

Commentary on:

C.E.R. — A TRANS TASMAN COURT?

Paper presented by Hon. Mr Justice M.D. Kirby — Page 16, Part I.

by

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COMMENTS ON THE ADDRESS BY MR JUSTICE KIRBY
TO THE LEGAL RESEARCH FOUNDATION'S SEMINAR ON CER
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Hon J.K. McLay, Minister of Justice, Attorney-General (N.Z.)

I want to congratulate Mr Justice Kirby for the contribution that he has made in this paper to a number of ongoing debates: the legal issues, of appeals to the Privy Council and matters of state sovereignty; the trade and economic issues, as to who will benefit most, and how, under CER; the commercial issues, about the need for specialist courts and judges to handle complex cases involving essentially trade issues; and the jurisprudential issues, touching on such things as whether the problems we are facing in achieving closer links with Australia are really nothing more than expanded versions of the same relations that are at present under some strain (and scrutiny) between the Federal and State Governments in Australia over such things as the Tasmanian Dam.

He has skilfully drawn together many of the issues to develop a thesis of perhaps deceptive simplicity and seemingly impeccable logic. He has left few stones unturned. And yet from his remarks, I cannot help but be left with the impression that under each stone there is a viper of one kind or another lurking in wait for the intrepid reformer to step within its reach.

Each stone obviously has to be approached not just with caution and restraint, but also with trepidation. Indeed some must be avoided altogether. For instance I want immediately to lay to rest any suggestion of some sort of Australasian political union. Mine is not a jingoistic reaction from a politician in a small state. I simply do not believe that any balance of advantage has been demonstrated. Indeed the only benefit would be that they'd get a good cricket team; we'd get a good rugby team; and an Australian horse would win the Melbourne Cup!

Mr Justice Kirby suggests that the original foundations for CER were first laid almost a hundred years ago. In fact it may have been even earlier. It was in 1783 that James Matra, a midshipman on Captain Cook's "Endeavour", pressed for the colonisation of New South Wales and drew attention to the advantages that it would gain from trade with New Zealand, particularly the flax trade which did develop and prosper after the colony was established. Indeed those acquainted with the thesis developed in Geoffrey Blamey's "The Tyranny of Distance" will know that access to such products and resources may have been one of the underlying reasons for the foundation of the penal colony at Sydney.

Moreover the spirit of CER was clearly evident in 1901 when William Pember Reeves wrote to the then New Zealand Premier Richard Seddon saying "for my own part, as you will know, I do not think we ought to enter the [Australian] Federation, though I do think we ought to make a working agreement with Australia on-such matters as defence, customs tariff etc ..."

Because of the geographical isolation of New Zealand and Australia, European colonisation and the common cultural origins of their white settlers; and because we have always faced similiar problems both in dealing with other countries and breaking into foreign markets; it has always seemed inevitable that we should move closer together at least economically.

But, as I say, I do not believe that such movement will ever reach the stage of complete union.

Nonetheless closer links in many areas are obviously both likely and highly desirable; and CER clearly paves the way for the development of such links.

A TRANS-NATIONAL COURT?

As to the principal options for a new trans-national court structure for New Zealand and Australia that Mr Justice Kirby discusses in his paper I must say that, although all seem possible, none at the moment seem very probable.

I have previously said that in my view the continuation of a right of appeal to the Privy Council from New Zealand is an anachronism; and that in due time it should come to an end. There has been sufficient support for that view (although also I concede considerable opposition) to lead me to believe that, in time, it will become a reality. Indeed, in my recent discussions

in Australia, lawyer-politicians of both major parties expressed surprise that the question of abolition is still an issue in New Zealand. However I have also accepted the need for the retention of a two-tier appellate structure. But whether that should be an entirely internal domestic structure or should include machinery for appeals to some external or regional judicial body is by no means an easy question to answer.

Personally I have considerable reservations about the suggestion of an external or regional court. Whether it be a regional Privy Council or a South Pacific appellate court I think that many of the objections that at present are raised to the Privy Council would continue to be equally valid. The three concerns of nationalism, social responsiveness of local judges and economic factors, as discussed on pages 15-17 of this paper are, in my view, almost overwhelming considerations.

I accept that a combination of the legal talents of judges in New Zealand and Australia could produce a "stronger" appellate bench than either country could provide on its own. And if, as Mr Justice Kirby suggests, Britain's further moves towards Europe might leave Australia and New Zealand as the "ultimate guardians of the Common Law grail", the idea becomes even more appealing.

But it must be recognised that the Common Law that once truly was a "common" law throughout most of the English speaking world has since developed in many different ways and with different emphases from one country to another; thus making it difficult

for judges, trained in one country and familiar with its laws and conventions, to have a proper understanding of both the background to different laws in other countries and the social conditions in which they are to be applied. Moreover, so much of the law that now comes before our courts is statutory, reflecting national perceptions of national economic and social policies.

The problem is perhaps analogous to that found in countries having a basically uniform language, but a variety of different dialects. Communication is always possible. The fundamentals are in common. But total understanding without much additional effort is often very difficult indeed.

Furthermore, both the differences in our legal systems and recent legislative developments would add quite considerably to the difficulties. New Zealand lawyers and judges, unfamiliar with the Australian Federal system and the provisions of the constitution, find it difficult to appreciate the constraints under which the Australian system operates. Similarly Australian lawyers and judges might well have difficulty in appreciating the effect of not having those constraints in New Zealand; from a distance, many find it hard to grasp the concept of a unicameral, unitary state with no formal written constitution.

I do not suggest that these difficulties would be insurmountable; but merely observe that they do exist. Things that are taken for granted in one country may not exist at all in, or may be anathema to, the other.

In many areas I doubt whether New Zealand's laws will ever be uniform with those of Australia. In some I doubt that we would want them to be; and vice versa.

One field that comes readily to mind is the law on personal injury by accident. Some work on this topic has been recently undertaken by the New South Wales Law Reform Commission. By our standards at least the recommendations are very timid. But they were undoubtedly pitched at what the Australian "market" would bear; obviously expectations in each country are rather different.

The same is undoubtedly true in other areas - such as large parts of the law of contract and commercial law.

Clearly the history, the social climate and even the balance of economic and political expectations will be reflected in legal and judicial approaches in each country.

So, what we would each be doing if we abandoned appeals to the Privy Council - or in Australia, more correctly, abolished the last vestiges of appeal - and then replaced them with appeals to some other sort of reconstituted (but closer to home) judicial authority; would be to replace one group with a number of known and accepted disadvantages with another with very similar disadvantages. The result in real terms would be little overall improvement.

Without the overriding link of formal union with Australia (and as I have made it clear that I do not favour nor do I believe that it will eventuate) I doubt that such an arrangement would ever operate satisfactorily for either Australian or New Zealand litigants.

In Australia of course, appeals to the Privy Council have already been abandoned in Federal cases, and are soon to be abolished in all State cases; so that shortly the final appellate court for all cases will be the High Court of Australia. The question of Privy Council appeals is undoubtedly a political issue, in that the final decision on retention or abolition must be made by politicians; although happily in neither country has it become a party political issue. Nonetheless political reality makes it highly unlikely that in the absence of political union politicians, having taken the significant step to abolish appeals to the Judicial Committee, would then put in its place another court of international character. It is simply not realistic to suppose that Australians would to resile from their recently achieved judicial autonomy and submit to the authority of a newly created composite court for Australasia or the South Pacific.

Certainly political reality in New Zealand is such that there would be a general unwillingness, if and when we do abolish appeals to the Privy Council, then to subject the decisions of our own courts to a further appeal to the High Court of Australia or a Pacific court.

There we have the essence of the dilemma.

The High Court is, of course a highly respected appellate body, and I admire Mr Justice Kirby's ingenuity in pointing out how simple it would be to arrange for New Zealand appeals to be taken to that court; either through federation under the terms of the Australian Constitution (which make specific provision for New Zealand's admission) or through an Act similar to that already in place for the Republic of Nauru.

However, I think I can safely say that however high the standing of the High Court, and however simple it might be for us to arrange for it to hear our appeals, there is nonetheless very little likelihood of that ever happening.

On the other hand, however, the notion of a commercial court or some other specialist court being set up to deal specifically with problems of CER trade and to provide uniform interpretation of CER inspired laws does have some greater attraction.

Nonetheless, in his paper, Mr Justice Kirby points to the constitutional difficulties in Australia facing the establishment of such a court. I suspect that the difficulties could be just as great in New Zealand - at least in a political sense - even though we are not confronted by the rigidly constricting effects of a formal written constitution.

Moreover the problems of who should sit on such a court, what they should decide, and what effect their decisions would have in each country (and what appeals should lie - and to where) would be potentially never-ending.

Nonetheless I want to make it clear I personally have no philosophical or conceptual objection to the basic idea of a trans-Tasman commercial court or a specialised CER tribunal. I can see many practical advantages that would flow to those people - the traders - on whom the ultimate success of CER will depend. I see in such a proposal no greater denial of national identity than is inherent in CER itself.

But I do see many practical difficulties that will not be easily overcome.

And so; in the short term we may have to accept the need to concentrate attention on harmonising our commercial and trade practice laws. To that end active New Zealand participation in Australian law reform work, meetings of Attorneys-General and other activities aimed at promoting uniform legislation throughout Australia seem to me to provide a more realistic short term objective.

New Zealand participation in Australian law reform activities already occurs to a limited extent. As Attorney-General for New Zealand I regularly attend meetings of the Australian Standing Committee of Attorneys-General; and there is a continuing flow of information between officials regarding the reforms and uniform law proposals that are considered at such meetings. A continuation and expansion of these de facto links is obviously both useful and important.

In addition, I see an urgent need to liberalise requirements for the admission of lawyers from one jurisdiction who seek to practice before the courts of another. With the expansion of trade through CER the demand for reciprocal admission rules will doubtless increase.

Obviously some nice legal points could arise because of the divided nature of the profession in some Australian states; the admission of lawyers as both barristers and solicitors in New Zealand; and even the different admission requirements of the various Australian States. However, with appropriate co-operation and goodwill on both sides, I am certain that these need not be a source of long term difficulty.

Beyond that, however, at a practical level lawyers acting for clients engaged in trans-Tasman trade will need to be far more aware of differences in our respective laws and legal systems.

So far as it is possible harmonisation of laws would obviously help in this regard. But even that can only go so far.

It will never mean that New Zealand or Australia will blindly follow what has been done by the other. Just as the Australian States cannot at present agree amongst themselves to uniform laws on matters such as credit contracts, trade practices, corporation and securities matters, and a host of other topics; so would the inclusion of New Zealand in such negotiations add a further complication and make differences even more likely.

Indeed we may not be far from the point where the work of the Australian Ministerial Council for Companies and Securities should be expanded to include New Zealand participation. That may well be a sound first step towards achieving harmony in our commercial and trade practice laws.

In fact it may well be that the commercial community itself will call for harmony. Fortunately experience has shown that in such circumstances commercial laws are among the most easily aligned, and usually are those in respect of which international agreement can be most easily achieved.

In short: everyone has something practical to gain from such harmonisation. Indeed there are already many existing trade conventions that form the basis of domestic laws in many countries.

However, numerous difficulties can arise from efforts to achieve harmony particularly when in one country there is no single law applicable.

Australian trade practice laws provide a good example. These are regulated on the basis of Federal laws if the trader is a company or if it trades inter-state, but on the basis of State law if he isn't incorporated and trades solely within one State. There are extensive differences between the Federal law, and the various State laws.

With which should we try to align?

At this stage I don't know the answer. The obvious and simple solution is to align with the Federal (or Commonwealth) law; but that may not be much use to the New Zealander who wants to trade solely in, say, New South Wales. Thus it is clear that harmony between some New Zealand laws and those of Australia may be as difficult to achieve as is uniformity between the laws of the individual Australian states. In fact uniformity of State laws may well be a prerequisite for any significant degree of harmonisation between Australia and New Zealand.

As to the difficulties with such matters as service and execution of process between New Zealand and Australia, I am certain these can and should be quickly corrected. We already do have a certain degree of reciprocal recognition of courts and court orders. For example in the family law field we have special reciprocal provisions for recognising and enforcing maintenance and custody orders. However there is obviously room for further reciprocity; and I certainly will not be averse to any new proposals.

If the Australian Law Reform Commission does decide to expand its reference on this subject to include service and execution of Australian processes in New Zealand, and vice versa, its recommendations could possibly be a suitable basis for reciprocal action in both countries.

The point is well made throughout the paper that New Zealand and Australia have always had a special relationship. Close economic and political links between our two countries have always made very good sense; and movements to strengthen and develop those links to the advantage of both countries have always seemed highly desirable.

The New Zealand and Australia Free Trade Agreement (NAFTA) of the mid 1960's and now the Closer Economic Relationship (CER) provide both the impetus and a formal structure around which this process can occur.

It is now up to the traders - and their lawyers - to take the next steps and deal with the practical and legal problems that remain.