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Hon. Justice Michael Kirby

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THE LEADERSHIP FORUM

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AUSTRALIA & NEW ZEALAND - PAST, PASSING & TO COME?

The Hon Justice Michael Kirby AC CMG^{*}

BEST OF MATES

I love New Zealand. That is why I am here. One Australian of my persuasion amidst 450 invited leaders from government, business and the community may be all that this conference can tolerate.

I love New Zealand so much that in my callow youth, undertaking a lecture series here more than twenty years ago, I proposed that we should replace our de facto relationship with the solemn ties of constitutional matrimony.

The Prime Minister of New Zealand of the time, Sir Robert Muldoon, was not one to mince words. "Who is this judicial comic?", he asked and challenged me to a debate on *Radio Pacific*. When I turned

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up and sincerely praised him and Doug Anthony for the *Closer Economic Relations Treaty* (CER). Sir Robert seemed uncharacteristically disarmed. Few in New Zealand, including in his own Party, lavished public praise upon him. When I promised that New Zealand, as part of the Australian Federation, would have two States and that bronze statues of Sir Robert would be raised from Broome to Dunedin, he was notably mollified. He left the programme declaring: "Well, we would have to negotiate the terms and conditions very carefully".

Prime Minister Muldoon played the anti-Australian card skilfully when it suited him. It was he who declared that "Everyone knows that when all those New Zealanders went to Australia at the end of the 1970s, the average IQ of both countries was lifted considerably"¹. After the notorious underarm delivery by Trevor Chappel in 1981, Australia narrowly escaped a declaration of war. Muldoon declared it an "act of cowardice". He suggested that the Australian team should dress in yellow for the remainder of the series².

Such passions have been recurrent, reciprocal and sometimes quite nasty. They have usually related to "dole bludgers", conflicts over

¹ Quoted "trans-Tasman" in *Sydney Morning Herald*, 1 March 2000; cf "trans-Tasman", *Sydney Morning Herald*, 9 October 2000, p 14; B Ansley, "Bloody Australians", *NZ Listener*, 20 April 2002, 14.

² B Reid, "A Row in the Family", *Time*, 17 August 1992, 17.

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great inventions (such as who devised the Pavlova), long held resentments (such as the death of Phar Lap) and economic anxieties (such as the Australian takeover of New Zealand banks)³. But as two countries that, above all else, take their sports with deadly seriousness and play their politics as a kind of blood sport, it is in those fields that the sharpest attitudes come to the fore. An Olympic anthem in Australia declared⁴:

"It's just not fair, but I don't care,
As long as we beat New Zealand".

In response, Prime Minister Jim Bolger attacked some Australian Labor Party advertisements for the then Victorian Premier Joan Kirner, warning against going down the New Zealand path. Mr Bolger dropped his usual gallantry stating "It's not over until the fat lady sings, and this week we heard her warming up"⁵. Even Mike Moore, as Opposition Leader at the time, a man of saintly charity, reportedly said of Australians: "They are our best mates", but he added, spoiling things a bit: "whether we like them or not"⁶.

³ See eg "A Question of Citizenship", *Sunday Telegraph* (Sydney), 10 December 2000, 67; S Bennett, "Kiwis Fear Erosion of Special Relationship with Australia", *Straits Times* (Singapore), 27 February 2001, 10.

⁴ Reid above n 2, *ibid*.

⁵ *Loc cit*.

⁶ *Loc cit*.

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So here I am again, in this country, defying all the odds - and national sibling rivalry or indifference - to suggest that the time may be approaching for us to tie the knot. But not, I am forced by the passage of the years to acknowledge, the knot of holy constitutional matrimony. The world has changed, even in the two decades during which I have addressed this topic. The nation state - as no one better than Mr Moore knows - has assumed a different, and generally lesser, standing in the world of global and regional organisations. Now the national options are more numerous, and different, from those available in earlier decades. The question that I now pose is whether we should explore our options with a little more attention and care than we have in the recent past. Or whether we are content to just drift along in the expectation that the formalities of our relationship will follow economics - a 21st century reversal of the patterns of our origins, when the flag followed trade, not the other way around.

Of course, the views I state are simply those of a citizen. They have no more validity than the views of any other person on either side of the Tasman. But believe me they are expressed from a deep affection for New Zealand and its people and a belief that our somewhat neglected relationship may need rekindling. In other words, as many others have said of late, economics is not enough. Especially in times of global tensions and danger, we all need true friends, kindred spirits.

ORIGINS AND DIRECTIONS

The starting point is to recognise our common characteristics as nations. If we stop and think about them, save for a few dismantled condominiums artificially created up by colonial history, there are few (if any) adjoining nations so similar to each other as our own. Sometimes it takes an outsider to remind us of that fact. Professor John Farrar, an Englishman, who has served in universities in both our countries, listed the main common characteristics, and even then did no more than scratch the surface. Taling of us he said⁷:

- "* They are geographically isolated outposts of European settlement in the Southern Hemisphere and adjacent to each other;
- * They are former British colonies;
- * In the early history of colonisation New Zealand's closest economic ties were with Australia in terms of labour, trade and banking;
- * They have distinct cultural similarities;
- * They share the inheritance of the common law but are struggling towards a sense of national identity;
- * Each has an indigenous population which is becoming more conscious of its rights; and
- * Both were prejudiced by the United Kingdom joining the EEC".

⁷ J Farrar, "Closer Economic Relations and Harmonisation of Law Between Australia and New Zealand" in P A Joseph (ed) *Essays on the Constitution* (1995) 158.

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We could add to those links commonalities of language, sports, culture and tourism. We could add the urgency of preserving the distinctive features of our societies and of their governance in an often hostile world and in making the most of our economic position in relation to the world. We could also add the urgency of finding a long-term solution to our relationship whilst we share, and each respect, a common head of state, free and fair elections, democratic parliaments and an uncorrupted judiciary. Professor Farrar estimated that it was "inevitable that there will be close contact between the two countries". But the question I pose is whether it should be closer and the links more formal.

Given the things in common, the relatively limited points of difference and the pressures of world trade and world events, it might be said that the really curious question is how the two nations have remained separate - rather than why they did not come together in some form of national bond.

Let there be no doubt that, initially, in colonial times, union was strongly contemplated. For a time, in the earliest days, New Zealand was governed from Sydney. Then, when the federal movement in Australia gathered pace at the end of the nineteenth century, it was certainly the expectation of the Imperial authorities and many locals that a formal union would be established. Hence the Federal Council of

Australasia⁸ and the provision in the *Australian Constitution Act* naming New Zealand as one of the British colonies that might be admitted into ... the Commonwealth as States ..."⁹. New Zealand delegates attended the Australian constitutional conventions. The powerful moving spirit of Alfred Deakin was strongly in favour of the inclusion of New Zealand, as earlier had been Henry Parkes. As late as 1899, the Seddon Government in New Zealand was undecided. That tried and trusted antidote to uncertainty - a Royal Commission - was summoned into being to elucidate the answer. Sensing the opposition - strongly voiced by trade unions against Australia's "coloured labour" and defensive of New Zealand's working conditions and social legislation - the Commission reported against federation¹⁰. And so the die was cast.

The common cause of ANZAC at Gallipoli and later in North Africa together with other forces of history cemented strong links throughout the twentieth century. But the first chance of formal union was lost. As a consequence, more than a century of independent nationhood has reinforced the severance which two thousand kilometres of sea stamped on our geography¹¹.

⁸ *Federal Council of Australasia Act* 1885 (UK).

⁹ *Commonwealth of Australia Constitution Act* 1900 (UK), covering clause 6.

¹⁰ M D Kirby and P A Joseph, "Trans-Tasman Relations - Towards 2000 and Beyond" in Joseph, above n 7, 129 at 133.

¹¹ *Ibid.*

One of the strongest forces towards the federal union in Australia was the creation of a single internal market for free trade and economic development. The rejection by New Zealand of the Commonwealth offer put it outside the benefits, economic and social, which s 92 of the Australian Constitution conferred on all Australians.

It was this deprivation that CER set out to mollify. It was more than just a free trade agreement. It committed Australia to harmonisation of business laws, trade practices, tariffs, competition and commercial laws, taxation, customs and quarantine arrangements. Since CER was negotiated, step by step, it has been expanded. Companies on both sides of the Tasman have secured much economic benefit from CER and the changes it has produced. Just the same, the economic differences between the two countries, on a person to person basis, remain significant. They contrast strongly with the relatively limited differences inside the Australian federation.

Professor Bob Catley pointed out last year that the difference between Australian's average per capita income (of \$US17,000 a year) and New Zealand's (of \$US11,200 a year) represents nearly \$US6,000 per head. That translates into a significant differentiation in the average standard and quality of life. It might be going too far to ask, as the Director of the Institute of International Affairs in New Zealand, Bryce

Harland, did in July 2001: "Is New Zealand viable"¹². However, a very big proportion of the population of New Zealand now comprises relatively new migrants who have few, if any, historical ties to New Zealand. For a long time there has been an extremely expensive exodus of New Zealanders to Australia - estimated in recent times as nearly 1 in 9 New Zealanders or just short of 400,000 now living in Australia¹³. This is a very large loss in terms of the educational, social and emotional investment of New Zealand. It is an even greater potential loss in terms of the optimism and confidence of New Zealand society.

On both sides of the Tasman, the trans-Tasman exodus has produced responses. In Australia, it has led to changes in the previously completely unrestricted visa-free movement of co-citizens across the Tasman. Restrictions have been introduced on the availability of social security benefits for New Zealanders who are not permanent residents of Australia¹⁴. The seriousness of the problem is fully appreciated by New Zealand leaders. Prime Minister Clark has repeatedly expressed the hope that the New Zealanders will return to contribute to their own economy and society. However, so long as there are significant

¹² M Venter, "How Viable is New Zealand?", *The Dominion*, 7 July 2001, 6.

¹³ "Trans-Tasman", *Sydney Morning Herald*, 1 March 2000, 14.

¹⁴ S Crichton and B Lagan, "Striping Kiwis of Benefits Will Save 1 bn", *Sydney Morning Herald*, 11 February 2000, 3.

economic differences and there remains relative ease of entry, it is natural and inevitable that a flow of talent will generally favour Australia¹⁵. If we were members of the one nation and economic unit, such large disparities would be regarded as intolerable. They would be tackled energetically. They would have to be. Even as a common economic zone, it suggests that we still have far to go.

LOOKING FOR NEW MODELS

Upon this Trans-Tasman journey of the heart, my views have changed over the years. The proposition boldly put to Sir Robert Muldoon, of full federal union, now seems out of reach. The very idea may even possibly be an impediment to easier and more achievable targets.

Ten years ago, in a book of *Essays on the Constitution*¹⁶, with Phillip Joseph, I wrote a more pragmatic prediction titled "Trans-Tasman Relations - Towards 2000 and Beyond". In it, from our differing perspectives, we, citizens respectively of Australia and New Zealand, examined various models and possibilities to give effect to the logic of CER, the huge long-term potential impact of the Asian economies, the remaining stimulus of the ANZAC spirit and the desirability of enhancing

¹⁵ *Ibid.*

¹⁶ Kirby and Joseph, above n 10, 137-140.

public life in both of our countries¹⁷. We acknowledged that the easiest option was to stick with the status quo. But apart from political union, other models were available. We suggested that they could be explored as a new form of international association between our countries that would address the long-term interests and needs of each without a surrender of emotionally precious sovereignty by either.

One potential model was that of closer association within Asia-Pacific Economic Cooperation (APEC). But clearly APEC is much too large, unwieldy and disparate in geography and culture to fulfil our peculiar Antipodean needs. Another model was that presented by the European Union which has gradually evolved over fifty years. It continues to expand and has at its heart both economic and human rights treaties and enforcement mechanisms to bind together into a supra-national union people infinitely more diverse and culturally varied than those of our two nations. A third model would disdain everything that others have done and opt for a new ANZ umbrella organisation to formalise and push forward into more social, cultural and human areas the initiatives that have been achieved through CER and the infrastructures of AUSTRADE and TRADENZ¹⁸.

¹⁷ *Ibid.*

¹⁸ Australian Trade Commission and New Zealand Trade Development Board. See Kirby and Joseph, above n 10, 155.

What has been proposed since Mr Joseph and I wrote our suggestions to address the long-term relationship between Australia and New Zealand? Relatively little, actually.

The respective Ministers of the two countries have continued to work on small but important projects aimed at ironing out weaknesses in the economic links that bind us. Thus, in August 2000, the Treasurers of Australia and New Zealand announced that they would try to resolve the problem of "triangular taxation". Despite CER, trans-Tasman investment has been subject to double or even triple taxation. The need to tackle problems of this kind is clear¹⁹. Earlier attempts to solve the problem have failed. But even if it could now be repaired, it is hardly the stuff to make hearts beat more quickly.

Also in 2000, a New Zealand Minister, Michael Cullen, advocated a plan of joint or reciprocal citizenship between Australia and New Zealand to cement national relationships and to increase the free flow of labour in both directions²⁰. An Australian Minister, Mr Ruddock, commented that the idea "smacked of financial self-interest on New Zealand's part"²¹. It seems unlikely that such a move would address the

¹⁹ D Dunbar, "Trans-Tasman Taxation Reform: Will it be Third Time Lucky or will History Repeat Itself?" (March 2002), *NZ Journal of Taxation Law and Policy*, 3.

²⁰ *The Australian*, 10 August 2000, 1.

²¹ *Ibid.*

trend of increasing settler arrivals in Australia. The symbolism, without deeper support, might be superficial and unproductive.

In 2001, Barry Jones and David Lange convened a function in Melbourne to debate "the merits of Australia and New Zealand uniting to form the Republic of Australasia". But given the decisive vote in Australia's referendum of 1999 to stick with the constitutional monarchy, the republic would need fresh wind in its sails to be an affirmative, and not a negative or divisive, factor in trans-Tasman relations.

So this leaves the debates about New Zealand that constituted a sub-text of the reflections on the centenary of Australia's federation in 2001 and thereafter. To mark that event, Professor Catley published an article in *Quadrant*: "Will Australia and New Zealand Unite?"²². In an editorial on the subject, Padraic McGuinness, the editor of *Quadrant*, returned to a long-time theme of his. He describes the "unfinished business" of Australia's relationship with New Zealand²³. Warming to his theme, and displaying the correctly incorrect political language for which he is justly famous, the editor urged the furthering of the idea of a common currency that was advanced as early as 1989 by Sir Geoffrey Palmer. He said that "even the old-fashioned feminist 'progressive'" who is the present Prime Minister of New Zealand "was sufficiently mugged

²² *Quadrant*, January-February 2001, 28.

²³ "Federation-100 Years and More" in *Quadrant*, January-February 2001, 2 at 4.

by reality after a visit to an international financial meeting to become an advocate of a currency union".

I was asked to talk of how Australians see New Zealand. Well, Mr McGuinness sees it thus²⁴:

"While some Australians might feel inclined to allow New Zealand to sink, the truth is that we should not allow this to happen in either economic or military matters. If we are going to pay for New Zealand's defence, at least we should be able to tax them for it. The long white cloud cuckooland is not invulnerable just because it is a long way from the rest of the world, and it has regional interests which need military backup".

Lamenting the brain-drain from New Zealand to Australia and from both countries to the United States and to multi-national corporations overseas, McGuinness plumps for the solution that I urged on the dubious Robert Muldoon twenty years earlier²⁵:

"The best solution is to move towards political union - with New Zealand entering the Australian federation as either one or two states ... While there are many dissimilarities between the Australian and New Zealand situation, especially with respect to indigenous peoples, these are not insuperable. It is likely that the New Zealand situation will become so critical in the early years of this century that support for political union will rise rapidly".

²⁴ *Loc cit.*

²⁵ *Ibid.*

So far, Padraic McGuinness's prediction has not been supported by polls on either side of the Tasman. As the article by Bob Catley in the same issue of *Quadrant* makes clear, there has been little recent debate about political union in either country. The recent opinion polls show a majority for full economic union as well as strong support for defence union. However, only about a quarter of Australians and a quarter of New Zealanders appear to favour political union²⁶. The last national politician in Australia to make a large issue of New Zealand was Dr John Hewson in 1993. He liked the more radical New Zealand liberal economic model of that time. He was always prepared to think outside the square. Yet a fair reading of Professor Catley's analysis suggests that Prime Minister Clark is right in her estimation of the chances of full political union²⁷:

"I don't favour it myself and I don't think it's going to happen".

THE ANZAC CENTENARY - A CHALLENGE

The problems in the path of full constitutional union seem larger to me now than they did twenty years ago and than they apparently do to Mr McGuinness. Top of the list would be the special fears felt by the

²⁶ In New Zealand 26% in August 1999; in Australia 24.1% in 1989. See Catley, above no 20 at 29, 31.

²⁷ H Clark cited "In Search of a Nation's Soul", *Time*, 14 August 2000, 30 at 31. See also *Australian Financial Review*, 25 May 2000, 19.

Maori in New Zealand that they might lose the legal and majority democratic support for the *Treaty of Waitangi* that links them to the Crown of New Zealand. There are many other considerations. They include a century as a distinctive nation which has laid claim to a special place in the Pacific and the world. According to Professor Catley, a Coalition government in Australia might be suspicious of the social values that, he claims, lie deep in the New Zealand psyche. And a Labour-led government in New Zealand might not want to imperil the peculiar New Zealand experiments in social, monetary and fiscal policies by absorbing them into the larger Australian Commonwealth. Add to this differing views about international relations and potential problems over a flag, an anthem and national sporting colours and the prospect of common nationhood seems as far away as ever²⁸.

Despite these obstacles Catley thinks, alike with Padraic McGuinness, that "the basis exists for the mobilisation of a strong coalition of interests in New Zealand in favour of integration with Australia". But what form of "integration"? He ascribes this potential coalition to the economic and social changes made in New Zealand in the last two decades which no political party has yet tried to mobilise.

So does the lingering question still remain in the air? Or should we put it aside forever and concentrate on more urgent and achievable

²⁸ Catley, above n 10, 34.

things - tax reform, enhancing CER, defence cooperation, a common money unit and so on? Even possibly a common passport?

An anniversary is fast approaching that gives both our nations the occasion and the opportunity to bring this issue out of the shadows and into the full glare of proper civic debate. The world has changed enormously in a hundred years, even in twenty years since I began contributing to this dialogue. Symbolically we are meeting on the fiftieth anniversary of the discovery of the double helix and DNA by Watson and Crick. Like it or not, we now live not just with "mates" across the Tasman but with the closely integrated world of the human genome, the Internet, lasers and expanding computer power. Ours is the world of global trade, global law and regional groupings. But it is also the world of global terrorism, religious fundamentalism, weapons of mass destruction, poverty, AIDS, malaria, water scarcity, refugee flows and volatile terms of trade.

Amidst these forces of good and ill, our two separate countries plod along as siblings normally do. With benign feelings but general indifference about each other, at least until a crisis strikes. Here we are, two states left-over from the era of British settler hegemony. No longer are we defended by the Royal Navy, sustained by Empire preference, strengthened by confident feelings of racial superiority. To speak bluntly, we are sometimes seen by outsiders as geographical and geopolitical anachronisms searching for a way to make our place in the world seem more natural and therefore more safe and secure. Habit,

emotion and frozen indecision suggest that we will just continue to drift along in this way. Rationality, mutual advantage and long term safety for our people suggest that, in some way, we should take our closer economic relations a step further in the logical direction to which CER points. It need not be political union. But it should be something more than economic. The founders of the American Republic were sufficiently imaginative to conceive and spell out the federal idea of government. It was then a real innovation. Since, it has attracted many copies. In Australasia we may need, in very different global and national times, to be equally imaginative and constitutionally inventive. But have we the will, the talent and the occasion to do so?

The coming centenary of ANZAC in 2015 provides New Zealanders and Australians with an inevitable opportunity and challenge to refocus our attention on these questions. At every level there should be an engagement between politicians, officials, academics and thinkers, artists, sporting teams and other citizens. A trans-Tasman Council might be established to consider the future of our relationship beyond the centennial of ANZAC and beyond CER. Twelve years before Australian federation in 1901, achieved after the American model of that time, the political miracle that the Australian Commonwealth represented seemed impossible except to the most foolhardy. Yet it came about. Political federation across the Tasman may not be feasible - now or ever. Yet something new, imaginative and different may be. What that something is we can see but through a glass darkly. At the very least, we should be thinking about it and doing so in an organised,

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sympathetic and mutually respectful way. And our motto should be:
"Economics is good; but it is not enough".