TRANS-TASMAN UNION - WAS SIR DOUGLAS GRAHAM RIGHT?

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AN OLD DEBATE REVIVES

On 8 January 1999, New Zealanders woke to reports that the Justice Minister, Sir Douglas Graham, had predicted that New Zealand and Australia would come together in some kind of union[1]. Speaking to a reporter from the Christchurch *Press,* Sir Douglas said that over the next 5 to 10 years New Zealand's ability to stay independent and prosperous would be the big issue. He was reported as saying: "If commodity prices that we're so dependent on keep tumbling, that will push us closer and closer to Australia". Asked if New Zealand would become part of Australia, he said: "I think that's a possibility in the next 10 years". He hastened to add that he would prefer that it did not happen because he rather liked "being a Kiwi"[2]. However, he pointed to the economic blocs being formed in other parts of the world - such as the European Union and the Northern American Free Trade Agreement. He described these as threats to New Zealand's future trading prosects and hence to its prosperity and the standard of living of its population. Sir Douglas described the Asia Pacific Economic Cooperation Group (APEC) which links New Zealand, Australia and other Pacific Rim countries as a "bit of a talkfest".

Needless to say, these remarks plunged New Zealanders into predictable commentary about their partly loved trans-Tasman cousins:

- The *Northern Advocate* on the same day warned Australians, not of war, but that they should get used to being portrayed as knock-about larrikins. Delving into the past, it even quoted the British *Sunday Times* of 1989 defining a cultured Australian as "someone who can read the comics without moving his lips"[3].

- A few weeks later a correspondent for the same newspaper complained that New Zealand's native birds were disappearing; the land was falling away; cattle and sheep plus farmlands were being sold off for fancy homes and

[1] See "Graham: NZ May be 7th State of Australia", *Northern Advocate*, 8 January 1999, 1.

[2] *Ibid.*

[3] *Northern Advocate,* 11 January 1999.

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"now" (as if it was the last straw) "Sir Douglas Graham would like to sell New Zealand to Australia"[4].

❖ At about the same time the New Zealand *Herald* observed archly that the constitutional debate about a republican Australia and about the Preamble to the present Australian Constitution, had proceeded without "any real thought being given to the provision in the existing Preamble for acceptance [of] New Zealand as a new Australian State"[5].

❖ A month later the same newspaper ran a major story on a possible ANZAC dollar[6]. It was unclear whether the chief objection was to the idea or to the proposal by Australia's then Deputy Prime Minister, Mr Tim Fischer, that the new currency should be named the "zac", being the last elements in the famous acronym ANZAC reviving the old colloquialism, common to both countries, for a sixpence. The reviewer suggested that the one dollar "zac" should display a "Pavlova, diplomatically garnished with both kiwi fruit and passionfruit (the latter to keep the Aussies happy)". Two dollar zacs would portray a barbecue scene complete with "chilly bins" (eskies to Australians) and jandles ("thongs" to Australians). On the ten dollar zac would be Phar Lap, the legendary racehorse born in New Zealand but invariably claimed as an Australian. On the fifty dollar zac would be the newly unveiled republican Mrs (formerly Dame) Edna Everidge with her Palmerston-North born bridesmaid, Madge. The one hundred dollar zacs would carry the face of the former Queensland Premier, Sir Joe Bjelke-Petersen, born in Dannevirke. The writer excused this courtesy on the basis "well, you wouldn't have to see his face very often"[7].

❖ And if you thought the debate was getting too serious, a letter to a newspaper on 23 March 1999 proposed the alternative option that New Zealand should become the 51st State of the United States which, it was claimed, would have far more benefit than political union with Australia[8]. A day later the banner headlines in the *Northern Advocate* blamed mild winter temperatures and humid autumn rain for attracting "well travelled Australian moths" - as if they had been sent over in retaliation for these unseemly jokes by angry Australian federalists keen to have the last laugh[9].

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4 *Northern Advocate,* 13 February 1999 ("True Blue").

5 G Ansley, "Aust to get new Constitution", New Zealand *Herald,* 19 February 1999, 1.

6 New Zealand *Herald,* 13-14 March 1999, 1.

7 *Ibid.*

8 G Casagrande, "51st State", New Zealand *Herald,* 23 March 1999.

9 *Northern Advocate,* 24 March 1991, 1 (T Eves, "Farmer's face Wriggilies").

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Humour of this kind is by no means new to the relationship between Australia and New Zealand. Sometimes, perhaps, it goes back to deep-seated feelings. Britain was, at the start, reluctant to bring New Zealand into the Empire as a new colony at all. The debate in Britain which clinched the decision to annex New Zealand was sparked by mounting lawlessness and violence in New Zealand itself thought to be a threat to the growing trade interests of the Empire in the Pacific[10]. Who was to blame for this lawlessness and violence?

> "One visitor of 1839 concluded that the Bay of Islands contained 'a greater number of rogues than any other spot of equal size in the universe".

They were described as the "various refuse of civilised society". Naturally enough, contemporary writers suggested that the reason was that Auckland had become populated by convicts escaped from Sydney[11]. So, from the very outset, the relationship between the fledgling colonies separated by the Tasman was a trifle rocky.

Nonetheless, on annexation, New Zealand at first became a dependency of New South Wales. Thus for a time, legally speaking, the two countries were united. However, this connection was very short lived. In May 1841, New Zealand was proclaimed a separate Crown colony. The separateness has continued every since. Yet there was enough memory of the political connection to prompt the father of Australian federation, Sir Henry Parkes, Premier of New South Wales, in 1889 to insist that New Zealand be invited to participate in the Federation Conventions. So indeed it was. When the federationists met in Melbourne and agreed on an Australasian Convention for 1891, New Zealand sent three delegates. They were commanded not to bind the colony to anything.

Economics was as important for New Zealanders in the 1890s as it is a century later. The Premier, Richard Seddon, was a significant obstacle to the serious discussion of terms under which New Zealand could join a proposed Australasian nation within the Empire. Like many of his countrymen, before and since, Seddon looked east. His dream was of a New Zealand Empire in the Pacific. For a time, this

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[10] W Jacobs, *The Birth of New Zealand - A Nation,* 46.

[11] W Fox (Principal Agent for the New Zealand company), *The Six Colonies of New Zealand* (1849).

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dream agitated some Maori and pakeha New Zealanders to view federation sympathetically. For their different reasons, they were fearful of the importation of labour from Fiji and the Cook Islands. The spectre of this possibility, in those times of white racial purity, caused many of the colonists in New Zealand to talk of uniting "with our own kith and kindred on the other side of the Tasman".

In 1900 the New Zealand Parliament decided to set up a Commission to investigate New Zealand's relationship with the impending new Australian Commonwealth. But Seddon, sensing the prospect of Prime Ministership of New Zealand, expressed himself forthrightly against the alliance. His views were not shared by all New Zealanders. A letter reproduced in the New Zealand *Herald* earlier this year[12] from a hundred years ago intoned:

> "As the federation of the Australian colonies is apparently approaching a happy consummation, it is a question of vital importance whether New Zealand should accept the invitation offered to throw in her lot with her Australian sisters and thus make an Australasian instead of an Australian federation. Various sentimental objections are offered to such a course, but viewed in the light of modern racial tendencies towards the consolidation of interests and particularly the demand made by the spirit of imperial patriotism for the tightening of the cords binding the detached parts of the Empire together for mutual defence and well being, a feeling of indifference or antagonism to the federal spirit is inpolitic and reprehensible ... Now we may become chivalrous participants in the great scheme of constitutional development ... which is much better than trusting for the future graciousness and condescension of a dominant partner".

Nevertheless, the Commission rejected federation. Seddon with 14 Ministers, Members of Parliament and other dignitaries, 73 men of the volunteer forces, 5 Maori chiefs and the Southern Pipers attended the federation ceremonies. They witnessed the birth of the new Australian nation. But they were not part of it.

It is pointless, as we approach the centenary of the Commonwealth of Australia to question what might have been if the attitudes on both sides of the Tasman had been more generous and forthcoming a hundred years ago. How different the constitutional document of Australasia would have looked. Instead of

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[12] New Zealand *Herald,* 20 March 1999.

the spare political instrument which spends most of its provisions dealing with customs and taxes and excise and financial matters, Australians might have had a more visionary Constitution. So much might well have been necessary to include in its provisions protections for the Maori people of New Zealand whose special treaty rights with the Crown in the *Treaty of Waitangi* of 1840 distinguished them so markedly and advantageously from Australia's indigenous peoples. The long struggle of the latter for legal recognition of their equal rights lay ahead; and is continuing. If Australasia had been achieved a hundred years ago, it seems most unlikely that it would have taken so long a time, and so painful a journey, to provide legal protections for the land and other rights of the Aboriginal and Torres Strait Islanders of Australia.

The century since 1900 proceeded without political union between Australia and New Zealand. Each nation became a Dominion of the Crown and eventually an independent nation. The soldiers of each nation fought at Gallipoli in 1915, with British allies. In common sacrifice, they forged an emotional union that it still celebrated each year on ANZAC Day. Each nation fought in later wars against common enemies. Each continued the sacrifice of young lives that seemed to renew the ANZAC spirit. Each did battle on the sporting field, with inordinate rivalry sometimes reaching frenzied heights. The kind of passions, in fact, that you only get between siblings in the one family. It has remained a unique relationship, with unique privileges between the citizens of each country for entry and egress - not quite common statehood but something very similar. The same brand names. The same banks and airlines. Roughly the same language. Much the same sports. Similar political debates. Common social problems. Interconnected laws.

FOUR CHANGES

Into these rather placid and comfortable familiarities a number of events began to occur in the last quarter of the present century which make it appropriate to both Australia and New Zealand to reconsider their relationships and to reflect upon where it is likely that time will take them.

- The realignment of the trading relationships of both nations is an obvious example. Both were seriously prejudiced when the United Kingdom joined the European Economic Community[13]. This was a blow because each country

[13] J Farrar, "Closer Economic Relations and Harmonisation of Law Between Australia and New Zealand" in P A Joseph (ed) *Essays on the Constitution,* Brookers, 1995 at 158.

had built its trading arrangements around the stability of a preferential trade system that was one of the mainstays of the old Empire. With the disappearance of the protected British market, both countries were obliged to find new markets and new trading arrangements. Both countries looked elsewhere. Eventually, they looked to each other. The consequence of their doing so was the *Closer Economic Relations Agreement* (CER) which is a lasting political achievement of Mr Doug Anthony (Australia) and Sir Robert Muldoon (New Zealand)[14].

❖ The realignment of the United Kingdom with its European trading partners cannot be seen in isolation. It heralded other shifts in international trade. These included the huge growth in the size of the East Asian economies, temporarily dented by the collapses of recent years but with a long-term trajectory of enormous potential for the economies of Australia and New Zealand. Moreover, the sight of Britain seeking its new economic alignment with the economies of Europe, plainly required of Australians and New Zealanders that they should ask what lessons, if any, from European developments, existed for them. This was the question that lay behind Sir Douglas Graham's remarks of January 1999 and his insistent demand that New Zealanders (and by parity of reasoning Australians) should be looking to the implications the European Union and the North American Free Trade Agreement for their own respective futures. Dr Gerard Henderson of the Sydney Institute pointed out, in commentary on Sir Douglas' remarks, that Northern Ireland with a population of only 3.5 million had become a unit in a market with a total population of 300 million. Canada with 27 million had joined a market serving a population of 300 million people as part of NAFTA (which links Canada, the United States and Mexico). It is not only airlines that form a "one world" and the "star alliance" for advantages of scale and competiveness. Nations must also find their place in the "one world". Where precisely will Australians and New Zealanders discover that place?

❖ A third development involves the search in Australia and New Zealand for their respective national identities as each country approaches the new millennium. That search may take the form of a debate about whether they should sever their common link with the Queen as Head of State and become separate national republics. On both sides of the Tasman there are citizens who support, and resist, such a move. Some believe that the constitutional arrangement by which the Head of State lives somewhere else is one singularly in tune with unpretentious people embarrassed by too much chest-

[14] M D Kirby and P A Joseph, "Trans-Tasman Relations - Towards 2000 and Beyond" in Joseph, above n 13 at 158. The full acronym is ANZCERTA (Australia-New Zealand Closer Economic Relations Trade Agreement). CER was signed in Canberra on 23 March 1983 but took effect retrospectively on 1 January 1983.

beating, flag-waving nationalism outside the sporting field. Others believe that the time has come to snap this last Imperial bond with our common constitutional progenitor[15]. In New Zealand, there is another link in the form of the Judicial Committee of the Privy Council, appeal to which was long since abolished in Australia[16]. But if anything deep were to be done about the relationship between Australia and New Zealand it would seem better that it be done whilst we share a common Head of State, something that may not last forever. It is curious, as the New Zealand *Herald* commented, that the Australian constitutional debate has not broadened its focus to wider questions including our constitutional connection with New Zealand. It is as if we were still engaged in the debates of the 1890s. Timidly, the bolder dreams and broader aspirations have been cast aside. Constitutional imagination has been dampened down by gallons of Tipex[17].

❖ A further important change, occurring in both countries, concerns the growing consciousness of the indigenous population of each concerning their rights both under national and international law. And of the common elements in their prospective demands, shared with other indigenous peoples in nations of the old Empire created originally by settlers from the British Isles: the United States of America, Canada, South Africa, Zimbabwe, Australia and New Zealand[18]. In some ways, the Maori, with their special treaty promises, given on behalf of Queen Victoria, taken as inherited by her heirs and successors, have achieved more by way of legal rights than most indigenous peoples. Yet they continue to demand what they perceived as their unacknowledged rights[19]. Their special treaty position in the polity of New Zealand would not necessarily be an impediment to New Zealand's future association with Australia. On the contrary, there seems little doubt that in the matter of the treatment of its indigenous peoples, Australia could benefit from a closer acquaintance with the New Zealand story.

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15 A referendum on a proposal to amend the Australian Constitution to a republican form of government will be held on 6 November 1999.

16 *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth); and *Australia Act* 1986 (Cth), s 11. See also *Kirmani v Captain Cook Pty Ltd [No 2]; Ex parte Attorney-General (Qld)* (1985) 159 CLR 461.

17 A print remover said to be necessary to remove all references to the Queen and the Crown in the Australian Constitution.

18 Farrer above n 13 at 158.

19 See eg Sir Douglas Graham, "Declaration of Sovereignty was Superseded by Treaty" in New Zealand *Herald,* 22 February 1999 A 13.

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EARLIER PROPOSALS

In 1983, following the achievement of CER, I was invited to give an address at the University of Auckland. I was asked to speculate on where CER "was taking us"[20]. Was it possible that it was taking us towards federation[21]? I suggested, at that time, that the story of the relationship between our two countries was one of lost opportunities and that Australia should endeavour to make the association between our countries more palatable by admitting New Zealand as two states of the federation and on terms providing special guarantees of respect for local institutions, laws and practices, particularly those of concern to the Maori. I wrote then:

> "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 later, in a contribution to a book of essays on the Constitution of New Zealand[22] I wrote a chapter with Mr Philip Joseph on "Trans-Tasman Relations - Towards 2000 and Beyond"[23]. I confess that the greater part of this chapter was written by Mr Joseph. However, his views I gladly embraced in with the enthusiasm of a judge, over-burdened by work, whose colleague had produced a draft opinion that mirrored exactly his own conclusions.

My earlier speech in 1983 had attracted the wrath of Sir Robert Muldoon, Prime Minister of New Zealand at the time. He asked whether I was some kind of "judicial comic". But when we both appeared on *Radio Pacific*, and I promised him bronze statues throughout the new Australian federation, he seemed to soften his objections somewhat. Truly he deserves a statue or two on each side of the Tasman, with Doug Anthony, for the achievement of CER. Given the history, it was most notable achievement.

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20 M D Kirby, "CER - Trans-Tasman Courts and Australasia" (1983) NZLJ 304. See also "CER - A Trans-Tasman Court?" in *CER - The Business and Law Essentials*, Pt 1, Legal Research Foundation, Seminar Papers, University of Auckland, 22 July, 1983 at 16 et sec. Cf K M Vautier, J Farmer and R Baxt (eds) *CER and Business Competition - Australia and New Zealand in a Global Economy,* Chapter "Integration of Judicial Systems" at pp 15 et sec.

21 [1983] NZLJ 304.

22 M D Kirby and P A Joseph above n 14.

23 *Ibid* at 129.

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CER undoubtedly set in train economic and legal steps, the impact of which we are still feeling and the ultimate directions of which we cannot yet be sure. In 1990, 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"[24]. The result of this spirit, which finds reflection in various hues of enthusiasm on both sides of the Tasman, has been a remarkable transformation in trade and institutional arrangements which, slowly but surely, has bound our two countries still more closely together in ways short of political union but long on economic and institutional links.

The objective of CER is to realise the "single market" concept across the whole range of Australia/New Zealand trading and economic relationships. In the first decade, bilateral trade between the two countries grew from $NZ2.5 billion ($AUD1.99 billion) to $NZ6.3 billion ($AUD5 billion)[25]. Just five years into CER, a review recorded an average annual growth rate in trade of 15%. This was higher than either country had recorded with the rest of the world[26]. However, CER is more than just a free trade agreement. It has brought in its train obligations to harmonise Australian/New Zealand business laws. These moves have, in turn, brought fundamental changes to trade practices, tariffs, competition, commercial laws, taxation, customs and quarantine arrangements. CER has also injected new reasons for developing a common approach to the law throughout Australasia[27].

Provisions have been adopted for the courts of each nation to take evidence and for that purpose to sit in the other country[28]. The *Trans-Tasman Mutual*

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24 G Palmer, "International Trade Blocs: New Zealand and Australia Beyond CER", Address to the 9th Commonwealth Law Conference, Auckland, 20 April 1990, 18.

25 *Joint Statement: 1992 Review of CER*, Wellington, 7 October 1992 (New Zealand Minister for Trade Negotiations, Mr P Burbon and Australian Minister for Trade and Overseas Development, Mr John Kerrin).

26 See New Zealand and Australia: Closer Economic Relations, Information Bulletin No 42, May 1993, Ministry of External Relations and Trade (NZ), 6.

27 See *Dominion Rent a Car Ltd v Budget Rent a Car Systems (1970) Ltd* [1987] 2 NZLR 395 at 407 per Cooke P. See also New Zealand decisions *Vicom New Zealand Ltd v Vicomm Systems Ltd* (1987) 2 NZLR 600 at 605; *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1 at 39; *Wineworths Group Ltd v Comité Interprofessional du Vin de Champagne* [1992] NZLR 327 at 331.

28 *Federal Court of Australia Act* 1976 (Cth) Pt III, Division 2 ("Exercise in New Zealand of jurisdiction by the Federal Court") and Division 3 ("Exercise in Australia of jurisdiction by High Court of New Zealand") and Division 4 ("taking of evidence by Federal Court or High Court of New Zealand"); Division 5 ("Enforcement of judgments of High Court of New Zealand"). New Zealand has long been treated as being in a special category, with simplified procedures, for the purposes of extradition to and from Australia. See *Extradition (Commonwealth Countries) Act* 1966 (Cth) Pt III; *Bates v McDonald* (1985 2 NSWLR 89 at 94.

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Recognition Act 1997 (Cth) enacted domestic laws to conform with Australia's treaty obligations with New Zealand under the Trans-Tasman Mutual Recognition Agreement. That agreement is itself one of the numerous outcomes of CER. It is directed to removing barriers to the movement of goods and occupations between Australia and New Zealand. The legislation includes a host of provisions on an extremely wide range of topics. For example, there are specific provisions about privacy which ensure that personal information provided to authorities registering an occupation protect the privacy of that information. This is the recognition in domestic law of an agreement between Australia and New Zealand[29]. It is a way whereby the very effective developments of privacy protection in New Zealand, pioneered by Mr Bruce Slane, can influence and stimulate the development of Australia's privacy laws which, to this time, have tended to lag behind New Zealand and international standards.

Part of the dramatic institutional revolution that has occurred in the aftermath of CER had its origins even before that treaty. I refer to the meetings of Ministers from Australia and New Zealand which have, in turn, stimulated regular meetings of officials and constitutional office-holders from both countries. Thus, the Chief Justice of New Zealand regularly attends the meetings of the Council of Chief Justices of Australia and New Zealand. He (and now she) takes an active, constructive and greatly valued role in the dialogue of these senior office-holders who share so much in common, especially when compared with their equivalents in other countries. In the wake of such arrangements, similar institutional bonds have been established with bodies such as the Australian Institute of Judicial Administration. New Zealand lawyers and judges take an active part in its work. And it is not only in the issues of the judiciary. For example, the Companies and Securities Advisory Committee (CASAC) in December 1998 released the Corporate Groups Discussion Paper. This covers a broad range of regulatory issues. It seeks comments, among other things, upon whether the *Corporations Law* should be amended to adopt the New Zealand approach to court-ordered contributions to pooling orders[30]. In virtually every activity of government, and many activities in the private sector, CER and its aftermath have thrown Australians and New Zealanders together in ways that would have been regarded as astonishing just two decades earlier[31].

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29 Trans-Tasman Mutual Recognition Bill 1997 (Cth).

30 *Insolvency Journal* [March 1999], 3.

31 There are countless joint authorities in relation to standards and practices. See for example the Commonwealth Diseases Network, Australia and New Zealand. There are also many Trans-Tasman professional bodies, including Royal Colleges in the medical profession.

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A decision of the High Court of Australia that New Zealand producers of television programmes had, under CER, equal rights in the Australian television market as Australian producers have in the New Zealand market[32] attracted various opinions, although the Court was merely interpreting the legislation. The *Sydney Morning Herald* in an editorial "True Kiwi"[33] observed:

> "The point about the CER is that it gives Australia a virtually unrestrained access to the New Zealand economic and cultural market. Admittedly, the New Zealand market is much smaller than ours. But Australia's comparative size gives its producers a weight that should be of considerable advantage over their New Zealand counterparts. Rather than trying to exclude cultural industries from the CER agreement, lobby groups ... should be working towards more cultural links between the two countries. The two cultures should engage rather than reject each other".

In a world of global television marked by mediocrity and fairly universal Americana, it does seem likely that the relatively common and egalitarian societies of Australia and New Zealand can find a lot of beneficial common ground in the business of culture, entertainment and media[34].

TOWARDS THE FUTURE

In my essay with Phillip Joseph, we suggested that Australia and New Zealand should be looking very closely at developments beyond those in trading arrangements. The future between us might lie not in an old fashioned political union of the kind negotiated between nations and peoples in the 19th century. That might have been an idea suitable for that time of Empire. For various reasons (some rational, some irrational and emotional) it might not be so suitable today, at least at first instance. But that does not mean that we cannot look at the European Union

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32 *Blue Sky Case. Project Blue Sky v Australian Broadcasting Authority,* 28 April 1998, 72 ALJR 819; 153 ALR 163.

33 3 April 199, p 34.

34 T Dusevic, "Nothing but True Blue Skies", *Time,* 19 April 1999, 9.

and the North American Free Trade Agreement to find ways, short of alterations to our sovereignty, which will continue and accelerate the institutional and legal developments which I have (with irritating frequency) sketched before New Zealand and Australian audiences. The options which Mr Joseph and I mentioned four years ago were:

(a) To remain separate independent sovereign states;

(b) To enter into a political union;

(c) To establish a South Pacific political alliance[35];

(d) To unite the two sovereignties under a supra national entity (as in Europe); or

(e) To develop a looser institutional structure for facilitating multi-lateral trade and the further links which would come with it[36].

Out of trade in Europe came first the *Treaty of Rome,* the European Common Market, the European Community and now the European Union. These developments have moved further towards the stated objective of "an even closer union among the peoples of Europe"[37]. The *Treaty of Rome* assumes the eventual achievement of twin goals of economic and political integration[38]. Although the F word (federation) cannot be uttered in Europe, and most especially in the United Kingdom, those who look at developments in that continent cannot really deny that a federal system of sorts is gradually emerging. There is a fundamental law to which the parts have subscribed (the *Treaty of Rome*). And there are the three constituent

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[35] cf L van den Brande, "The International Legal Position of Flanders: Some Considerations: in K Wellens (ed) *International Law: Theory and Practice* (1998), The Hague, 145. The author points out that after World War II, "traditional State structures on the European continent were subject to developments of both a centripetal and centrifugal nature". These pressures have produced novel political arrangements which are proliferating throughout the world.

[36] Kirby and Joseph, above n 14, at 137.

[37] Article 2 of the *European Economic Community Treaty*.

[38] Principally the Preamble to and Article B of the Treaty. The Treaty came into force on 1 November 1993 following ratification of the *Maastricht Treaty* by all 12 member states.

parts of government: the European Parliament in Strasbourg; the European Commission in Brussels and the European Court of Justice in Luxembourg. It may not be a federation of the 1776 or 1901 type. There is no single head of state. There is no single language. There is no single allegiance. But who can doubt that out of the rather rapid developments in Europe stimulated by economics will come a kind of allegiance?

Already such a coalescence is happening and it is reinforced by other European institutions such as the European Coal and Steel Community established in 1951, the European Atomic Energy Community and the Council of Europe with its energetic companion, the *European Convention on Human Rights* applied by the European Court of Human Rights at Strasbourg. If this kind of close and intensifying association can be achieved between nations with ancient enmities, proudly different languages, competing economic situations, different political and legal traditions and distinct heads of state, is it the very similarity of Australia and New Zealand that makes such bold achievements as between ourselves impossible or, worse still, regarded as unimportant?

At the beginning of this century, Australia and New Zealand, together with Argentina, held the top places in the world for GDP per capita and for estimates of standard of living and quality of life. Argentina has fallen quite away. Australia and New Zealand have been overtaken by many other nations. Old and captive markets have gone forever. We must find new ones. The long term opportunities of Asia and the Pacific must be tapped. We must ask what our distinct societies on the brink of a region with huge potential for the next century, have to offer. And whether we would do better to offer our contributions separately or together. What are those contributions? We share them in common. Our stable constitutional and legal arrangements. Our democratic societies. Our community of English speaking people in a world that wants and uses our language. Our uncorrupted bureaucracies. Our relatively open markets. Our independent, neutral courts. If we are to maintain our economic position as the mainstay of our standard of living, it seems inevitable that we must reinforce and further the links[39]. CER has initiated a movement that will not be stopped. It cannot be stopped. It is a movement that goes far beyond economics. But economic self-interest (as originally in the Australian Commonwealth and later in the European Union) is once again the stimulus for something bigger than itself. Where will it lead? And is the direction a political and formal one which, like Sir Douglas Graham, we only take reluctantly, half-heartedly and without enthusiasm or true emotion.

[39] cf New Zealand, Treasury, Working Paper 99/6, *Economic Integration and Monetary Union,* (A Coleman) 1999.

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VIEW FROM CAPE HELLAS

I was in Sydney on the day the beautiful new bridge was named for ANZAC. I saw the New Zealand flag rung up as it will fly there, beside the Australian flag, to remind everyone who passes of the indelible links between us.

As I looked at the two flags, so similar, I suddenly remembered Cape Hellas where the same flags fly at the tip of the Dardenelles in Turkey. In 1970 I travelled down the Isthmus to Gallipoli. I stood on Cape Hellas. I saw the beaches and rocks where the ANZAC spirit was forged. I looked across the Dardenelles to where the ancient city of Troy once stood. I looked down to where Xerxes of legend crossed the Hellespont. Down on the right was Suvla Bay. I was standing so easily on the windy promontory which the brave Australian and New Zealand soldiers in 1915, far from home, struggled valiantly, and ultimately unsuccessfully, to attain their joint goal. They were fighting for a now faded rose pink Empire on which the sun at last has set. They were fighting for King and country. The country they had in mind was as much the Empire as their own Antipodean lands. They were fighting against autocratic Prussian militarism and for the idea of liberal democracies such as they had recently established at home. The Empire may have receded to the pages of history. But the goal of liberal democracy for all humanity remains as true today as it was then. Now it is allied with the struggle for human rights for every man, woman and child wherever they may be in the world. To that struggle Australians and New Zealanders, being specially privileged, have special contributions to make.

Since Gallipoli in 1915, many of the old certainties of the world have changed utterly. Some of the old arrangements, such as that involving the nation state, are increasingly coming under question as regionalism and globalism work their powerful messages on the human imagination and pocket. Australia and New Zealand are adjusting quite rapidly from being small outposts of a global empire, protected by world powers and economic preference, to multicultural societies in harmony with their geographical surroundings and with their outward looking economies. But we are, and on our own always will be, small fry. In the world of regional groupings, if we are to maintain our privileged place, we must show greater imagination and enterprise. And (it seems to me) we must draw closer together.

Politicians, who answer to weekly opinion polls, may find it hard sometimes to say such things. This is especially true of Australians who, in the words of Ted Woodford, New Zealand's High Commissioner to Australia in the early 1990s, do "not

want to be seen as bullying the smaller partner"[40]. Initiatives in the matter of our relationships probably have to come from this side of the Tasman. They need to come from citizens who know each country well and who in their funny and different ways love them both. They probably have to come at times apart from the sporting contests when rivalry tempers run high. But is it too much to hope that out of CER will emerge a new movement and new institutions to replace those inherited from the British? A Council of Australasia for example? Is it impossible to dream of a common court to resolve shared differences? Of a common representative body to make laws applicable to the growing areas of shared concern? Of a common currency and shared economic institutions and laws: Such large ideas rarely come directly from the political process. They tend to come from economic pressure and popular sentiment.

The centenary of Gallipoli will be upon us in 2015 more quickly than we think. The fundamental question is where our relationship will be in that year and where it will be pointed in the new millennium we are about to enter.

In the words of Prime Minister Jenny Shipley:

> "With CER getting to a more mature phase how could we expand what is now a 19.5 million market into something larger?"[41]

Only we, the citizens of New Zealand and Australia, can answer those questions. But answer them we must.

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[40] Kirby and Joseph, above n 14 at 135.

[41] V Jayne, "CER ... How Close is close enough?" in *Management* (NZ) May 1999 13 at 18.