ments from professional and community organisations and individuals will be taken into account by the Council in advising the Commonwealth Attorney-General whether the report should be used as a basis for law reform in the ACT and for consideration of uniform legislation by the Standing Committee of Attorneys-General.

court reforms. In New Zealand, coinciding with the report of the NSWLRC, was a forward-looking decision of the NZ Court of Appeal (*Auckland Star,* 29 June 1983). The court upheld a claim for a half share in a property owned by a deceased woman with whom the claimant had lived in a de facto relationship. The couple had lived together for nearly ten years. A purported will had left the entire property to the de facto husband but it was invalid because it was not witnessed. Nonetheless, the New Zealand court unanimously ruled in favour of the claimant, Edward Hayward. Sir Robin Cooke said that there might be a lingering sense that the law should refuse to recognise relationships between men and women as having any bearing on property rights, if they fell short of legal wedlock:

> But a function of the courts must be to develop common law and equity so as to reflect the reasonable dictates of social facts, not to frustrate them.

Perhaps if there were more judgments of this kind, there would be less need for law reform reports.

new new zealand?

I live much further away from Sydney than any of you people in Auckland do.

Paul Hasluck, 1967

c e r agreement. In March 1983, following the delay resulting from the Federal election and change of Australian Government, a new trade agreement was signed between Australia and New Zealand. Called the Closer Economic Relations Treaty (CER for short) the agreement contemplates a major increase in trans-Tasman trade. It foreshadows 'second generation' issues, including the need to provide neutral courts and tribunals for resolution of the increasing numbers of commercial and trade disputes that will inevitably accompany rapidly growing trade between Australia and New Zealand.

In this context, the Legal Research Foundation of New Zealand organised, on 22-23 July 1983, a major international seminar at Auckland University, New Zealand, to discuss the legal implications of CER. Participants were present from the judiciary, government and law firms on both sides of the dividing sea. The ALRC Chairman (Justice M D Kirby) was invited to deliver an address on the potential for a trans-Tasman court.

In a wide-ranging paper, he explored various possibilities that have been debated over the past decade or so, including by such legal luminaries as former Chief Justice Sir Garfield Barwick:

- revival of the Judicial Committee of the Privy Council for Australia and New Zealand;
- creation of a special South Pacific Privy Council;
- creation of an entirely new Court of Appeals for the South Pacific as called for by the Chief Justice of Fiji;
- conferring jurisdiction on the High Court of Australia in New Zealand cases;
- creation of a specialised trans-Tasman commercial court.

Justice Kirby concluded that none of these proposals was viable. Only if New Zealand were at last to join the Australian Federation would the possibility of appeals to the Australian High Court, enlarged by the appointment of New Zealand judges, be appropriate and possible. Led to this conclusion, he pointed to the active steps in the late 19th century towards federation between Australia and New Zealand:

- the involvement of New Zealand in the Federal Council of Australasia Act 1885;
- the involvement of New Zealand delegates in all the Australian constitutional conventions in the 1890s;
- the provision of New Zealand as an 'original State' in the Australian 1901 Constitution;
- the near acceptance by New Zealand of Australian statehood in 1900;
- the subsequent history of close relationships between Australia and New Zealand in peace and war;
- the retreat of the British Empire, leaving Australia and New Zealand as English-speaking countries with common institutions in an Asian/Pacific region;
- the reality that if federation is to be achieved, it should be sought soon, having regard to the changing composition both of Australia and New Zealand.

bold ideas. Justice Kirby said that only a 'fear of bold ideas, provincial attitudes and petty jealousies' had prevented the union between the two countries in the past. He suggested that Australia should consider an 'act of generosity' by admitting New Zealand to the federation as two additional States in an enlarged Australasia. He pointed out that section 121 of the Australian Constitution gives wide powers to the Federal Parliament to provide for the cross-admission of new States and that upon admission, New Zealand producers would enjoy the guarantees to trade provided under section 92 of the Constitution. Short of federation, Justice Kirby said that a trans-Tasman court was out of the question. However, he mentioned various ways in which legal links could be strengthened, such as:

- law reform work towards harmonious and uniform laws, particularly in trade and commercial law;
- exchange of commissions by judges and tribunal members, such as has recently occurred with the Stewart Royal Commission on Drugs;
- facilitation of admission of legal practitioners in Australia and New Zealand;
- further personal links between Australian and New Zealand lawyers.

But Justice Kirby's principal call was for a revival of the federation debate. He reminded participants of what Sir Henry Parkes had said 100 years previously, that 'the crimson thread of kinship runs through us all'.

melbourne cup. Justice Ian Barker of the High Court of New Zealand, Chairman of the NZLRF, referred to Alfred Deakin's description of New Zealand as 'a coy maiden not unwilling and indeed expecting to be courted and whose consent would be granted by and by as a favour'. He pointed to the speech delivered by Sir Paul Hasluck, later Governor-General of Australia, at the Legal Research Foundation dinner in New Zealand in 1967. Sir Paul had mentioned the evolving nature of the Australian constitutional system. As a West Australian, he could understand New Zealand attidues to a government in Canberra.

NZ Attorney-General Jim McLay, commenting on the ALRC Chairman's paper, said that he did not believe advantage had been demonstrated for a Federal link with New Zealand. In practical terms, he suspected, the only advantage of federation would be combined sports teams and a chance for an Australian horse to win the Melbourne Cup at long last. Mr McLay said that CER would pave the way for desirable links between Australia and New Zealand. However, he did not believe that these would reach the stage of 'complete union'. He said that he could see the possible attraction in the notion of a commercial or specialist court being set up specifically to deal with problems of CER trade and to provide uniform interpretation of CER-inspired laws. However, he did not see the possibility of this leading on to more.

Dr Geoffrey Palmer, Deputy Leader of the NZ Opposition Labour Party, was similarly cautious:

> Federation is not congenial to the New Zealand political experience. I do not think we would take kindly to it and I am doubtful that we would benefit from it. The only chance of New Zealand merging with Australia would be if we faced a further 20 years of sustained economic adversity. We could be driven to it by the poverty of our economic performance.

Dr Palmer said that shared judicial institutions might be needed. But these would follow shared trade or political institutions and would arise from political rather than legal activity. He said that if this did not happen, the CER agreement would drift into becoming 'boring trade negotiations of limited significance'.

The Prime Minister of New Zealand, Mr Robert Muldoon, gave a typically blunt response when asked for his comments. He said that he did not think much of the idea. 'New Zealanders wouldn't wear it', he declared. Indeed he described the ALRC Chairman as 'a comic' and the idea of federation as a 'bad joke'.

Justice Ian Barker was kinder in summing up the conference. He declared that the discussion amounted to a 'landmark in the history of Australia and New Zealand'. One Christchurch practitioner in the audience, responding to the political unanimity of Mr McLay and Dr Palmer, said that New Zealanders as a whole were not unanimously opposed to the idea of federation. He suggested that in 20 years' time, when New Zealand was ready, according to Dr Palmer's timetable, Australia might no longer be interested.

divided editorials. Editorial response to the ALRC Chairman's suggestion was, to put it mildly, divided. First off the mark was the New Zealand *Herald* (25 July):

> Closer economic relations, yes; a defence alliance, certainly; general co-operation, by all means. But New Zealand as a State, or even two States of Australia? Well, thanks all the same ... Several countries have tried unions that have come unstuck; and examples are known – Newfoundland for one (and Tasmania for another?) – of offshore Provinces or States that find themselves all but ignored ... No-one can know what people will think in 25, 50 or 100 years. Today's distance may become tomorrow's togetherness.

The Melbourne *Age* on the following day took a similar theme:

> Mr Justice Kirby's ... ideas about a trans-Tasman federation are below his usual standard ... The Australian federation is an imperfect instrument in any event when it comes to ordering the lives of those who live in its component States. Do we need the complication of additional States from across the Tasman represented by politicians who would be no less perverse than their Australian counterparts? Do we need Mr Muldoon at a Premiers' conference?

The *Auckland Star* (25 July 1983) thought the union of the two countries was 'no answer':

> While sharing a common heritage, the two countries have inevitably grown in different directions. Australia has a three or four-generation affinity to homelands that are not our own; a diversity of foreign investment has set many Australian enterprises on a different course. Australia talks of becoming a republic, an idea far from the hearts of many New Zealanders who see in their traditional ties, stability and a sense of identity.

The *Nelson Mail* (6 August 1983), reproduced in the *Daily Post* (Rotorua), concluded:

> In a world in which federations have had little success, it is odd that the unification of Australia and New Zealand should now be advanced as a credible political goal. Those accused of provincialism and pettiness could, in fact, have been more pragmatic in outlook than Mr Justice Kirby. We share a language and to a large extent a common origin, it is true. But for 150 to 200 years we have lived more than a thousand miles apart, shaped by different environments and now, increasingly, influenced by different geopolitical considerations. Australia is learning to live with Asia, whilst this country, at long last, is coming to terms with being partly Polynesian and lapped by the Pacific.

The *Waikato Times* (26 July 1983) declared that the merger idea was a 'dead duck':

> Surely the need now is to sort out the problems, to get CER into top gear and running smoothly rather than to indulge in pipe dreams about a trans-Tasman merger. That just isn't on and all the indications are, never will be.

The *Sydney Morning Herald* (27 July 1983) was more acid:

> The tendency to want to solve problems with one stroke can lead to solutions that become part of the problem. Life is complex. There are few simple solutions to its problems, no matter what the politicans, economists, lawyers, doctors, engineers and leader writers might claim.

serious consideration. Yet a number of leader writers urged the need in New Zealand for a more serious debate about the fundamental issue than it has so far received. The New Zealand *Evening Post* (25 July 1983) asked:

> Weekend revival of the familiar suggestion of New Zealand merging into Federal union with Australia will be easily dismissed by many. But shouldn't we explore this relationship more deeply? The popular thing for any New Zealand politician or newspaper editorial to say would be to reject giving up our independence to become a small, distant voice as part of the Australian Commonwealth. While that argument is crucial, it is about time the people in both countries had some fresh facts and a modern look at the advantages and disadvantages of even closer association, including the ramifications of political union. An authoritative New Zealand and Australia joint commission with a wide-ranging brief should examine such a proposition and any lesser options ... Humorous references playing to our sporting rivalries are good for the day. But future relationships between our two countries are of more long-term and comprehensive significance.

And the prestigious New Zealand *Listener* (13 August 1983) in a major editorial, 'Divided We Stand', devoted half a page to the issue:

> Mr Justice Kirby's Federal union proposal deserves serious consideration, not outraged rejection. Mr Palmer left room for debate when he commented that only a further 20 years of adversity might bring us to the altar; but he predicted that the future would look kindly on our part of the world. Whether that future is kind or cruel, it is to be hoped that it brings with it some internal reunion of our divided nation. Only then, whole and strong, could we consider a marriage – a partnership of equals.

fare refund? Finally, hot on the heels of the ALRC Chairman's speech came an address to the NZ National Press Club in Wellington on 9 August 1983 by Mr Paddy McGuinness, Editor-in-Chief of the *Australian Financial Review*. Commenting on the earlier proposals, he told his audience:

> It is unlikely that the required constitutional procedures for admission as two States of New Zealand are feasible. While there is specific provision in the Australian Constitution for admission of New Zealand as a single 'original' State, any more is hardly a realistic proposition – far from enthusiasm for political union with New Zealand, the Australian electorate's view of your country is best described as one of benevolent indifference ... I should add that Judge Kirby's speech was a wide-ranging review of the possibilities of legal co-operation between Australia and New Zealand in the context of CER. The debate concerning political union was only touched upon glancingly. While the problems of New Zealand with the idea are understandable, I think everyone should realise that this is a theme that will recur as an undercurrent in all the future discussions about closer political, economic, judicial and foreign policy co-operation between us both.

Returning to Australia, Mr McGuinness' newspaper led off with an editorial, 'New Zealand – An Economy of Fear', (*AFR*, 16 August 1983):

> The likenesses between the two countries ... obscure the fact that in economic matters Australia tends to operate under a checks and balances system, in which the rule of law is predominant. By contrast New Zealand has no written constitution, no courts with standing independent of the wishes of Parliament, no limits on the legislative authority of Parliament and not even a second chamber of the Parliament with powers of review and delay. The result is that a government with a majority of one and with virtually unlimited powers to act by regulation, that is by decree, can establish a reign of terror in the economic sphere.

Prime Minister Muldoon did not call Mr McGuinness a 'comic'. But according to the New Zealand *Herald* (20 August 1983) he did

say that he regretted that the government had paid his fare and described him as 'an extraordinary fellow'. But the editorial in the same journal on 16 August declared that it was better to 'capture candour than to purchase propaganda' from visitors. Let the last word be offered by the editorial in the NZ *Listener:*

> The idea [of federation] has other advantages, not the least the elimination of the necessity to explain abroad that New Zealand is *not* part of Australia. For that blame Mercator's projection which shrinks thousands of kilometres of unpleasantly heaving salt water to a few centimetres on most world maps.

lawyers together?

There shall be no introspective self-analysis that has featured in recent conferences.

Mr G A Murphy, President, Law Council of Australia, 3 July 1983

vivid contrast. The Twenty Second Australian Legal Convention was held in Brisbane in July 1983. It was opened by the Governor-General (Sir Ninian Stephen) in an impressive ceremony in the Brisbane Town Hall. Sir Ninian reviewed and contrasted previous legal conventions in Brisbane, in earlier, quieter times. The President of the Law Council of Australia, Mr Gerry Murphy, thrice repeated the injunction contained in the theme for the Brisbane convention, 'Back to Basics'. Rumination and self-criticisms were out. Locus standi, the Mareva injunction, section 92 and taxation were back!

Speaking at a function of the Queensland Council of Professions on 7 July 1983, in the middle of the convention period, the ALRC Chairman described the vivid contrast between the opening speech by Mr Murphy and the immediately following address by Senator Gareth Evans, the Federal Attorney-General:

> On the stage there emerged a deep and abiding difference between the perspective offered by the President of the Law Council ... and the Attorney-General. Both are young men of ability and high professional attainments. Both are no-nonsense men – used to calling a spade a spade. Both were soberly, indeed immaculately dressed. Both spoke with assurance and commitment. But a greater study in contrasts between these two lawyers could scarcely have been offered. The contrasts are important because Mr Murphy is the elected head of the body which represents the legal profession in all of its branches and in all parts of Australia. Senator Evans is the elected and appointed First Law Officer of Australia. Of his intellect, energy, zeal and determination, there can be no question.

Whereas Mr Murphy called the delegates 'back to basics', Senator Evans disdained this thrice repeated injunction and followed the President's speech with a tour de force which outlined his views, presumably, of what was 'basic'. Senator Evans told the assembled lawyers bluntly that they were not giving value for money for Federal legal aid expenditures. And unless they put their own house in order the Commonwealth Government would have to intervene to protect the Federal public purse. Most telling of all was Senator Evans' statistical information. Last year the Commonwealth paid $36 million to private practitioners for legal aid services. It was a 'simple but alarming statistic' that in three years the amounts paid to private lawyers had increased in real terms by 80.2%. The number of cases handled by those lawyers had increased by only 27.1%. There were a number of cures:

- Simpler and cheaper legal procedures such as in family law, conveyancing and accident compensation
- Federal regulation of legal fees in the growing docket of Federal courts and tribunals, or
- Moves towards legal aid through salaried professionals.

first sinner. Senator Evans' somewhat discordant speech earned a gentle rebuke from the Queensland Chief Justice who followed him. As described by John Slee, legal correspondent of the *Sydney Morning Herald* (11 July 1983), the Federal Attorney-General's blatant disobedience of the convention organisers' dictates prompted Sir Walter Campell to observe, with 'affected jocularity', that naturally, there would be some sinning against the conference commandment pro-