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Reconstituting the Constitution

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When it comes to committee hearings, some have attracted a wider range of submissions than others. The New Zealand-Singapore CEP agreement attracted 145 submissions. However, over a hundred of these were standard form letters produced by the anti-agreement campaign (one submission also had another 190 signed letters attached). Over the remaining 30 or so submissions, opinion was largely divided on the agreement with business groups and ACT in favour and the Green Party, unions and other civil society groups against.⁶⁰ The Committee report noted the content of these submissions but finally concluded that the benefits of the Treaty outweighed its potential costs. Since then, (with the exception of the particularly high-profile New Zealand-China FTA) interest has waned somewhat.⁶¹

Regardless of the level of critical input to committee hearings, though, the outcome has always ultimately been full acceptance of the government's position. It is possible that the Committee feels intimidated by the fact that important international relationships have already been established and is therefore unwilling to push MFAT officials to revisit negotiations. However the Green and Alliance parties were willing to press their dissent over the New Zealand-Singapore CEP agreement, despite the fact that the Alliance Party was a coalition partner in the Labour government and the Green Party has continued to register minority objections to all of New Zealand's preferential trade agreements.

A more convincing explanation is that:

the majority of the New Zealand parliament understands New Zealand to be part of a globalised, rather than protectionist world: the predominant view is that, with its non-subsidised agricultural and manufacturing sectors . . . the country needs free trade and bilateral and multilateral aid agreements.⁶²

In other words, the pro-liberalisation consensus appears to be far more broad-based than simply a pre-occupation of the executive. Civil society's critical input to committee hearings can only have a political impact if there are enough committee representatives to take civil society views seriously and exert pressure to ensure that they are converted into meaningful political opposition to MFAT's negotiating practice. That kind of political opposition, in turn, is only likely if concerns about trade policy can be tied into an alternative vision of economic policy for New Zealand that is clearly hampered by the kinds of provision included in current trade agreements. One can imagine civil society pressure defeating a single aspect of a trade treaty (for example, retaining or enhancing government scrutiny over land acquisition by foreigners). A whole-scale change in economic philosophy, though, would require a larger political movement connected up with one of the major political parties.

⁶⁰ Hoadley (2003).

⁶¹ The extraordinarily wide-ranging TPP treaty only received three submissions. The China agreement received 54 submissions: 27 opposing the agreement, 12 neutral but raising issues and 15 in favour.

⁶² McLeay and Uhr (2006).

New Zealand's enthusiasm for signing free trade agreements, then, has multiple sources. As in many countries in the world, negotiating staff tend to be trade enthusiasts. MFAT has far more resources at its disposal to gather information supporting its negotiating preferences than other actors on the New Zealand have for gathering counter-arguments. The all or nothing choice faced by committees reviewing these agreements at the post-negotiation stage has helped to encourage a discourse around them that is polarised between pro and anti-trade positions, without encouraging scrutiny of the detailed provisions at stake. The length and technical nature of the documents concerned make detailed public critique unlikely, without the assistance of some active mobilisation by civil society groups and may even be intimidating to those sitting on committee. The major political parties in New Zealand certainly appear to have formed a consensus that it is politically appropriate to support rather than challenge these kinds of agreements.

Nonetheless, that does not mean that committee hearings are irrelevant. From the tone of [Sect. 18.2](#) of this paper, it may be clear that I personally see the current policy consensus as unfortunate. Political change does not come from nowhere; it comes from a process of debate in which consensus is gradually changed in response to political pressure and changing economic conditions. Committee hearings do provide an important public forum in which the arguments can be heard and pressed. As such, enhancing the committee process could help to provide a space in which to start changing opinion over time.

The most problematic aspects of the current process are that scrutiny and consultation primarily take place *after* agreements have been negotiated and that notice periods for committee submissions are very short. Both aspects of the process tend to enhance the impact of executive dominance, rather than offset it. Once a deal has been agreed, parliamentary committees are faced with a sharp choice of deal or no deal, rather than having space to shape the kind of deal that they might wish to see. The less risky option is to agree to the deal that has been struck, placing the burden of proof squarely with the critics. Meanwhile, the short time-scale for consultations and the limited resources available to civil society groups combine to undermine critical groups' ability to draw together the evidence necessary to provide appropriate criticism of the problematic aspects of an agreement.

The process could be significantly improved by commissioning well-resourced alternative NIA reports at a relatively early stage of the negotiations. One could imagine a process where, following early meetings between negotiating parties, a moderately trade sceptic academic was given access to negotiating texts and a briefing on the range of likely final outcomes, together with a reasonable budget to research some of the potential downsides of the agreement. The result would be an authoritative document of alternative views, which the committee might feel more obliged to take seriously. An early committee hearing could then be held to provide feedback to MFAT negotiators about national negotiating priorities. This meeting could provide a focus for civil society groups to organise campaigns on the issues prior to a second final meeting at the ratification / implementing legislation stage.

Even so, civil society groups would face a tough challenge to alter the current political consensus around economic policy. Over the past three decades,

politicians have done a good job of steering debate into a somewhat simplistic for or against free trade dichotomy in which critics of trade are naïve idealists who are more concerned with distribution than with growth. The challenge for critical civil society groups is to change the terms of debate. Critics of trade agreements need to show that their position can be a pro-growth one; that the new “trade” agreements not only have regressive distributional consequences but also damage long-term growth in an economy dominated by primary commodity production and tourism. In particular, they need to emphasise that these new agreements are investment agreements, rather than trade agreements, and that more foreign capital is not what New Zealand needs, given its capital account position. They need to articulate a pro-active position that identifies policies that could benefit the New Zealand economy but that will be prevented by specific provisions in the kinds of agreements MFAT is currently negotiating. That would require engaging the public interest in complex technical issues whose impact on their lives is significant but indirect and difficult to discern. Even then, public consensus would need to be robust enough to challenge the structural incentives favouring executive dominance that I identified in [Sect. 18.3](#) of this chapter. It is a difficult task but one that must be attempted if New Zealanders are to get out of a situation in which the majority work some of the longest hours in the OECD for well-below average wages, while a narrow elite accrue an increasing proportion of the national wealth. These brute facts would seem to provide some political incentives to look for an alternative approach to economic policy.

18.5 Conclusions

Whilst public debate and protest about globalisation may have waned, New Zealand continues to expand the extent of its international economic obligations in ways that significantly constrain future policy options. International literature has tended to suggest that executive dominance is an important driver of globalising economic agreements. In New Zealand, though, if this is a problem it does not seem to be one driven by constitutional relationships that exclude the legislature from deliberation of international economic agreements. The new arrangements are not perfect but any lack of criticism appears to be driven more by the overall political environment and the political parties’ comfort with international obligations than by any institutional restrictions on participation.

Some of the more informal processes that are thought to shape executive influence may well be operating. It may be easier for the executive to access technical resources and data produced by champions of international liberalisation than it is for Committee members to access creative alternative views of economic policy-making. However, it is difficult to see how institutional arrangements to alter the treaty scrutiny process in New Zealand could alter this situation. If New Zealand is too enthusiastic about signing up to liberalising international treaties, the

government will only be restrained when civil society has been won over to different perspectives on appropriate economic management.

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Introduction to Part 8

The Trans-Tasman Relationship

Petra Butler

After discussing the general influence of international law on New Zealand in session 7 session 8 takes a closer look at the relationship between Australia and New Zealand. New Zealand's identity has been shaped by its interactions with other nation states, particularly Australia. Being often seen as Australia's little siblings or its 8th state New Zealand has in fact developed legally as well as culturally very different from Australia. That is not to say that there are considerable similarities in the law but also historically and socially: starting with both having been British colonies. Unsurprisingly, all discussants make the Constitution Act 1901 their starting point.

As Colin James points out, Australia and New Zealand are in many ways similar but also in many ways different which he explores in more detail in his paper. Though Australia and New Zealand are unlikely to federate or confederate in the next 20 years, they have been drawing closer together in a range of ways. He points out that the re-meshing of the two societies and economies more recently has revived talk on both sides of the Tasman of federation or some other form of constitutional or quasi-constitutional reconnection, as in a confederation or by way of a proliferation of supranational joint agencies. James points out that coincidental with the re-meshing has been a differentiation. The relationship, in his view, is both *foreign* and *family*.

Philippa Mein Smith lists as the main points of distinction: the matter of a written or unwritten constitution and defence policy while cooperation exists in trade, ideas exchange and at high political levels. She advances the thesis that with the realignment of global power relations, New Zealand would do well to maintain its separate status while at the same time recognising its complementarity with Australia.

Paul O'Sullivan suggests that the relationship could take the form similar to the relationship between the Nordic states or the Benelux states. Differing national sentiments, economic reasons and political personalities all played their part in New Zealand's decision not to become Australia's seventh state. Despite this, the two countries have maintained a dynamic relationship throughout the twentieth century into the present day.

Chapter 19

Waltzing Matilda (or Not): New Zealand's Constitutional Relationship With Australia

Colin James

New Zealand was for a long time attached to Australia or, rather, was under the sea next to Australian Gondwanaland. It was briefly part of Australia when incorporated in the colony of New South Wales before the Treaty of Waitangi made it a separate colony. It chose to stay out of Australia when the continental colonies federated in 1900 but under section 6 was designated a colony of the Commonwealth of Australia and could therefore, at least in theory, choose to join as a state (provided section 6 is not amended to exclude New Zealand).

Federation was off the agenda through the twentieth century as the two emerging and then independent countries pursued separate, even if often parallel, agendas. The relationship at times resembled a triangle, with a thin line between them and two thick lines from each to Britain. This began slowly to change from the mid-1960s as the two economies evolved, as jet aircraft made travel between the two countries once again as easy as within them, as it had been before steam travel, and then in the 1970s as Britain contracted into Europe.

The re-meshing of the two societies and economies has revived talk on both sides of the Tasman of federation or some other form of constitutional or quasi-constitutional reconnection, as in a confederation (perhaps involving also some South Pacific countries) or by way of a proliferation of supranational joint agencies.

But coincidental with the re-meshing has been a differentiation. The relationship is both *foreign* and *family*.

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Many factors make us *family*:

History: The two countries share a British heritage, which, so far as it directly relates to the constitution, includes a monarch, representative democracy with an executive accountable to Parliament, the common law and independent courts.

Geography: Australia borders, and New Zealand is in, the south-west Pacific. They are major players in the South Pacific Forum. Both are on the periphery of Asia and within the emerging Chinese economic and political sphere of influence.

Demography: Both have (diminishing) majority ethnic-European populations and rising ethnic-Asian minorities.

Colonisation and Empire: Both were colonised by Britain. Colonists brought with them ideas and ideals of progress, social mobility and enlightenment. Australia's beginnings as a penal colony are often cited as a trans-Tasman difference but many convicts came to New Zealand after release. Both colonies initially suppressed their indigenous peoples, though in different ways. Both were long part of the British Empire and members of the "old" – that is, white – Commonwealth, successor to the Empire.

Society: Familial links have multiplied since the advent of cheaper, more convenient transport across the Tasman. Half a million Australians were born in New Zealand, large numbers of Māori among them.

Culture: As a result of what they share in history, demography and social/familial linkages, the two peoples share a great deal in the fine arts, popular arts and day-to-day custom and language.

Economy: The two economies are deeply enmeshed and are set to become more enmeshed, at least over the short to medium term (5–10 years), through the single economic market (SEM) process designed to reduce differences in the business operating environments of the two countries. This is not just a factor of globalisation: the speed and depth of the meshing has been much greater than from globalisation alone.

Security: Neither country could defend its territory against a determined, large aggressor. Both may face difficult choices in the transition of economic, soft and hard power in Asia from United States dominance to a shared influence in which China will play a larger and probably (say, by 2050) eventually dominant role.

Political and Administrative: In a wide range of portfolio areas New Zealand ministers (and officials) sit in Council of Australian Governments (COAG) meetings of the federal and state ministers (and officials) and these are occasionally held in New Zealand. New Zealand officials are at times involved in developing federal-state policy.¹ At relatively low levels in the bureaucracies there is

¹ One example is in the development of uniform consumer law to replace individual states' laws.

pick-up-the-phone contact between Wellington and Canberra and some state capitals. A “work programme” of 20 items was agreed between the two Prime Ministers in March 2009 and a joint officials trans-Tasman outcomes implementation group oversees and periodically reports to the governments on progress. Overarching oversight is by the two Prime Minister's departments and detailed oversight is by the Treasury in Australia and the Ministry of Economic Development in New Zealand. A protocol, initially signed in 2006 and updated in 2010,² requires regulators and officials responsible for the development of policy to cooperate “to ensure opportunities for deeper business integration and commercial benefits are maximised” and to inform and consult the other country about any new initiatives and resolve impediments discovered in existing law. There is cooperation between the courts on civil matters, subpoenas and criminal matters arising from competition and securities laws and also between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission and between the Australian Securities and Investments Commission and the New Zealand Securities Commission. There is one joint technical agency, the Food Standards Authority which oversees food safety in each country; a joint Trans-Tasman Therapeutic Products Authority was agreed in 2007 between the two governments but blocked in the New Zealand Parliament. There is very extensive mutual recognition of standards and qualifications. These developments have constitutional overtones in that they are voluntary diminutions of sovereignty or separate jurisdiction.

These shared factors present an argument for political union: while *de jure* New Zealand remains sovereign, *de facto* that sovereignty is progressively attenuated. Australians often puzzle that New Zealand stays separate. New Zealanders generally discount union, though recent polls suggest that attitude may be softening: 24% supported union in a poll published in March 2010 and 41% thought it “worth debating”. (Of Australians, 37% supported union and only 52% opposed it, versus 71% of New Zealanders.)³

Nevertheless, there are many factors that keep the two countries *foreign* to each other.

Geology, Flora and Fauna and Climate: New Zealanders and Australians are to some extent shaped by their very different physical environments and climates. One factor is that Australia's geology has bequeathed it vast quantities of readily extractable minerals which enrich Australians but benefit New Zealanders only indirectly through Australian investment in New Zealand and Australians' capacity to buy New Zealand goods and services (or directly, of course, if New Zealanders emigrate to Australia). New Zealand has rain and productive soils lacking in much of Australia. Australia has more sun.

² Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on the Coordination of Business Law, 2 July 2010.

³ *New Zealand Herald*, 13 and 15 March 2010.

History: Human habitation in Australia preceded that in New Zealand by 40,000-plus years. The customs, cultures and economic and social organisation of the two countries' original inhabitants are profoundly different.

Geography: New Zealand is *in* the Pacific. Australia is on the Pacific's periphery. Australia is close by south-east Asia and a target for people-smugglers. New Zealand is distant from Asia.

Asymmetry: Australia has five times more people, a sevenfold bigger economy and a landmass 29 times bigger than New Zealand. Australians know Australia is bigger and often treat New Zealanders as diminutive. Paul Kelly's book⁴ of his 2001 television series on the centenary of federation mentioned New Zealand a total of seven times, three of those in connection with Gallipoli and all seven just fleeting mentions, some of them no more than asides, one a footnote. He did not mention New Zealand in the context of ANZUS and did not mention CER at all. To ignore Australia in a 100-year history of New Zealand would be to leave too much of the history unwritten.

Demography: New Zealand's Māori and general Polynesian population is large and increasingly influences custom, day-to-day culture and high culture and political custom and process and, as owners of tribal assets and members (or not) of the workforce, the economy. New Zealand is increasingly becoming a Pacific nation in ways that are not readily comprehensible to Australians. New Zealand is *of* the Pacific. Australia is a self-contained continent: Australia is *of* Australia.

The Treaty of Waitangi: Iwi would be likely to reject anything closer than confederation on the ground that it would, or at least could, compromise their gains and position under the Treaty of Waitangi and the special consideration of indigenous claims and rights that the Treaty has injected into New Zealand's protocols, conventions, politics and administration.

Security: New Zealand's distance from tyranny, coupled with its small size and recognition that it cannot defend its territory and its exclusive economic zone, has given it a different, and less excitable, perspective on security issues, one which has for 25 years preferred multilateral institutions to Australia's strict alliance with the United States. An anti-nuclear stance is unthinkable to all but a tiny minority of Australians but is now embedded in most New Zealanders' concept of the national brand. This perspective might change if the security intelligence John Key has said he has been given that people-smugglers will target New Zealand proves correct but that is conjecture at this point.

Global Affairs: New Zealand has distinct needs in global institutions and negotiations which can be fully prosecuted only through direct representation. Climate change negotiations are an example: it is highly unlikely Australia could

⁴ Kelly (2001).