Tasman Marriage", *TIME* magazine, 14 September 1992, per the Australian National Party's Bruce Lloyd.

⁷⁵ *Ibid.*, per Hon. Clyde Holding.

Treaty has forced the reconstruction of law and legal history."⁷⁶ In *New Zealand Maori Council v. Attorney-General*,⁷⁷ Cooke P. said: "Now the emphasis is much more on the need to preserve Maoritanga, Maori land and communal life, a distinctive Maori identity." The Court of Appeal proclaimed the Treaty a compact between races - a partnership which gave legitimacy to the British Crown in New Zealand and through which the Maori pledged loyalty to the Queen, acceptance of her government and reasonable co-operation.⁷⁸ For Maori, the Treaty is a sacred document which extracted personal covenants from Queen Victoria (and thence the Sovereign in right of New Zealand)⁷⁹ and could not be sacrificed to Australian union. And in Australia too, the cause of the indigenous peoples has stirred the national conscience. Eddie Mabo's historic victory in the High Court⁸⁰ was, for the aboriginal peoples, a cause celebre. Recognition that pre-colonial Australia was not terra nullius and that aboriginal title qualified the Crown's radical ownership drew swift response. The Keating government introduced the *Native Title Act* 1993 which endorsed common law aboriginal title and established a national land acquisition fund for dispossessed indigenous people. The *Mabo* and Waitangi developments are unique to the European and native cultures of each country, and invariably complicate conceptions of a united Australasia.

(c) Asia-Pacific Political Alliance

APEC (Asia Pacific Economic Co-operation) was a concept "whose time has come". Thus claimed New Zealand's Secretary for Foreign Affairs and Trade at the Australia-New Zealand Business Council's 1993 Conference in Sydney.⁸¹ He observed the potential of APEC for an integrated regional market and advocated a "more formal institutional structure" to advance APEC's objectives:⁸²

"[APEC] has a wide membership from our region, and it has the potential to be a vehicle whereby regional members can agree on measures to reduce barriers to trade ... with a view to moving towards an integrated regional market. [The Ministry] certainly endorses that goal and has been encouraging adoption of a *more formal institutional structure* to advance APEC's trade and economic agenda."

⁷⁶ Joseph, op. cit., p. 37.

⁷⁷ [1987] N.Z.L.R. 641 (H.C. and C.A.) at 664.

⁷⁸ Ibid., at 664 per Cooke P. For discussion of the *Maori Council* case, see Joseph, op. cit., pp. 37-38, 69-72.

⁷⁹ For the concept of the separate and divisible Crown, see Joseph, ibid. pp. 492-494.

⁸⁰ *Mabo v. Queensland (No.2)* (1992) 175 C.L.R. 1; 66 A.L.J.R. 408; 107 A.L.R. 1 (H.C.A.). See the Symposium Issue, "Mabo v. State of Queensland" (1993) 15 Syd. L. Rev. 119 et seq.

⁸¹ Richard Nottage, Secretary for Foreign Affairs and Trade, Opening Address to the Australia-New Zealand Business Council's Joint Conference, Sydney, 13-15 October 1993.

⁸² Ibid. (emphasis added).

Might APEC be the Pacific Rim's answer to European Union? Might ideas of Australasian union be subsumed by a much larger union, involving Australia, New Zealand and the established and emerging economic powers to the north? We do not believe so. The Secretary for Foreign Affairs and Trade was not envisaging any political alliance or union when he spoke of "a more formal institutional structure".⁸³ APEC is a much too large, unwieldy and disparate body - geographically and culturally - to emulate European Union. APEC is a Pacific Rim concept. It was established in 1989 with 12 members and has a membership now of 18. It includes the United States, Canada and Mexico, and a cluster of South American, Asian and South Pacific countries.⁸⁴ No political alliance could meld nations as diverse as the United States, China and Indonesia, or China, Hong Kong and Taiwan. Their political, cultural, religious and ethnic divisions run deeper than any that would divide the European Union, or even the Commonwealth. The adoption of an institutional structure for advancing APEC's multilateral free-trade goals would not transform APEC from an ad hoc consultative forum.

Australia and New Zealand also have member status in the South Pacific Forum and observer status within ASEAN (Association of South East Asian Nations). The former organisation is unlikely to become more than its name suggests (a South Pacific federation is not realistically feasible) and the latter body has no pretension towards any political union.

(d) A Supranational Union

Since 1983, when C.E.R. was signed and the idea of trans-Tasman union revived, the European Community has moved further towards its stated objective, of "an ever closer union among the peoples of Europe".⁸⁵ That objective is preambled in the Community's constituent instrument, the Treaty of Rome, and assumes the twin goals of economic and political integration. The Treaty of Rome made no explicit statement on the political aspirations of membership, but it was not doubted that the Community's economic objectives would draw the member countries towards political integration. A European customs union, uniform commercial and competition policies, and the removal of state subsidies, monopolies and other impediments to a common market would inevitably forge closer Community ties. The Treaty on European Union (the "Maastricht Treaty") now explicitly recognises political integration as a founding principle of Community

⁸³ Ibid.

⁸⁴ The member countries are Australia (whose original initiative led to the formation of APEC), Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, South Korea, Malaysia, Mexico, New Zealand, the Philippines, Papua New Guinea, Singapore, Taiwan, Thailand, and the United States. The decision to admit Chile and Mexico was made at the Seattle meeting of the APEC members in November 1993, although they had still not officially joined as of March 1994.

⁸⁵ Article 2 EEC.

membership.⁸⁶ It is now customary to refer to the European Union (EU) rather than the European Community (EC), although the latter remains the foundation of the EU.

Might the European Union provide a precedent? Might supranational union further the economic objectives of C.E.R. and provide a cohesive Australia/New Zealand strategy for Asian-Pacific trade? Under the European Union, member States share common political institutions and citizenship rights but retain their independent existence under separate Heads of State.

F. THE EUROPEAN PRECEDENT

(a) European Union

The European Community comprises three separate communities served by common institutions: the European Coal and Steel Community (ECSC) established in 1951 by the Treaty of Paris, and the European Atomic Energy Community (EURATOM) and European Economic Community (EEC) established by the Treaty of Rome in 1957. A Merger Treaty adopted in 1965 placed the three communities under the control of a single Council, Commission and Court.

The European Community began with six member States. In 1973, membership swelled to nine with the accession of Denmark, Ireland and the United Kingdom. In 1979, Greece joined, and in 1986 Spain and Portugal extended the membership to 12. In May 1994, the European Parliament voted to admit Austria, Finland, Sweden and Norway (subject to national referenda) from 1995. Switzerland has also applied for membership, as have Turkey, Cyprus and Malta and several other countries, which may eventually see the Community comprising 20 or more member States.⁸⁷

The Community has an intricate institutional structure served by four major bodies:⁸⁸

(i) *The Council of the European Union*⁸⁹ The Council facilitates political representation of the member States. Each member State furnishes one member, usually of ministerial ranking, for representing the State's interests. The participating Ministers vary, depending upon the particular portfolio affected by an issue under discussion. It is in the Council that ultimate political and legislative power resides. The Council's legislative function is exercised in conjunction with the European Commission which initiates

⁸⁶ Principally the Preamble to and Article B of the Treaty. The Treaty entered into force on 1 November 1993, following the ratification of the Treaty by all 12 member States.

⁸⁷ *THE PRESS*, Christchurch, 3 March 1994.

⁸⁸ For a summary, see J.S. Davidson, "The Treaty on European Union" (1992) 5 *Canta L.R.* 102 at 105-108.

⁸⁹ As renamed under the Treaty on European Union (formerly the Council of Ministers).

legislative proposals to the Council. In certain circumstances, the Council must consult with the European Parliament which may veto legislation, subject to an overriding (unanimous) Council vote. Most Council decisions are taken by Qualified Majority Voting (QMV), with the member States enjoying weighted voting power. Under the existing membership of 12 States, there are a total of 76 votes, of which 54 are required for a qualified (70 percent) majority.⁹⁰ The four new members (Austria, Finland, Sweden and Norway) will raise the total votes to 90 and the blocking minority from 23 to 27 votes.

(ii) *The European Commission* The Commission has 17 members who represent, not partisan (State) interests, but those of the Community itself. The "Big Four" (France, Germany, Italy and the United Kingdom) and Spain have two Commissioners each, and the remaining States one Commissioner. The Commission may initiate legislation within its mandated areas and enjoys a general legislative initiative for upholding the proper functioning of the Community. It also exercises a form of derivative legislative power under delegation. The Commission discharges further functions as Community "watch-dog", initiating action against member States for failing their Treaty obligations, and supervising their implementation of the Community's competition and anti-dumping policies.

(iii) *The European Parliament* The European Parliament once comprised nominated members of national Parliaments but it is now a directly elected body. Its functions are three-fold: approving legislative proposals of the EU Council, granting consent for the adoption of the Community's budget, and monitoring the Commission's activities, with power to dismiss the Commission en bloc by a vote of censure. The European Parliament also keeps Council action under periodic (quarterly) review which has necessitated the President of the Council addressing the Parliament once a year. It may also commence actions before the European Court of Justice where it is considered that the Commission or the Council has failed its Treaty functions.

(iv) *The European Court of Justice* Article 164 of the European Treaty enjoins the Court "to ensure that in the interpretation and application of this Treaty the law is observed". The Court consists of 13 judges and is given a wide array of functions and powers. It can act in five capacities: as an international court in disputes between member States, as a constitutional court on Community issues referred by national courts for binding ruling, as a court of review for determining the legality of Community acts, as a

⁹⁰ The "Big Four" (France, Italy, Germany and the United Kingdom) enjoy 10 votes each which gives an effective blocking minority to any two large countries and a small one. Major issues, such as taxation and foreign policy, must be taken by unanimous vote.

civil court where Community action (or inaction) causes loss to a national of a member State, and as an employment court in disputes between the Community and its employees. The Court has developed a distinctively "European" jurisprudence for promoting the supremacy of Community law over national law and reinforcing the supranational element of Community membership. Some have accused it of unwarranted activism in remodelling the Community instruments for creating a Federal Europe.⁹¹

(b) The Maastricht Treaty

The Maastricht Treaty was an historic accord for promoting the Community's economic, monetary and political union, including a single currency by the year 2000, and a framework for a common foreign and security policy. Some member States (Germany, Ireland and the Benelux countries) moved quickly to ratify the Treaty; for others (Denmark, France and the United Kingdom), the path to ratification was rather more bumpy. The erosion of national sovereignty became a burning issue. "Euro-skeptics" pointed to the Commission's broadened legislative initiative and interventionist powers, and claimed that monetary union would subordinate member States' economic decision-making. Both Denmark and the United Kingdom negotiated separate Protocols, exempting them from the Treaty timetable for moving towards monetary union.

Changes agreed on at Maastricht include: the concept of European citizenship and the free movement of persons,⁹² economic integration under "an open market policy with free competition",⁹³ monetary union under a European System of Banks (ESCB),⁹⁴ the free movement of capital between member States,⁹⁵ common rules on competition and taxation laws⁹⁶ and commercial policy (including tariff and trade agreements),⁹⁷ improved educational and vocational opportunities through (a) a European Social Fund and (b) increased geographical and occupational mobility within the Community,⁹⁸ mutual recognition of professional and vocational qualifications,⁹⁹ co-ordinated disease prevention policies,¹⁰⁰ common environmental principles and State programmes,¹⁰¹ development of a

⁹¹ See generally T.C. Hartley, "Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community" (1986) 34 Am. J. Comp. L. 229; *The Foundations of European Community Law* (2nd ed, New York, O.U.P., 1988).

⁹² Articles 8 and 8a-8c of the Treaty Establishing the European Community.

⁹³ Articles 102a, 103, 103a, 104 and 104a-104c (quoted portion in text from Article 102a).

⁹⁴ Articles 105, 105a, 106-108, 108a and 109.

⁹⁵ Articles 73a-73h and 75.

⁹⁶ Articles 92(3), 94, 99-100, 100c-100d.

⁹⁷ Articles 113 and 115.

⁹⁸ Articles 123 and 125-127.

⁹⁹ Article 57.

¹⁰⁰ Article 129.

¹⁰¹ Articles 130r-130t.

common foreign and security policy,¹⁰² co-operation in fields of justice and home affairs,¹⁰³ and the necessary pro tanto institutional changes.

The above attests to the Community's supranational political character. For example, European citizenship entitles nationals to move and reside freely within member States, and for resident non-nationals to vote and stand as candidates at municipal elections in another State, and to vote and stand as candidates in elections from that State to the European Parliament, and to seek the diplomatic or consular protection of any member State when in the territory of a third country. Co-operation in the fields of justice and home affairs covers matters ranging from immigration and asylum policies to the fight against organised crime and drug trafficking, including the establishment of a European Police Office (Europol) for the efficient exchange of information and detection of crime.

From the outset of the Community, Euro-skeptics seized upon the language of *federalism*, arguing that the Community would lead to a Federal Europe which would emasculate the member States and destroy their national sovereignty. History has not been so accommodating, although some fervently believe that true federal union is Europe's best hope of surviving the global and continental challenges.¹⁰⁴ European federalists accept that the Union is not essentially federal, despite the changes agreed at Maastricht. If federating with Australia is politically untenable for New Zealand, might European Union offer hope of preserving national sovereignties within a supranational union?

(c) The European Union - An Unworkable Analogy¹⁰⁵

(i) *Pooling of sovereignty* European Union provides a sophisticated model, but national sovereignty would remain an insuperable obstacle to Australasian union. Supra-national bonding between the countries would not involve any "cession" or "pooling" of sovereignty, as under the European Union. Community membership involves a diminution of national sovereignty, matched by a transfer of power to the Community whose decisions are binding on the member States and their nationals:

¹⁰² Articles J and J.1-J.11.

¹⁰³ Articles K and K.1-K.9.

¹⁰⁴ See T.C. Hartley, *The Foundations of European Community Law* (2nd ed., New York, O.U.P.), p. 6; J. Siourthas, "Supranational Federations: The European Community as a Model" (1993) Mon. L.R. 273.

¹⁰⁵ The authors thank Dr Andrew Stockley, of the University of Canterbury, for his helpful comments in this section.

"The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."¹⁰⁶

Qualified majority voting (QMV)¹⁰⁷ governs most aspects of Community decision-making, requiring a 70 percent majority on weighted voting power. Member States may be outvoted on particular policies or directives, but such decisions are binding. Sovereignty is, in this sense, pooled, since no one member State is guaranteed that it will always be in the majority (and able to impose its will), or that it will always be in the minority.

The European model would not work under a two-state union. There would be either unequal or disproportionate surrender of sovereignty, or no surrender at all. If weighted voting power were calculated on population (or on other relevant criteria), Australia would dominate. Decision-making on the basis of "one State, one vote" would remedy the imbalance, but then there would be no pooling of sovereignty. In a union of two States, neither State could be in a minority or outvoted. Thus Australia and New Zealand either give up no sovereignty (both States' agreement required), or New Zealand surrenders its sovereignty (Australia dominating decision-making under QMV).

The scope of European Union may also be too grand. Consider:

(ii) *Direct applicability of supranational law* It is fundamental to a supranational system that community laws apply directly in the member States and prevail over national laws in the event of conflict.¹⁰⁸ Thus Community legislation penetrates directly into the domestic legal order of a member State without need of further enactment or act of adoption, and establishes rights and obligations that are directly enforceable in both the national and community courts. The European Court of Justice has held that a national court must set aside conflicting provisions of national law, whether prior or subsequent to the Community provisions, without awaiting their repeal by the national legislature.¹⁰⁹

Those features of supranational law would impose twin drawbacks for Australasian union: a supranational legal order would be excessively elaborate and costly, and neither country would welcome the direct applicability and primacy of external laws, without obvious

¹⁰⁶ *Van Gend en Loos v. Nederlandse Administratie Der Belastingen* [1963] E.C.R. 1 at 12 (E.C.J.). See also *Costa v. Enel* [1963] E.C.R. 585 at 593 (E.C.J.).

¹⁰⁷ See above, p. XXX.

¹⁰⁸ See e.g. *Costa v. Enel* [1964] E.C.R. 585 at 594; *Commission v. United Kingdom* [1979] E.C.R. 419 at 429.

¹⁰⁹ *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] E.C.R. 629.

benefit. Neither country (particularly New Zealand) could any longer hold to conceptions of legislative supremacy.

(iii) *Economic integration* There are essential differences between a free trade area and economic union. The latter's objectives far exceed those of free trade arrangements. The European Community has entered a customs union, with member States having common customs legislation and applying common external tariffs to non-member countries, and the Maastricht Treaty establishes a timetable for full economic and monetary union. A common currency and European banking system have caused dissension in Europe, fuelled by currency speculation in 1992-1993 which undermined the European exchange mechanism. Several countries (including Britain) have negotiated "opt-out" clauses for monetary union as an aspect of economic integration.

This places the achievements of C.E.R. in context. Australia and New Zealand established a free trade area, but retained their own customs, competition and business laws, their own external tariffs against other countries, and separate currencies. The progressive harmonisation of business laws offers an obtainable goal for forging closer trans-Tasman links, but this goal remains modest by comparison to supranational union. C.E.R. is more analogous to the North American Free Trade Agreement (NAFTA, linking Canada, the United States and Mexico) than to European Union.

(iv) *The bureaucracy, revenues and spending* The members of the European Union provide immense monetary contributions to the European budget. The Community has an elaborate institutional structure and it is doubtful whether the Australian and New Zealand peoples would welcome further bureaucracy and incipient public spending. Australia would also dominate a trans-Tasman bureaucracy. Australia, with its greater population base, would be the logical location for the institutions. Dividing these would be costly and inefficient.

Much European revenue is directed towards less developed member States and regions of the Union. There is a widespread perception that moneys tend to be taken from the wealthier industrialised nations for redistribution to the poorer or agriculturally-based economies. Whereas member States may accept the equity balance in a union of 12 (or more) States, a two-state union would lack any comparable balance. Few New Zealanders or Australians would welcome gifting sums of money ostensibly for the benefit of the other. Trans-Tasman relations have never risen to philanthropic ideals.

(v) *Interjurisdictional disputes* Supranational union would intensify interjurisdictional disputes, necessitating some form of Australasian court or disputes mechanism. Under C.E.R., commentators have already proposed a trans-national commercial court, having specialist judges developing a uniform interpretation of "harmonised" laws.¹¹⁰ In Europe, the European Court of Justice resolves disputes between member States and sits as a constitutional court on Community issues and as a court of review on the legality of Community acts. Authoritative rulings, binding the member States, are vital to the progress of the Union.

Australia's problem would be surmounting the constitutional barriers. Sections 71-72 of the Constitution establish the paramount and independent position of the courts in the constitutional scheme. These sections strictly separate federal judicial power from the other powers of the Commonwealth. No tribunal or body may combine judicial and non-judicial powers, and only "courts" created under Chapter III (entitled "The Judicature") may exercise any part of the federal judicial power. The Constitution prohibits attempts at conferring such power on a non-s.71 "court".¹¹¹ The Australian courts have applied four criteria for distinguishing Commonwealth judicial power: the power to make a binding declaration of rights and duties at law;¹¹² the type and degree of discretionary power the tribunal enjoys;¹¹³ the power of direct enforcement of decisions;¹¹⁴ and legislative context or history indicating that the tribunal's powers were intended to be "judicial".¹¹⁵

A replicated European Court of Justice would offend against Chapter III, as usurping Commonwealth judicial power. One Australian lawyer has argued that the Commonwealth could use its external affairs power¹¹⁶ to establish a trans-Tasman commercial court, having a strictly limited jurisdiction.¹¹⁷ But an interjurisdictional court - even one established pursuant to an international Treaty between the countries - may encounter problems. From the authorities, the Commonwealth Parliament may invoke its external affairs power when the legislation relates to an event, matter, or thing external to Australia¹¹⁸ or is based

110 For example, W. Pengilly, "On Trans-Tasman Banter and Things C.E.R.", mimeo, Auckland, 17 April 1990, p. 7. See also M.D. Kirby, "Integration of Judicial Systems", op. cit., pp. 28-30.

111 See e.g. *New South Wales v. Commonwealth* (1915) 20 C.L.R. 54 (the *Wheat Case*); *Waterside Workers' Federation of Australia v. J.W. Alexander Ltd* (1918) 25 C.L.R. 434; *Attorney-General for Commonwealth v. The Queen* (1956) 94 C.L.R. 254 (H.C.), (1957) 95 C.L.R. 529 (P.C.) (the *Boilermakers' Case*).

112 See *Huddart, Parker & Co. P/L v. Moorehead* (1909) 8 C.L.R. 330 at 357 per Griffiths C.J., approved in *Shell Company of Australia Ltd v. Federal Commissioner of Taxation* (1930) 44 C.L.R. 530 at 542 (P.C.); *South Australia v. Victoria* (1911) 12 C.L.R. 667 at 675 per Griffiths C.J. (Barton J. agreeing); *In re Judiciary Act, 1903-1920 and Navigation Act, 1912-120* (1921) 29 C.L.R. 257 (the *Advisory Opinions Case*); *R. v. Commonwealth Court of Conciliation and Arbitration, ex parte Barrett* (1945) 70 C.L.R. 141.

113 See *R. v. Spicer, ex parte Waterside Workers' Federation of Australia* (1957) 100 C.L.R. 312 at 317; the *Boilermakers' Case* (1956) 94 C.L.R. 254 (H.C.), (1957) 95 C.L.R. 529 (P.C.).

114 See *Alexandria Case* (1918) 25 C.L.R. 434; *Silk Bros P/L v. State Electricity Commission of Victoria* (1943) 67 C.L.R. 1; the *Boilermakers' Case* (1956) 94 C.L.R. 254 (H.C.), (1957) 95 C.L.R. 529 (P.C.); *Palling v. Corfield* (1971) 123 C.L.R. 52.

115 See *Munro's Case* (1926) 38 C.L.R. 153 at 175; *Munro's Case* (1926) 38 C.L.R. 153; the *Shell Case* (1930) 44 C.L.R. 530; *Rola Co. (Aust.) P/L v. Commonwealth* (1944) 69 C.L.R. 185; *R. v. Davison* (1954) 90 C.L.R. 353.

116 Conferred by s. 51(XXIX) of the Constitution.

117 W. Pengilly, "On Trans-Tasman Banter and Things: C.E.R.", mimeo, Auckland, 17 April 1990, p. 7.

118 *Polyukhov v. Commonwealth* (1991) 172 C.L.R. 501 at 528-529 per Mason C.J., 549-550 per Brennan J., 599 per Deane J., 632 per Dawson J., 653 per Toohey J., 692 per Gaudron J., and 712, 714 per McHugh J., following *New South Wales v. Commonwealth* (1975) 135 C.L.R. 337 (the *Seas and Submerged Lands case*). By a 4:3 majority, the High Court in

on an international treaty to which Australia is a party.¹¹⁹ Under the first head, a trans-Tasman court sitting beyond Australian territory, in New Zealand, may not relieve the constitutional problem.¹²⁰ In *New South Wales v. Commonwealth*,¹²¹ Barwick C.J. constrained this aspect of the external affairs power "subject always to the Constitution as a whole". Would the High Court forsake the Commonwealth judicial power guaranteed by the Constitution? While the High Court has been prepared to countenance an expansion of the Federal Parliament's external affairs power, it seems less likely that it would grant that power primacy over the judicial power and the separation of powers required by the structure of the Constitution.¹²²

An international treaty could supply the constitutional foundation of a trans-Tasman court. *Koowarta*¹²³ and the *Tasmanian Dams* case¹²⁴ established the Commonwealth's power to implement treaties into domestic legislation, without usurping the power of the States. The mere entry into an international treaty demonstrated the judgment of the executive that the subject was of international moment, and thus within the Commonwealth's external affairs power. A treaty obligation actually to legislate for a trans-Tasman court would allay any doubt.¹²⁵ But other problems may afflict the Commonwealth's treaty implementation power. These stem from the constitutional inabilities: (a) to exclude the High Court's prerogative review of all courts and tribunals established by the Australian Parliament and (b) to create an appeal from any Australian court to a body or court outside Australia (including now the Judicial Committee of the Privy Council). The High Court of Australia has already struck down an attempt to create an appeal from the High Court to the Court of Conciliation and Arbitration in industrial matters.¹²⁶ Section 73 of the Constitution declares the High Court's decisions on appeal "final and conclusive". Establishing appeals to an interjurisdictional court of appeal would necessitate amending the Constitution, and the record of successful proposals for constitutional amendment in Australia is discouraging, particularly of recent times.¹²⁷

Polyukhovich upheld the constitutional validity of the *War Crimes Amendment Act 1988* (Cth) on the basis of the external affairs power under s. 51(XXIX).

119 See *Koowarta v. Bjelke-Peterson* (1982) 153 C.L.R. 168; *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1 (*Tasmania Dam* case). For further situations not relevant to the present where the power may be invoked, see D.R. Rothwell, "The High Court and the External Affairs Power: A Consideration of its Outer and Inner Limits" (1993) 15 *Adel. L.R.* 209 at 212-213.

120 Some matters external to the Commonwealth fall within the external affairs power, although they may have a substantial internal aspect or operation. In *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, the majority upheld the *War Crimes Amendment Act 1988* (Cth) which dealt with war crimes committed abroad but within the jurisdiction of the Australian courts.

121 *Seas and Submerged Lands* case (1975) 135 C.L.R. 337 at 360.

122 Compare *Polyukhovich v. The Commonwealth* (1991) 172 C.L.R. 501 at 531 ff.

123 (1982) 153 C.L.R. 168.

124 (1983) 158 C.L.R. 1.

125 Compare Brennan J. in the *Tasmanian Dams* case, *ibid.*, at 219; *Airlines of NSW Pty Ltd v. New South Wales* (No. 2) (1965) 113 C.L.R. 54 at 87 per Barwick C.J. (domestic legislation based on a treaty must be "appropriate and adapted" to the terms of the Treaty), accepted in *Richardson v. Forestry Commission of Tasmania* (1988) 164 C.L.R. 261 at 289 per Mason C.J. and Brennan J., and 303 per Wilson J.

126

127 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 percent and the proposals failed in every State of Australia.

G. AN AUSTRALIA/NEW ZEALAND UMBRELLA ORGANISATION

The grand design is instantly more fetching. Proposals for full political or supranational union grip the imagination and stir feelings of ANZAC camaraderie. But lesser initiatives may serve the national interests just as well. Both countries have negotiated troubled economic times by sharpening their competitive edge (New Zealand demonstrably so with uncompromising public sector, economic and employment reforms).¹²⁸ Australia and New Zealand now face exciting trade opportunities - under C.E.R., as part of the developing Asian free-trade bloc, and through global trade under a new General Agreement on Tariffs and Trade. In April 1994, Ministers from over 100 countries concluded the world's most ambitious trade negotiations, launched in 1986 in the Uruguayan resort of Punta del Este. Morocco hosted the ceremonial signing of the new GATT, which promises to add an estimated \$350 billion a year to world income.¹²⁹ The reduction of agricultural protection and export subsidies in the United States and Europe will provide, for both countries, "significant economic benefits".¹³⁰ The question now for Australian and New Zealand trade Ministers and officials: "Would a joint international trade initiative reap reciprocal benefits?"

In April 1994, the Thai Prime Minister, Mr Chuan Leekpai, invited Australian Prime Minister, Mr Keating, to initiate consultations with the ASEAN countries (Thailand, Malaysia, Singapore, Indonesia, the Philippines and Brunei) for Australia and New Zealand to join the ASEAN free-trade bloc.¹³¹ Mr Keating undertook to approach New Zealand and to initiate discussions with the ASEAN countries. New Zealand Minister of Foreign Affairs and Trade, Mr Don McKinnon, welcomed these developments and the trade opportunities in the ASEAN markets.¹³² The joining of Australia and New Zealand would create a Southern Asia/Pacific free-trade zone worth an estimated \$125 billion, second only to the North American free-trade agreement (NAFTA) which links the United States, Canada and Mexico. This initiative would extend the institutional structure under C.E.R. from bilateral (trans-Tasman) trade to multilateral (ASEAN) trade.

Joint ministerial statements from 1988 identify the importance of C.E.R. as a springboard into Asia: "Under C.E.R. both countries have always had more than a bilateral economic focus. Our business communities are taking increasing advantage of export opportunities

¹²⁸ Notably under its *Reserve Bank of New Zealand Act 1989*, *Employment Contracts Act 1991* and corporatisation and privatisation programmes for reducing public spending and promoting efficiencies. Greater social dislocation through unemployment and lower incomes has accompanied the economic reforms.

¹²⁹ *The Press*, Christchurch, 16 April 1994. *Semble* Reuter's figure of \$350 billion a year was in United States currency.

¹³⁰ *Australia: Good for Business*, Department of Foreign Affairs and Trade (Aus), Fact Sheet, October 1993.

¹³¹ *The Press*, Christchurch, 9 April 1994.

¹³² *Ibid.*

in the world market, particularly in the Asia-Pacific region."¹³³ The business communities have already initiated talks on multilateral trade through Asia. Members of the Australia-New Zealand Business Council have mooted the formation of a trans-Tasman umbrella organisation, spearheading joint operations in the Asian/Pacific markets and co-ordinating third-market trade strategies. Joining the ASEAN free-trade bloc, or simply moving into Asia, may necessitate an institutional structure for transitional purposes (phasing in trade agreements and removing tariffs) or establishing an interjurisdictional disputes mechanism (although Asian countries may prefer direct negotiation to formal procedures). A trans-Tasman Council would require the support of both governments, moving in tandem with the Australian and New Zealand business and academic communities. A blue-print could be formalised in a trans-Tasman Treaty and given legislative force under domestic law.

Trade officials and representatives are also taking stock of the multilateral trade opportunities. New Zealand's High Commissioner to Australia until 1994, Mr Ted Woodfield, exhorted New Zealand to make "common cause with Australia" in its approach to the wider Asia Pacific region.¹³⁴ He believed the bilateral relationship was approaching a plateau and that joint trade initiatives into Asia would revitalise the relationship. For Woodfield, the *bi-* and *multi-*lateral aspects of C.E.R. relations were "mutually reinforcing", rather than "mutually exclusive". He proposed the formation of a Trans-Tasman Community Council to play a monitoring and advisory role to both governments, for "looking over the whole spectrum of the relationship".¹³⁵ He believed that the initiative would need to come from New Zealand, not Australia. The attitude of the Hawke and earlier Australian governments was that the more powerful partner "did not want to be seen bullying the smaller partner".¹³⁶ Woodfield believed the time was opportune with Australia currently reviewing its Constitution in preparation for the Australian Commonwealth centennial in 2001.

The need for an institutional framework becomes greater with increasing integration of the economies. But proposals for new structures should also be assessed within the context of what already exists, in institutional setting, under C.E.R. C.E.R. has established much of the infrastructure for joint multi-lateral trade. Both countries have trade commissions working in close co-operation. AUSTRADE¹³⁷ and TRADENZ¹³⁸ could co-ordinate marketing under an umbrella organisation straddling the Asian/Pacific markets. Their

¹³³ *Joint Statement by the Prime Minister of Australia, Hon. Bob Hawke and the Prime Minister of New Zealand, Rt Hon. Geoffrey Palmer*, 2 July 1990. Similar views were aired by Hon. Philip Burdon, Minister for Trade Negotiations, quoted in the Opening Address to the Australia-New Zealand Business Council's Joint Conference, Sydney, October 1993, op. cit.

¹³⁴ "A Trans-Tasman Community? Future Directions in New Zealand-Australia Relations", *Newsletter*, Institute of Policy Studies, Victoria University of Wellington, August 1994, pp. 6-7.

¹³⁵ *Ibid.*, p. 7.

¹³⁶ *Ibid.*

¹³⁷ Australian Trade Commission. For the organisation's profile, see *AUSTRADE - Corporate Review 1992-93*.

¹³⁸ New Zealand Trade Development Board. For TRADENZ's corporate profile, see *Stretching for Growth: Building an Export Strategy for New Zealand 1993/94*.

"constituents" would not change; AUSTRADE facilitates Australian trade, TRADENZ New Zealand trade. But each performs a valuable reciprocal role which was formally documented in a Memorandum of Understanding between the trade organisations in May 1993. AUSTRADE and TRADENZ operate under reciprocal (co-operative) arrangements in "third" markets (including East Asia), where their respective countries tend to be "small forces". Each acts as an information conduit for the other, in third markets and under C.E.R., and assists companies from each side of the Tasman wishing to invest or source products or services.

These organisations have the personnel, budget and infrastructure for a co-ordinated joint initiative. AUSTRADE commits over half of its overseas budget in Asia, where it has 27 permanent offices. From AUSTRADE's 1992/93 Corporate Review: "The Australian Government is determined to enmesh Australia with the growing Asian economies. AUSTRADE is at the leading edge of Australia's thrust into Asia."¹³⁹ TRADENZ's 1993/1994 Report documented East Asia as New Zealand's fastest growing market, taking 34 per cent of its exports for 1993.¹⁴⁰ TRADENZ has ten offices in the region (including an office in Japan) manned by full time representatives, with the New Zealand Commerce and Industry Office operating two further East Asia offices.¹⁴¹ A joint Asian/Pacific initiative would maximise AUSTRADE's and TRADENZ's presence in the region, resulting in reciprocal trade benefits. Their Memorandum of Understanding from 1993 could be adapted to accommodate multilateral marketing rules. In third markets, both organisations could be required to convey market information and opportunities to the other, in order that Australian and New Zealand companies may compete on equal (or near equal) terms. The Memorandum of Understanding could formalise the spirit of co-operation that currently exists between the two trade organisations.

G. CONCLUSION

Opinion polls on both sides of the Tasman oppose full political union. Yet more respondents support full economic union, and even more a full defence union.¹⁴² Talk of a common currency,¹⁴³ an integrated aviation market,¹⁴⁴ open shipping competition,¹⁴⁵ a

¹³⁹ AUSTRADE - Corporate Review 1992-93, p. 14.

¹⁴⁰ *Stretching for Growth: Building an Export Strategy for New Zealand 1993/94*, pp. 16-17, 19.

¹⁴¹ *Ibid.*, p. 91.

¹⁴² See M.D. Kirby, "CER and Business Competition - Australia and New Zealand in a Global Economy", *op. cit.*, p. 40.

¹⁴³ See M.D. Kirby, *ibid.*, citing Sir Geoffrey Palmer, 28 August 1989.

¹⁴⁴ On 1 August 1992, the two Transport Ministers signed a Memorandum of Understanding for phasing in a fully integrated Australia/New Zealand aviation market. As from 1 November 1994, Australian and New Zealand airlines could operate domestically in and on all routes between the two countries. See *New Zealand and Australia: Closer Economic Relations*, Information Bulletin No. 42, Ministry of External Relations and Trade, May 1993, p. 12.

¹⁴⁵ Both governments oppose the Maritime Union Accord reserving trans-Tasman shipping for Australian and New Zealand crewed ships: *Joint Statement: 1992 Review of C.E.R.*, Wellington, 7 October 1992. Both governments favour full deregulation of maritime transport by 1 July 1995. This represents the phasing-in date for the remaining exempted services under the Protocol on Trade in Services, signed by the Prime Ministers in August 1988 (operative 1 January 1989).

combined defence force¹⁴⁶ and growing economic ties have rekindled interest in a trans-Tasman polity of some sort. For the antipodean peoples, the issue entails more than sheer economic self-interest.

On 25 April, Australians and New Zealanders gather to pay remembrance to their youth who died at Gallipoli. The ANZAC spirit evokes a deep sense of kinship and belonging. At the 1994 commemorations, Prime Minister Keating extolled the "ANZAC legend":¹⁴⁷

"Since that fateful April day in 1915, a spirit of duty and courage that cannot be destroyed has been symbolised by what we know as the Anzac legend. The qualities which have given rise to that legend continue to inspire us today."

Mr Keating spoke of "the bond forged at Gallipoli", as "continu[ing] to inspire us today".¹⁴⁸ These words speak to the future as much as the past, with almost a *hint* of foreknowing. Can the ANZAC legend lay the foundations of a new polity? War forged the bonds at Gallipoli; C.E.R. and global trade may cement them into the next century. The success of C.E.R. has surprised even its architects. When signed in 1983, it provided for the final tariffs and quantitative restrictions on trans-Tasman trade to be removed on 1 July 1995. In fact, full free trade in goods was completed on 1 July 1990, fully five years earlier than scheduled.¹⁴⁹ The great political philosopher, Machiavelli, observed the independent will of State experiments: "Let no man who begins an innovation in a State expect that he shall stop it at his pleasure or regulate it according to his intention." It would take a bold writer who would predict what C.E.R. may accomplish for Australia/New Zealand relations. Political union beyond 2000 cannot be discounted. But joint programmes for global trade are immediately more attainable, whatever the next epoch may herald.

¹⁴⁶ "A Tasman Marriage", *TIME* magazine, 14 September 1992.

¹⁴⁷ *THE PRESS*, Christchurch, 25 April 1994.

¹⁴⁸ *Ibid.*

¹⁴⁹ *New Zealand and Australia: Closer Economic Relations*, Information Bulletin No. 42, May 1993, Ministry of External Relations and Trade (N.Z.), p. 6.