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# Reconstituting the Constitution

 Springer

*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 book<sup>4</sup> 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

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<sup>4</sup> Kelly (2001).

or would have achieved as much to meet New Zealand's special needs in forestry, land-use change and animal methane as did New Zealand's active diplomacy on those issues, including leading some initiatives.<sup>5</sup> In trade negotiations, New Zealand has specific needs in agriculture and intellectual property which, if it was part of Australia, might not be met.

*Politics and Policy:* New Zealand's politics are materially different, with a much stronger indigenous rights element (in large part, due to the demographics) and a stronger environmentalist attitude that includes a peace dimension largely absent in Australia. There are large differences in tax, regulatory and social services policy settings and in the assumptions and political culture that lie behind them.

*Sovereignty:* At the political level federation or confederation would greatly diminish the authority of the New Zealand Prime Minister and cabinet, Parliament and courts. At the level of individual citizens, whatever polls say, popular refusal to be subject to Canberra would constrain even a federation-willing Prime Minister and Parliament. This applies also to a hybrid arrangement. One option might be a federation with special provisions making New Zealand a sort of super-state (on the Scottish model), that is a quasi-confederal federation; but even if New Zealand agreed, it is hard to see why the Australian states would.

*Diversity and Subsidiarity:* If in developed economies rising generations' expectations that goods and services are personally customised increasingly changes the nature of demand for "public" services, that shift will logically require more diversity in, and decentralisation of, government decision-making and delivery of those services – services that in the twentieth century were standardised and delivered by central authorities. This would take the two countries in the opposite direction from federation.

Nevertheless, none of these factors is a conclusive barrier to federation (or quasi-confederal federation). Even taken together, they are not an insuperable obstacle to closer formal ties if there was a political or national will.

Indeed, a deep and long world recession or serious interstate conflict in east Asia or between east and south Asia or between east Asia and the United States could force New Zealand into Australia or drive the two together. The spectre of Newfoundland's collapse into Canada hovers over the Tasman.

Even without such a dramatic event, some sort of union might gradually become more logical and thus more acceptable. Commonalities might come to outweigh separateness in the popular mind.

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<sup>5</sup> Though some initiatives are in the context of a so-far elusive global agreement.

*Among the commonalities might be:*

*SEM and Next Steps:* At some point the combination of the single economic market process, closer institutional cooperation between regulatory and judicial/quasi-judicial agencies and courts and development of joint agencies for technical matters (say, genetic modification, privacy and security in the digital age, medical ethics as nanotechnology, biogenetics and psychology merge) is likely to lead to discussion of matters which directly impinge on sovereignty. One such matter would be the closer alignment of tax systems and a common currency as ingredients in a single economy. Another would be a common border (tariffs, biosecurity measures, customs processes and visa and migrant policy). Such initiatives would further enmesh the two countries' economies and societies, perhaps near-inextricably, and that might in time create a demand for a uniform politics and constitution to reduce friction and duplication.

*Fiscal Equity:* If the westward flow of migrants continues through the next decade or two (that is, if the wage gap persists), New Zealand taxpayers and politicians may begin to ration social services, benefits and state superannuation to returning migrants because taxes they pay in Australia would not have been available to fund New Zealand services. An alternative might be to join Australia to gain a share in the fiscal fruits of the richer economy.

*Demography and Indigenous Rights:* If Māori (and Pasifika) continue to emigrate to Australia in large numbers, Australia's demographic mix may come to look somewhat more like New Zealand's. The likely continued influx of Asians in both countries would have a similar effect. And there will be pressure on both countries to provide jobs for young Melanesians, to relieve tensions and instability in Melanesian countries. Demography conceivably could thus diminish as perceived necessity for a distinct sovereignty in this country. This would be the more likely if after the settling of historical grievances under the Treaty of Waitangi is completed, policy toward Māori is driven under a general indigenous rights umbrella, which is closer to the Australian response (a response which over time is likely to gain more weight).

*Security:* A change in the security balance in east Asia might increase a perceived need for a common response; likewise, if there is instability in and between states in Asia resulting from water shortages, food shortages, resources shortages and climate change. This might in time drive much closer military and other cooperation and so reduce the difference of strategic perspective.

*Global Affairs:* The difference in size has resulted in Australia being included in some forums (notably the G20 gathering of 20 leading or representative economies), from which New Zealand is excluded. New Zealand has to rely on Australia to represent it at those forums and report back from them. Would Canberra's delegates better convey and represent New Zealand's interests if New Zealand was a state/super-state of Australia/Australasia?

Are these pressures and tendencies likely to lead to federation in the absence of a severe economic or security shock? They are most unlikely in the next 20 years. Even a version of confederation or an arrangement akin to the Scottish model within Britain are unlikely.

This is not just a matter of sovereignty sensitivities in New Zealand. Several barriers might arise even if New Zealand invoked section 6 and sought to federate. One or more states might object. The Australian Parliament might reject New Zealand's application under section 121 of the Constitution. The Australian government might choose to put it to a plebiscite: one way could be to put up a constitutional amendment, to be rejected or accepted, proposing to remove New Zealand from section 6. Under section 109 federal laws override inconsistent state laws and Australia might not be prepared to negotiate special exemptions from section 109 for some of New Zealand's distinctive laws, for example, those requiring special consultation with *iwi* (which section 51 (xxvi)<sup>6</sup> could be used to resolve) or the Civil Union Act [which might be difficult under section 51 (xxi)].<sup>7</sup> None of these are insuperable barriers but navigating them would require determination from New Zealand and goodwill in Canberra, state capitals and the populace

Nevertheless, the two countries are drawing closer and becoming much more closely intertwined and informally enmeshed, in social, cultural and economic interaction. Partly as a result of that but also as a result of conscious decisions and actions by politicians, government officials and tribunals and courts, the two governments are formally drawing closer. This has subtly modified the constitutional separateness to a degree near-unimaginable 30 years ago.

We are not back to 5 February 1840, as part of New South Wales. But neither are we quite the fully independent sovereign state of Westphalian inviolability we have thought we were for 40 years or so. Who really can be sure where we will be 30 years hence, on 5 February 2040?

## References

Kelly P (2001) 100 years. The Australian story. Allen and Unwin, Crows Nest

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<sup>6</sup>“The Parliament shall . . . have power to make laws . . . with respect to . . . The people of any race for whom it is deemed necessary to make special laws.”

<sup>7</sup>“The Parliament shall . . . have power to make laws . . . with respect to . . . marriage.”

# Chapter 20

## The Evolution of the Australia–New Zealand Relationship

Philippa Mein Smith

### 20.1 Introduction

We can only understand ourselves as a state and community if we understand how our history has related to others. New Zealand identities have formed in interaction with global powers – the United Kingdom and the United States – and Pacific neighbours, and above all with Australia. It is therefore pleasing that this conference on New Zealand’s constitutional arrangements gave space to the Australia–New Zealand relationship.

This relationship has been remarkably consistent over time because it comprises a web of diverse communities of interest built on a history of trans-Tasman traffic and experience. Close cooperation and sharing are enduring features despite fundamental contrasts in physical environment, climate and scale. Whether in terms of landscape, people, strategic place in the world or law and legal practice, it is useful to think of Australia and New Zealand as complementary.

It is a sisterly relationship, born of being Britannia’s daughters, whose dynamic depends first on internal influences – how people live and act as individuals, families and communities – and second on responses to global forces, which can ease or obstruct relations between the countries. The Tasman relationship altered dramatically with the constitution of Australia at the start of the twentieth century. It persisted in the face of hostile external forces when the world deglobalised from 1914 and grew closer after World War II. The relationship has strengthened with

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globalisation and political leadership since the 1960s to the extent that a new Australasia is emerging.<sup>1</sup>

First I will outline some main drivers of Tasman relations. Second I will consider constitutional implications of divergence and convergence in this sisterly relationship. My reading of historical trends is that New Zealand and Australia would, at minimum, mutually benefit from engaging in each other's debates about "reconstituting the constitution" to the extent of having formal representatives in each other's conversations. A deliberate getting together may not happen across the board but only in areas where there is already a long history of interactions, living together, working together and playing together.

## 20.2 Historical Drivers

### 20.2.1 *A Shared British History and Heritage*

James Cook launched Australia and New Zealand's shared history when he mapped New Zealand and the east coast of New South Wales on his first voyage in 1769–1770. He had with him the first chart titled "Australasie" depicting the segment of the imagined southern continent south of Asia. After Sydney was established as a convict settlement in 1788 "Australasia" became shorthand for the British possessions in the region.

Māori were right there at the start shaping New Zealand through their trans-Tasman dealings. Nga Puhī leaders chose the first New Zealand flag in 1834 so that they could trade with New South Wales. Constitutionally New Zealand was part of New South Wales when the Treaty of Waitangi was signed in 1840; New Zealand became a separate Crown Colony in 1841. The shift of power from tribes to settler governments from the 1860s coincided with the emergence of six Australian colonies across the Tasman. From the 1860s New Zealand came to be known as one of the seven colonies of Australasia, sharing a regional history within which the seven developed different histories of colonisation. Yet the idea of Australasia failed to unite the colonies. Instead the national concept of Australia – "a nation for a continent" triumphed with the establishment of the Commonwealth of Australia in 1901. This did not stop Tasman links continuing and flourishing across the twentieth century, as we will see.

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<sup>1</sup> On this "new Australasia", see Hempenstall and Mein Smith (2008).

### 20.2.2 *Sentiment*

Why the Australian colonies adopted a federal constitution historians now consider to be more a matter of sentiment than a business deal. Why New Zealand chose not to become Australia's seventh state is part of the same story.<sup>2</sup> New Zealanders harboured the same sentiments that drove Australians to federate: identity, status and a grander future. Racial attitudes coloured this sentiment. From an Australian perspective, the “crimson thread of kinship” – the British blood tie – ran through all seven colonies. But that was not enough to persuade New Zealanders to join the new Australia. For example Māori and women already had the vote in New Zealand when the Franchise Act 1902 gave Australia's white women a Commonwealth vote, but effectively denied the vote to Aboriginal people.<sup>3</sup> Federation might put New Zealand's state experiments at risk.<sup>4</sup> Attitudes that are now familiar, akin to the joke that Kiwi migrants to Australia raised the IQ of both countries, were already present. It was commonly believed that New Zealanders were a better type of settler and native. As a churchman explained, New Zealand was “an insular nation. Australia is a continental nation. The history of all races shows that continental races and insular races diverge further and further apart”.<sup>5</sup> Some saw Australia's tropical north as a threat to New Zealand's racial – and social – purity. New Zealanders endorsed the White Australia policy but wondered how could Australia be white when it included Queensland?<sup>6</sup>

The cartoon “How We See It” (1900, below) summarises the contemporary attitudes expressed about why New Zealand did not join Australia. Zealandia, Britannia's daughter, wears an indigenous cloak, distinguishing her from her sister “Federated Australia”, and holds hands with the “noble savage”, a Pacific Islander, with whom she might seek an alternative future. The impediment to closer sisterly relations is the ogre whose “arms bear chains”: Australia's legacy of convictism. But for the convict ogre, the cartoon suggests, New Zealand might have been able to teach Australia something about race relations. The attitudes exposed show how Australian federation consolidated national identity on both sides of the Tasman, strengthening views that New Zealand should not sacrifice her independence. The implication is that federation would require a community of sentiment and patriotic feeling with Australia. That did not exist in 1900 any more than it does today when contemplating constitutional arrangements.

<sup>2</sup> Hirst (2000). Cf Sinclair (1986).

<sup>3</sup> For further details see [http://www.aec.gov.au/voting/indigenous\\_vote/aborigin.htm](http://www.aec.gov.au/voting/indigenous_vote/aborigin.htm).

<sup>4</sup> Mein Smith (1999), Grimshaw (2002).

<sup>5</sup> Curzon-Siggers W (1901), A–4, p. 109.

<sup>6</sup> Mein Smith (2003).





#### HOW WE SEE IT

THE OGRE: "Come into these arms." NEW ZEALAND: "Nay sir, those arms bear chains."

The New South Wales Premier speaking at a Federal League meeting said that as the Colonies were on the eve of federation it was proper for Great Britain to defer linking the South Sea Islands to New Zealand. He also believed that the sentiment of the people of New Zealand would force that Government into the Australian Federation.

*New Zealand Graphic*, Auckland, Saturday, October 20, 1900. Vol. XXV. — No. XVI. Cartoonist: Scatz.

Source: Ref. J-040-002, Alexander Turnbull Library, Wellington

### 20.2.3 *Political Personalities*

Political personalities played key roles in determining how the relationship evolved. Personalities still enable and inhibit. One reason New Zealand stayed separate was because of Premier Richard Seddon's ego. The suitably named "King Dick" would not champion the federal cause when that meant being demoted to premier of an Australian state, especially one third in importance after New South Wales and Victoria. Carefully reading the public mood, he also judged that the

federal cause would not win him votes in the 1899 election. Yet he sought trade deals with Australia.

Personal relationships have always underpinned the trans-Tasman relationship. In the 1960s, faced with the British Empire's decline, deputy prime ministers and trade ministers "Black Jack" McEwen and Jack Marshall worked hard to achieve the New Zealand-Australia Free Trade Agreement (NAFTA). While not a free trade agreement (it added a schedule of freely traded goods to the traditional imperial preferences) NAFTA was the precursor of the Closer Economic Relations trade agreement (CER). Alarmed by Britain's bid to join the EEC, McEwen and Marshall resolved to collaborate to combat agricultural protectionism by Europe and the United States and to promote Australia's and New Zealand's economic development.<sup>7</sup> Similarly McEwen's successor Doug Anthony established an effective partnership with Robert Muldoon in negotiating the landmark Closer Economic Relations trade agreement between 1979 and 1982. Since 1901 circumstances and personalities in Australia rather than New Zealand have usually dictated the pace of developments. Witness Kevin Rudd's ousting as prime minister in 2010 and the Australian federal election's impact on the tempo of trans-Tasman inter-governmental relations.

#### **20.2.4 Economic Drivers**

New Zealand representative Sir John Hall is routinely quoted as telling the Australasian Federation Conference in 1890: "Nature has made 1,200 impediments to the inclusion of New Zealand in any such federation in the 1,200 miles of stormy ocean which lie between us and our brethren in Australia".<sup>8</sup> This selective quotation is misleading because it focuses on the impediments in the trans-Tasman relationship. It implies that distance precluded federation because Parliament needed to be close to the people. In reviewing constitutional arrangements we should be mindful of what Hall said next, which is usually not quoted. He added: "That does not prevent the existence of a community of interests between us." This is key because diverse communities of interest are what bind the Tasman relationship.

Economic relations are foremost among these myriad communities of interest. From a New Zealand perspective economic relations are the relationship's cornerstone. New Zealand sought reciprocity in Tasman trade relations since 1870, but because of external constraints this did not prove possible until the CER agreement came into effect in 1983. New Zealand tried in 1870 (stopped by Britain), 1895 (stalled by the federal movement) and 1906 (Seddon died).

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<sup>7</sup> Mein Smith (2008).

<sup>8</sup> Hall (1890), p. 175.

Australian–New Zealand trade agreements in 1922 and 1933 incorporated British preferential tariffs. So did NAFTA in 1965, though in the context of a transforming world economic climate, the British retreat from Asia and moves to join the EEC. NAFTA – however complex and farcically detailed – provided the platform of networks and relationships that made a new start possible under CER less than two decades later.<sup>9</sup>

Another driver is a history of incessant people movement across the Tasman Sea since the late eighteenth century, which underpins why New Zealanders expect free entry to Australia under the Trans-Tasman Travel Arrangement. Until the 1960s the flow of migrants was more from Australia to New Zealand. The big change came in the mid-1960s when the flow reversed and has been from New Zealand to Australia ever since. New Zealand migration to Australia experienced pronounced surges in the late 1970s (“Muldoonism”), late 1980s (“Rogernomics”), late 1990s to 2001 and the late 2000s (driven by an increasing gap in real earnings and employment).<sup>10</sup>

Constitutional as well as cultural and economic implications arise from the reality that such a high proportion of New Zealanders live in Australia. According to a report on Australian social trends, for every 100 New Zealanders in New Zealand in 2006 there were 15 New Zealand-born people living in Australia.<sup>11</sup> By 2009 New Zealand was the second largest single country contributor to Australia’s population of people born overseas.<sup>12</sup> For many more Australia is an extension of home because of visits to family, on holiday or business. Almost all Māori now have whanau across the Tasman. Whereas 1 in 50 Māori lived in Australia in 1966, that proportion rose to 1 in 6 or 7 by 2006.<sup>13</sup> An increasing number of our grandchildren, especially of Māori descent, will be born in Australia. These grandchildren and migrant parents are excluded from New Zealand’s nation state but not from Māoridom. If Māori have a special relationship to the constitution, how will the constitution be cognisant of “Mozzies” (Māori Australians)?

### 20.3 Divergence Since Australian Federation in 1901

The constitution of the Australian Commonwealth was a pivotal moment for New Zealand because that act fundamentally altered the dynamics of the trans-Tasman relationship. Australian federation made Australia large and New Zealand

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<sup>9</sup> Mein Smith (2008).

<sup>10</sup> Mein Smith et al. (2008), pp. 57–62. On “Muldoonism” and “Rogernomics”, see Mein Smith (2005), Chap. 9.

<sup>11</sup> Australian Bureau of Statistics (2010), p. 2.

<sup>12</sup> Australian Bureau of Statistics (2010), p. 1.

<sup>13</sup> Hamer (2007).

relatively small, creating what Colin James refers to as an asymmetry of size and power.<sup>14</sup> Any move to reconstitute a “modern Australian federation”<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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,<sup>18</sup> 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

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<sup>14</sup> James (2006).

<sup>15</sup> As suggested by the Rudd government’s Australia 2020 Summit in 2008.

<sup>16</sup> Craig (1993).

<sup>17</sup> UMR Poll, March 2010.

<sup>18</sup> Queensland is the exception in Australia.