

Caroline Morris · Jonathan Boston
Petra Butler *Editors*

Reconstituting the Constitution

 Springer

relatively small, creating what Colin James refers to as an asymmetry of size and power.¹⁴ Any move to reconstitute a “modern Australian federation”¹⁵ or to abolish the states would have corresponding potential to rebalance relations and Tasman futures.

20.3.1 A Written Constitution (Australia) Vs Unwritten Constitution (New Zealand)

New Zealand could become Australia’s seventh state without a change to the Australian constitution for two reasons. First, New Zealand is named in the preamble to the Commonwealth of Australia Constitution Act, although not as an original state. Second, the Australian constitution specifies that the federal Parliament may admit or establish new states. Without a written constitution, the New Zealand Parliament could vote to join Australia.¹⁶ That is, New Zealand could join Australia under the existing Australian constitution if the federal Government and New Zealand Government agreed. The catch is that New Zealand would have to join by Australian rules.

Given that New Zealanders decided against political union in 1901, the ebb and flow of the Tasman relationship since then suggests there is little likelihood that New Zealand will join either the existing Australia or a reconstituted Australia. Yet Australia and New Zealand are more integrated now than at any other time in their history. For this reason Australasia may regenerate in some form. In the late 1890s, another time of integration, New Zealand was doing better economically than the Australian colonies. Now it is doing worse. This explains why a quarter of people surveyed in a recent poll favoured another look at the question of becoming an Australian state and 41% thought the idea was worth debating.¹⁷ But sentiment is still likely to preclude political union because New Zealanders are unlikely to sacrifice their right to self-government and independence unless another global redistribution of power or apocalyptic event shatters that independence.

The history of the trans-Tasman relationship shows that debates over bicameral versus unicameral Parliaments,¹⁸ the presence or absence of a Bill of Rights Act, different electoral systems and – above all – the Treaty of Waitangi will only have constitutional implications if New Zealand contemplates some sort of federation or confederation with Australia. Should that be the case, the Treaty of Waitangi may

¹⁴ James (2006).

¹⁵ As suggested by the Rudd government’s Australia 2020 Summit in 2008.

¹⁶ Craig (1993).

¹⁷ UMR Poll, March 2010.

¹⁸ Queensland is the exception in Australia.

ignite dispute. The Treaty is a fundamental point of difference between the countries because the Treaty partnership, however flawed, gave Māori greater political potential compared to Aboriginal people who were subjected to state policies of control long after federation. Settler-indigenous relations became part of New Zealand's international identity by the 1890s even though the Treaty disappeared from public consciousness.¹⁹ Yet indigenous relations do not historically form part of the core business of the trans-Tasman relationship because they are regarded as domestic matters.

20.3.2 *Defending the Realm*

That New Zealand is a nation state shows most clearly in the defence and security relationship. Unlike New Zealand, Australia aspires to middle power status. In the Australian view defence is the emotional cornerstone of the relationship; we are ANZACs together in ANZAC spirit. Yet defence and security is an area of Tasman divergence since 1901 and the passing of Australia's 1903 Defence Act. Australia established its own navy whereas New Zealand contributed a ship to the British navy early in the twentieth century; in World War I all the Australian ANZACs were volunteers whereas New Zealand sent volunteers and conscripts; divergent responses to the Pacific War in World War II drew heated comments from Australian Prime Minister John Curtin. Yet the ANZAC partners signed the ANZAC (Canberra) Pact in 1944 – at Curtin's urging – and the Anzus alliance with the United States in 1951. Divergence in defence policy peaked during the Anzus crisis and nuclear ships debate of 1985–1986 over relations with the United States, which are of first importance to Australia, and loomed again during the second Iraq war in 2003. Yet the partners have conducted joint ANZAC peacekeeping operations in the Pacific since 1997, enriching ANZAC links. The pattern in the security relationship is together and apart over time though in the Pacific probably neither would like to act without the other.²⁰

The key word in trans-Tasman defence and security relations is “inter-operability”, that is, complementarities in force structure and behaviour. New Zealand has a niche defence force yet politically cannot be seen to tailor that niche to fit the defence of the Australian continent, the more so since the anti-nuclear policy that marked the end of New Zealand's Cold War in the 1980s has become expressive of national identity. Given this paradox, how can we expect New Zealand as a nation state to factor relations with Australia into constitutional arrangements?

¹⁹ In *Wi Parata v Bishop of Wellington* [1877] 3 NZ Jur (NS) 72, Justice Prendergast declared the Treaty a “simple nullity”.

²⁰ McMillan (2008).

20.4 Convergence: A (Loose) Confederation?

In actual fact New Zealand performs a double act, more akin to an Australian state, in other areas of state development, particularly those affecting everyday life. There are already signs of a loose confederation in Tasman political and economic relations. Constitutionally significant arrangements have developed within communities of interest that possess a history of links across the Tasman such as in consumer affairs, police, education, tourism and transport.

20.4.1 *Policy Transfer and Learning*

There is a history of policy transfer, learning and innovation across the Tasman and much knowledge sharing and copying to achieve cognitive shortcuts. The system of compulsory arbitration established between 1890 and 1914 and the ensuing male breadwinner model in labour and welfare policy characterised state development in both countries for much of the twentieth century. There was a similar pattern of policy convergence in the economic liberalisation era of the 1980s and 1990s. Convergence, however, did not equal uniformity. Living and working together did and does not mean doing everything together. The historical pattern is one of learning and variations on a theme.

New Zealand was able to secure formal ties of influence into the Commonwealth of Australia in the late twentieth century because of this history of policy transfer and learning. Most remarkable is New Zealand's participation in the Council of Australian Governments (COAG), established in 1992. Within COAG New Zealand behaves much like a seventh state by participating in COAG Ministerial Councils and associated committees (but not Premiers' Conferences) alongside the six Australian states and two territories. New Zealand is a member or observer on about half of the COAG Ministerial Councils. By having a voice – and in certain areas a vote – in COAG New Zealand performs a double act in Tasman relations, working within the Australian federal model to the extent that this advances the national interest. Here is evidence that New Zealand is already in a loose association – even confederation – with Australia.

New Zealand's involvement in COAG also shows how more than one option is possible. A joint institution to regulate food standards, Food Standards Australia and New Zealand, grew out of COAG. So did the Trans-Tasman Mutual Recognition Arrangement (TTMRA) in 1998. TTMRA developed from an earlier agreement between the Australian federal, state and territory governments but by stretching to New Zealand became more far-reaching than any other scheme for mutual recognition. The concept of "mutual recognition" offers a useful way to think about constitutional implications of this sisterly relationship as it signifies a "Tasman world" way of doing things that has developed from New Zealand's participation in COAG meetings as well as CER.

20.4.2 *From CER to SEM?*

Tasman relations have grown closer in the twenty-first century despite – or perhaps because of – the social welfare agreement of 2001 which restricted New Zealanders’ eligibility for welfare in Australia and an agreement to disagree on strategic policy. There has been a conscious effort at official levels since 2001 to develop networks and closer integration in diverse areas of the relationship, especially since 2003 when the Australian High Commissioner warned that relations were at a turning point. One champion of deeper business integration is the Australia-New Zealand Leadership Forum of political, business and academic leaders that has met annually since 2004 to advance the agenda of a Single Economic Market (SEM) and of working together to maximise collaborative advantage. Consequently relations grew closer between 2003 and 2009, particularly in business and business law. The degree of integration is uneven, though it has accelerated in the past 5 years. There were moves towards legal integration in 2010 with the creation of a trans-Tasman judicial area under Trans-Tasman Proceedings Acts passed in both Parliaments. But there is little enthusiasm to enmesh taxation regimes. Whether CER will lead to a SEM remains to be seen; in the 1980s even Robert Muldoon predicted one.

Contingency and timing matter for confluence just as personalities do. Moments of alignment can pass quickly. Contrast the climate in August 2009 when John Key brought six ministers to the first trans-Tasman cabinet meeting while attending the Australia-New Zealand Leadership Forum in Sydney – this meeting of ministers could not be called a “joint” Cabinet meeting because that would have been unconstitutional²¹ – and the context 1 year later when Australia’s federal election resulted in a hung Parliament followed by a minority Labor Government. Impressively, ministers signed the two governments’ revised Memorandum of Understanding on the Coordination of Business Law on 23 June 2010, the very day Kevin Rudd was toppled as prime minister. But the Leadership Forum scheduled for August 2010 was postponed until 2011 because of this turn in Australian politics. While keeping the relationship in good heart demands political effort, it does not take much to disrupt the balance necessary to drive momentum, whether for business integration or constitutional change.

20.5 Conclusion

In the book *Remaking the Tasman World* Peter Hempenstall and I concluded with our dreaming for a common future in a new Australasia that would once again reach out to the Pacific.²² Whether the federal idea bridges the Tasman, or is overtaken,

²¹ I thank Chris Eichbaum, School of Government, Victoria University of Wellington, for this observation.

²² Hempenstall and Mein Smith (2008).

remains to be seen. Effectively the federal idea already does span the Tasman because, in practice, New Zealand performs as a nation state or Australian state depending on the issue.

Transforming relations with global superpowers pose broader questions for the future. In 1900, in the context of restructuring relations with Britain, then the global superpower, New Zealand chose to stay separate from the new Commonwealth of Australia. In 2010, global power is fast rebalancing from west to east, as seen in New Zealand's and Australia's trade statistics. The resurgence of China and India in the world will shape outcomes. When China eclipses Australia as New Zealand's number one trading partner will be a turning point in New Zealand history and in the trans-Tasman relationship.

The history of relations with global superpowers, however, suggests that now is a good time to be separate. This is especially so in relations with India, with whom New Zealand's geopolitical outlook is more aligned than is Australia's.

Equally this is a critical time to maintain trans-Tasman conversations, side by side, accepting that Australia and New Zealand are complementary. Formal representatives in each other's constitutional debates would both acknowledge and give symbolic effect to the already exceptional closeness in policy-making by the Tasman neighbours.

References

- Australian Bureau of Statistics (2010) Australian social trends September 2010: New Zealanders in Australia. Catalogue No. 4102.0. www.abs.gov.au/socialtrends
- Craig J (1993) A United States of Australasia? *Aust J Polit Sci* 28:38–53
- Curzon-Siggers W (1901) Royal commission on federation, evidence. *AJHRs* A–4
- Grimshaw P (2002) Federation as a turning point in Australian history. *Aust Hist Stud* 118 (January):25–41
- Hall Sir J (1890) Record of the proceedings and debates of the Australasian federation conference
- Hamer P (2007) Māori in Australia: Ngā Māori i te Ao Moemoeā. Te Puni Kokiri, Wellington
- Hempenstall P, Mein Smith P (2008) Australasia dreaming. In: Mein Smith P, Hempenstall P, Goldfinch S, Remaking the Tasman world. Canterbury University Press, Christchurch, ch. 10
- Hirst J (2000) The sentimental nation: the making of the Australian commonwealth. Oxford University Press, Melbourne
- James C (2006) Foreign and family: the Australian connection – sensible sovereignty or niggling nationalism? In: Lynch B (ed) *New Zealand and the world: the major foreign policy issues, 2005–2010*. New Zealand Institute of International Affairs, Wellington, pp 29–37
- McMillan S (2008) Defending the realm. In: Mein Smith P, Hempenstall P, Goldfinch S, Remaking the Tasman world. Canterbury University Press, Christchurch, ch. 9
- Mein Smith P (1999) New Zealand. In: Irving H (ed) *The centenary companion to Australian federation*. Cambridge University Press, Melbourne, pp 400–405
- Mein Smith P (2003) New Zealand federation commissioners in Australia: one past, two historiographies. *Aust Hist Stud* 122(October):305–325
- Mein Smith P (2005) *A concise history of New Zealand*. Cambridge University Press, Cambridge/Melbourne

- Mein Smith P (2008) Trading places. In: Mein Smith P, Hemenstall P, Goldfinch S. Remaking the Tasman world. Canterbury University Press, Christchurch, ch. 5
- Mein Smith P, Hemenstall P, Goldfinch S (2008) Remaking the Tasman World. Canterbury University Press, Christchurch
- Sinclair K (1986) A destiny apart: New Zealand's search for national identity. Allen and Unwin/Port Nicholson Press, Wellington

Chapter 21

The Trans-Tasman Relationship: Past, Present and Future

Paul O'Sullivan AO

21.1 Introduction

In terms of the trans-Tasman relationship, the *Reconstituting the Constitution* conference provided a good time for reflection – to take stock of the constitutional relations both within New Zealand, and between our two countries, which is the particular concern of this chapter. Accordingly, I do not propose to suggest how New Zealand might wish to rearrange its domestic constitutional arrangements, even if that may be required, as that is rightly the decision for New Zealanders to make. Instead, I intend to offer some personal observations about what Australia and New Zealand already do together, and also discuss some of the constitutional options that may present themselves in future.

Let me be clear, however – none of my comments are aimed at providing a prescription or programme for change. Any proposals for changes to New Zealand's status must, in my view, come from New Zealand. They are decisions for New Zealanders to make.

Australian High Commissioner to New Zealand. The remarks in this chapter are delivered in a personal capacity.

P. O'Sullivan AO

21.2 Historical Context

Much has been made of New Zealand's choice of "a destiny apart",¹ but as the Australasian colonies moved toward federation towards the end of the nineteenth century, it is important to note that this view was not just confined to New Zealand.

Fiji was also envisaged as a member of a federation in the early stages of the process, but ultimately did not join. And in Western Australia, separated not by sea from the Eastern states but by a formidable physical barrier in the form of the Nullarbor Desert, there was for a long time strong opposition to joining in federation with the other Eastern colonies. The decision ultimately to join the federation was a close one. Even after federation, a secessionist movement endured, and called for Western Australia to withdraw from the federation. In a subsequent referendum in 1933, voters endorsed secession but were ultimately foiled when the bid lapsed.

Across New Zealand political parties, there was opposition to federation with Australia. As an example of the prevailing view, there is the often-quoted statement from Sir John Hall to the Australasian Federation Conference in 1890:

Nature has made 1200 impediments to the inclusion of New Zealand in any such federation in the 1200 miles of stormy ocean which lie between us and our brethren in Australia.²

But distance was not the only reason for New Zealand's reluctance to join Australia. Economic conditions had improved for New Zealand with refrigeration and the guaranteed market of the "mother country", Britain. Had it been a decade earlier, when the colony was in recession and Britain was not a viable market for New Zealand's major agricultural exports, the closer market of the other Australian colonies may well have been more attractive.

In fact, there is in a published collection from Victoria University of Wellington, *New Zealand as it Might have Been*,³ a scenario where New Zealand joined the federation and Western Australia did not. And the distance between Sydney and Perth is greater than between Sydney and Wellington.

21.3 The Bilateral Relationship Today

However, the distance between the countries and the reasons for not joining did not necessarily preclude strong ties between the new Commonwealth of Australia and New Zealand. As Philippa Mein Smith has pointed out, Sir John Hall also said in his

¹Noted New Zealand historian Sir Keith Sinclair published in 1986 *A Destiny Apart: New Zealand's Search for National Identity* (Sinclair 1986).

²Hall (1890).

³Levine (2006).

remarks that not joining the federation “does not prevent the existence of a community of interests between us.”⁴

The community of interests that Sir John Hall referred to has ebbed and flowed in the time since, but a century later, it is very strong.

Take a moment to consider the extent of our ties today. Australians and New Zealanders freely move between the two countries, for stays ranging from a day or two’s business trip to a holiday to permanent settlement on the other side of the Tasman. People readily move between career opportunities in both countries, as well as within the countries themselves. Australians and New Zealanders study in each other’s universities, New Zealand sporting teams play in Australian competitions, Australians provide the largest number of tourist visitors to New Zealand and there are strong business and governmental relations between our countries.

We cooperate abroad, from joint advocacy in the United Nations on issues of mutual concern to military deployments in the world’s troubled spots – including Afghanistan, Timor Leste and the Solomon Islands.

We have built up a series of agreements – allowing free travel, reciprocal healthcare, social security arrangements, mutual recognition of skills and portability of superannuation – that provide us with a solid framework of arrangements to build on in the future – that is, if both countries wish to.

The last 30 years have seen a renewed appreciation on both sides of the Tasman of the importance of each country to the other – joined by trade, tourism and strong people-to-people links.

With a large concentration of New Zealanders in Australia, it is no surprise that there are regular discussions and fierce debates over where New Zealand sits in relation to its neighbour. Australia is an obvious benchmark, and in the eyes of some, a place where the grass is greener on the other side of the Tasman – at least, metaphorically.

21.4 New Zealand’s Options

In terms of the trans-Tasman relationship, and where New Zealand might wish to take the relationship in future, there is a range of options.

The first could be termed the “this far and no further” option. It acknowledges the range of ties between the two countries as they are, but that is as far as it goes. This argument would place particular emphasis on the contention of legal experts who argue that the option in Australia’s Constitution for New Zealand to join the federation has long since expired.

⁴ Hall (1890).

The second is to continue developing closer relations in some particular areas of mutual interest. In a sense, this is already happening with the development of the Single Economic Market agenda, which is intended to harmonise regulations across both countries. Apart from harmonisation of regulations, other possibilities would include further removal of barriers to trans-Tasman travel and labour mobility.

Both Parliaments are continually ratifying agreements between the two countries. During 2010, the New Zealand Parliament passed legislation allowing the entry into force of a bilateral agreement on Court proceedings across the Tasman. This agreement enables court orders (in areas such as child custody and access) in one country to be enforced in the other, and reflects the increasing number of people moving between the two countries. Also, the bilateral agreement on superannuation portability in 2009 has been ratified by the New Zealand Parliament. This enables people moving from one country to consolidate their retirement savings when they reach the other. And in the private sector, we are seeing developments such as the collaboration between the institutes of chartered accountants in New Zealand and Australia to work towards the convergence of accounting standards.

A decisive step along the continuum would be the implementation of a common outer border and a common inner border for Australia and New Zealand. This would streamline border control across both countries, and help to make trans-Tasman travel even easier still.

21.5 Join the Federation?

The third option, that has been the subject of public debate in recent months in New Zealand, is whether the country should formally join Australia. Television New Zealand undertook a poll earlier this year of both Australians and New Zealanders on this question. The results indicated that on both sides of the Tasman, support for New Zealand joining Australia was a minority view.

However, as a hypothetical, let us take a look at what might happen if New Zealand joined Australia. Would it keep its sporting teams? Most likely. There is ample precedent in football and rugby union for this – for example England, Scotland, Wales and Ireland. The Commonwealth Games would probably keep a separate New Zealand team, but what would happen for the Olympics is less clear. It might require a joint team, and this has been done before in 1908 and 1912, and as history notes, it did quite well. Or the International Olympic Committee might create an exemption to allow a separate New Zealand team, given its lengthy Olympic history.

New Zealand's Parliament would become another state Parliament, and its range of responsibilities would change accordingly. So far as foreign policy is concerned, I would note that there is already a significant overlap of values and interests that both countries bring to their conduct of foreign policy and which find their

expression in both our statements to the United Nations, and other regional and multilateral organisations and fora.

Just how influential would New Zealand be within an enlarged federation? Historians have written about how New Zealand shifted from being the third strongest voice of the Australasian colonies to a smaller and independent voice on the world stage following Australian Federation. In population terms, if New Zealand were to join the federation, it would be the third largest state, smaller than New South Wales and Victoria and just ahead of Queensland, Australia's fastest growing state. In effect, it would be resuming its historic place as an influential voice in deliberations with the Australian states. In a Federal Parliament, if it were allocated on the current population, New Zealand would receive 12 Senate seats and probably 30–35 House seats. But New Zealand could well divide and join as two states, which could mean an additional 12 Senate seats. So New Zealand has the potential to be a powerful and influential voice in the federation.

This contrasts with the experience of Newfoundland when it joined Canada, which is often mentioned as an example of a smaller country joining a larger federation. But three key points need to be made here – first, Newfoundland was broke, and New Zealand is clearly not, even if it lags behind Australia on wages and indicators such as GDP per capita; second, Newfoundland is much closer to continental Canada than New Zealand is to Australia; and third, Newfoundland was joining a confederal structure rather than a federal structure. In confederal structures, powers mostly remain with the provinces or states, rather than the federation. Also, with regard to Newfoundland, there was external pressure from Britain for Newfoundland to join Canada. That external influence or pressure simply does not exist in New Zealand's case. It is a much larger country in both size and population compared to Newfoundland.

A complex, but not insurmountable issue, would be the actual process of admission to the Australian federation. While it is true that the Constitution of Australia provides for the admission of new states, there would need to be negotiation over how New Zealand would be admitted, should it wish to be.

And any decision by New Zealand to join the Australian Federation would most likely stir up debate in Australia itself. There are a number of proposals – historic and contemporary – for new states in Australia. The most well known are New England in northern New South Wales, and a state in northern Queensland. In recent times, there have been calls to separate out the major cities (Sydney, Brisbane, Melbourne) from the regional areas. And in fact, during 2010 there were press reports of a proposal for a new state of North Queensland and a combination of most of the Northern Territory and a northern section of Western Australia to form Northwestern Australia.

Any serious expression of New Zealand interest in joining Australia could well provoke a debate in Australia about the form of the federation, particularly if New Zealand were to be added to it. The end result could be not just changes to the political map of Australia and New Zealand, but changes in the way government at different levels – local, state, federal – do business with each other and the people they represent.