

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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Taken from remarks commenting on paper "CER - A Trans-Tasman Court?" delivered by Hon Mr Justice Kirby to the Legal Research Foundation's Seminar "CER - The Business & Law Essentials" held at the University of Auckland, 22-23 July 1983

To be a sovereign state, even a small one, is a very different matter from being a state in a federation.

Federation is not congenial to the New Zealand political experience. I do not think we would take kindly to it. I am doubtful that we would benefit from it.

There are suggestions in the paper that New Zealand could possibly be admitted to the Australian Federation as two states. As a South Island MP in New Zealand it may be thought that I should pause to consider the implications of that. I do. I predict it will not happen - despite the generous and charitable instincts of the Australians. It will not happen because New Zealanders will continue to cherish their independence.

The only chance of New Zealand merging with Australia would be if we faced a further 20 years of sustained economic adversity. We could be driven to it by the poverty of our economic performance. The sort of scenario which would bring us to it would be painful economically, socially and psychologically.

I do not expect it to take place. The future should look kindly on our part of the world.

Australia, we must remember, is bound to become a more important place in the world with each decade that passes. We must become even more closely involved with them or risk becoming an isolated and somewhat primitive backwater, as I said in a 1982 paper which Mr Justice Kirby was kind enough to quote.

In that paper I also pointed out the contribution will not be all one way. New Zealand social welfare schemes have often been models for Australian development.

I am actually one of two New Zealanders who were once involved in an exercise in 1973-75, the basic purpose of which was to give the Australians the benefit of New Zealand thinking about accident compensation.

It was an unforgettable experience. It was a bold piece of Trans-Tasman vision on the part of Gough Whitlam to try and translate a New Zealand social experiment to Australia. It has not yet taken root there.

It was an experience which convinced me that social experiments are easier to legislate in New Zealand. A federal state is so profoundly different from a unitary state in this respect that it still comes to my mind often as I sit in the New Zealand Parliament.

One of the challenges we faced was the Australian Constitution Act. I have, therefore, a special regard for what Mr Justice Kirby terms in his paper "the specially sophisticated intellectualism and legalism of a federal polity". As a person who spent even more time in the United States than Australia in the law I would interpolate the remark that the Australian federal polity seemed to some of us to be dominated by what the Americans would call a climate of the most strict construction.

It remains my opinion, as it was in 1982, that shared institutions must develop as a result of CER. The possible shape of these shared institutions is in one respect made clearer in my mind by the paper.

Judicial institutions will not be the place where shared institutional commitment will begin. Shared trade or political institutions will have to come first. Judicial institutions arise from a polity. Building an Australian-New Zealand polity is a political task, not a legal one.

The process of building the polity should begin now. Practical legal problems of a commercial nature will certainly arise out of CER. They are likely to be of a kind which will be of a substantial irritant to the relationship. There is a legal need for authoritative means of settling such disputes. But the political commitment to supra-national institutions must come first. And when such institutions come they must not confine themselves to legal questions.

Mr Justice Kirby's excellent and comprehensive analysis persuades me a lot of things are not possible.

He demonstrated a number of conclusions with which I find it hard to disagree:

- . It is beyond the time when a regional Judicial Committee of the Privy Council could be established.
- . Use of the High Court of Australia is practicable only if there is federation which will not occur.
- . A Court of Appeal for the South Pacific does not address itself to the legal problems arising from CER.
- . A special Trans-Tasman Commercial Court appears to be an attractive possibility - there are real problems in making it work, especially on the Australian side.

We are left with a number of more prosaic but also more practical suggestions: dual commissions, arbitration, service and execution of process, and professional contact.

I see no harm in those suggestions. Solid practical advances may flow from them. I confess, however, they leave me unsatisfied.

I share with Mr Justice Kirby the desire to infuse the Australian-New Zealand relationship with excitement and vision.

I can see why the Judge arrives at the conclusion anything short of New Zealand joining the federation will not do (he does not say exactly that but it is implied). My difficulty is that I cannot see that federation is politically either saleable or desirable.

The risk which flows from this conclusion is that CER will drift into the same sort of doldrums that NAFTA became - boring trade negotiations of limited significance.

I know that is not enough. But I cannot see the way out of the tunnel.

We owe Mr Justice Kirby a debt for exhibiting so clearly the sterility of our present plight.

The answer lies in developing an Australian-New Zealand polity. I hope it will happen.