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TRANS-TASMAN ADR

Arbitrators' and Mediators' Institute of New Zealand Conference,
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Thursday 6 August 2009.

The Hon. Michael Kirby AC CMG

ARBITRATORS' AND MEDIATORS' INSTITUTE OF NEW ZEALAND
INSTITUTE OF ARBITRATORS AND MEDIATORS AUSTRALIA

GRAND HALL, PARLIAMENT HOUSE
WELLINGTON, NEW ZEALAND

THURSDAY 6 AUGUST 2009.

TRANS-TASMAN ADR

The Hon. Michael Kirby AC CMG[*]

Tena koutou katoa kua hui hui mai nei i tenei ahiahi

Tena kourua, tena koutou, tena koutou katoa.

AUSTRALIAN LINKS

I pay my respects to the people of New Zealand and express thanks to the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) for inviting me, as President of the Institute of Arbitrators & Mediators Australia (IAMA), to take part in this opening ceremony of the AMINZ 2009 annual conference.

I am especially honoured to be standing here in the Grand Hall of the Parliament of New Zealand. Doing so obliges me to pay the respect that is due to the Parliament and people of New Zealand for establishing, and maintaining, one of the oldest continuously operating democratic legislatures in the world.

Reflecting on the duration and strength of our representative democracies in Australasia sometimes comes to us as a surprise. We often think of ourselves as young countries and so, in some respects, we

[*] President of the Institute of Arbitrators & Mediators, Australia

are. But by the world's measure, we are mature democracies. And in New Zealand, it is in these parliamentary buildings that elected representatives of the people have made the law and renewed the rule of law, in this land.

After the American Revolution of 1776, the British Crown learned a number of lessons. One of them was the need, in settler societies at least, to create strong representative forms of government and not to interfere too much in the laws that they made for themselves. So it was that, in 1856, a remarkably short time after the establishment of the colonies in New South Wales and New Zealand, that representative chambers were established here. They have been continuously operating in both jurisdictions ever since. We, who come together, to consider new techniques of alternative dispute resolution, do so in societies with strong parliaments and independents courts. Our enterprise is part of the continuing conversation by which democracies participate in improving the way the people are governed and their disputes peacefully resolved.

As I reflect on this venue, my mind goes back to many earlier meetings and conferences held in this Hall or in the adjacent chamber which served, for a time, as the Upper House of the New Zealand parliament. In those earlier meetings, I had the privilege of participating with fine public officers of New Zealand of the past, including Sir Guy Powles (the first Ombudsman in the English-speaking world), Sir Ronald Davison (the first Chief Justice of New Zealand whom I knew well), Sir Robin Cooke (later ennobled as Lord Cooke of Thorndon) and other wonderful lawyers who would grace the highest courts of any countries. Later, Sir Thomas Eichelbaum, Sir Owen Woodhouse, Sir Kenneth Keith (now a

judge of the International Court of Justice) and Dame Sian Elias and many others became my friends.

THE FEDERAL IDEA

Thinking of the chamber of the old Upper House reminded me that New Zealand, together with the Australian State of Queensland, have abolished their second houses of parliament. In earlier times, I endeavoured to tantalize New Zealand with the possibility of belatedly entering the Australian Commonwealth and thereby embracing the joys of sending parliamentarians to the House and Senate of the Federal Parliament in Canberra. Over a number of years, I pressed this idea upon a reluctant population in New Zealand[1]. Eventually, Sir Robert Muldoon, Prime Minister, agreed to debate the topic on Radio Pacific. He was his usual combative self.

When I unilaterally offered New Zealand not one but two States for each of the main islands, and even suggested possibilities of negotiations over the status of Stewart Island, Sir Robert's opposition seemed to flag a bit. As he left the studio, he was heard asking his minders: 'Who is that man?'. Nothing came of my bold ideas.

Standing here in the parliamentary precincts, it is proper to remember the initiatives that Sir Robert Muldoon and the Rt. Hon. Doug Anthony AC CH displayed in creating the Closer Economic Relations Treaty between our two countries. In a sense, the integration of our economies and societies which that treaty has brought about, has replaced the calls for political union. It has produced many co-operative developments in

[1] See e.g. M.D. Kirby, "Closer economic and legal relations between Australia and New Zealand" (1984) 53 ALJ 626

law and policy, including in the co-operative arrangements between the courts on both sides of the Tasman[2]. Participation of the New Zealand Attorney-General in the regular meetings of the Standing Committee of Attorneys-General has helped to integrate initiatives of law and policy throughout Australasia in a way that partly fulfils those early dreams of a single Australasian nation.

MEMORANDUM OF UNDERSTANDING

In late May 2009, at the annual conference of IAMA in Melbourne, the President of AMINZ, Mr. David Carden, represented the interests of alternative dispute resolution (ADR) in New Zealand by executing, with me and the then President of IAMA, Professor Angela O'Brien, a memorandum of understanding between IAMA and AMINZ. This memorandum enshrines the principles of co-operation, the sharing of news and information and heralds still further joint activities in the future.

With the closer integration of our economies, on both sides of the Tasman, the need for judicial co-operation between our two countries became immediately apparent. By the same token, co-operation between both nations in matters of ADR was equally established as an objective to be pursued. Inter-jurisdictional disputes can occasion produce complex and doubtful problems of law. Such disputes are ready-made for ADR, and especially as between Australian and New Zealand, through the processes of mediation. It is often said that mediation is most useful where the parties need to ensure the survival of their long-term relationships. Such are the business economic

[2] See e.g. *Federal Court of Australia Act* 1976 (Cth), Pt.III(A) ("Trans-Tasman market proceedings) ss32B-32ZF.

associations across the Tasman that this is often a necessity that ADR can help fulfil.

I am sure that the memorandum of understanding between AMINZ and IAMA will, with time, give rise to even stronger links between our two organisations and their members. Thus, it is possible that, with time, we will create a sharing of joint activities and a mutual recognition of accreditation granted to practitioners of ADR. These are early days. However, I am sure that we will see many more such developments.

STRENGTHENING OUR INSTITUTES

I was fascinated to hear repeated references to the late conversion of the Attorney-General for New Zealand (the Hon. Christopher Finlayson MP) to the merits of ADR. Especially intrigued that this conversion should be likened to the last-minute repentance of Archbishop Thomas Cranmer on the scaffold. I could empathise both with the image and with the hesitation that the Attorney-General earlier felt.

It is natural that those of us who have practised and participated in the courts should recognise their strengths as the public venue where important conflicts are authoritatively resolved in both of our societies. No-one can suggest that ADR will replace the courts. Some functions must continue to be resolved in a public hearing. Some involve re-expression of the law in a way that no ADR process could attempt. Some disputes are simply too important to be decided between the parties behind closed doors.

This said, in recent years the merits of ADR, of speed, economy, confidentiality and disputant empowerment have convinced even the

sceptical that its procedures represent an important supplement to the ordinary functions of the courts. We will be better able to extend the application of ADR in both of our societies if we can recognise the limitations inherent in ADR and the need that exists to improve its procedures and to strengthen the qualifications of those who engage in them. Both AMINZ and IAMA have strong commitments enhancing the quality of ADR and promoting the accreditation of its practitioners so that citizens can have confidence in the honesty and skill of all those who are accredited.

This conference in Wellington will address these and many other issues. As with the IAMA conference in Melbourne earlier in the year, there are alternative streams with very many subjects in ADR of large importance and real interest. The presenters have established expertise. The conference offers a happy mixture of doctrine and good practice. And at the back of our minds is the knowledge that the courts of law remain in place for the indispensible work that they continue to play in both of our societies.

From across the Tasman I therefore bring greetings from the Council and members of IAMA. For us, the memorandum of understanding and co-operation between IAMA and AMINZ is a symbol of the strengthening of the bonds between the two premier ADR organisations in this part of the world. We will enrich each institution by co-operation and exchange of experience. By doing so, we will better serve the people of New Zealand and Australia. A worthy thought in this historic venue.

Tena kourua, tena koutou, tena koutou katoa