

TRANS-TASMAN GOVERNANCE: A QUIET FORM OF FEDERALISM?

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I. INTRODUCTION

The articles contained in this collection examine various legal elements of the growing trans-Tasman relationship. This paper focuses on the constitutional framework that underpins these arrangements. It is perhaps unfashionable to talk in such constitutional terms when referring to the Tasman world but it is the submission of this paper that such coyness is unfounded.¹ Indeed, such a failure to discuss the realities of the deep relationship between Aotearoa/New Zealand and Australia risks misunderstanding both the nature of that relationship and its potential consequences.

Although the trans-Tasman relationship is obviously bi-lateral, this paper approaches the subject from an unashamedly New Zealand perspective. It does so for both pragmatic and normative reasons. Firstly, as a New Zealand public lawyer, the author's expertise lies far more on the New Zealand side of the Tasman than the Australian. More importantly, the reality of situation is that whatever the political niceties, Australia is of far more importance to New Zealand than vice-versa. As England's Henry VIII famously prophesied, no matter the constitutional position, "the greater shall draw the lesser". His comments as to the future of England under a Scots monarch were to prove prophetic but they are equally relevant to understanding the practicalities of any future relationship between the two Tasman neighbours.

This article applies a federal lens to this trans-Tasman relationship. As its starting point it examines the peculiar aversion to federalism and federal ideas in New Zealand. The seeds of federalism have fallen on stony ground due primarily to the influence of the United Kingdom's federal debate upon New Zealand constitutional thought. As a consequence, New Zealand's approach to federal ideas has remained institutional in the extreme. This limited understanding of the federal idea has, I argue, blinded New Zealand to the wider realities of federalism and to the essentially federal relationship that already exists between Aotearoa and its Australian neighbour.

As a consequence of this approach, the relevant constitutional question should not be whether New Zealand and Australia wish to engage in federation but how the federal relationship that already exists should be managed.

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1 The term "Tasman world" was used by Professor James Belich describing the pre-1900 Australasian relationship. See J Belich, *Paradise Reforged: A History of the New Zealanders from the 1880s to the year 2000* (Penguin, Auckland, 2007). A more contemporary use of the term is found in P Mein-Smith, P Hepenstall and S Goldfinch, *Remaking the Tasman World* (Canterbury University Press, Christchurch, 2008).

II. THE PROBLEM OF THE “F” WORD

The use of the term “federalism” has often proved problematic in the United Kingdom’s constitutional debate. Federalism is the “dirty word” of British politics. The reasons for this seem related to the association of the term with centralisation and central dominance. New Zealand’s similar approach to the term seems to be a legacy from her imperial past. In New Zealand’s case the negativity associated with federal ideas can at least partially be credited to the perceived failure of the New Zealand provincial system and its abolition in 1876. But, as few (if any) New Zealand authors actually regard this structure as federal, this cannot be the main reason.² This dismissal of the federalist credentials of the provincial system nevertheless gives us a strong clue as to what that main reason is. Perhaps surprisingly, this can be traced back to issues of definition and, perhaps even more strangely, to the work of an academic.

Although federalism and its study are, like many other subjects, cursed by arguments over definition and content, these debates have largely been absent in New Zealand and the United Kingdom. In most academic discourse definitions of federalism have remained contentious and the approach towards the subject has shifted significantly over the years. In constitutional circles in both the United Kingdom and New Zealand, however, the definition of federalism has remained remarkably constant. This dominant Anglo-New Zealand definition was developed, ironically, by the work of the Australian political scientist, Kenneth Wheare. Wheare’s definition of federalism, first published in 1939, was the first coherent definition in the English language at least in modern times.³ As those who are aware of Dicey’s impact on British constitutional thought can testify, being the first to define a concept matters. In Wheare’s case, his ongoing work on the subject of federalism in the years that followed meant that this definition grew to dominate our understanding of the topic today, at least in New Zealand.

Before examining Wheare’s concept of federalism it is important to understand the context in which he developed it. Wheare began work on the issue of federal government in Oxford in the 1930s against a background of increasing interest in the topic generally. He himself was generally supportive of the idea of federalism but his academic interest was aroused as a result of frustration at the lack of academic rigour in the well-intentioned but confused discussion papers of the various pro-federal groups (primarily in a European context) that had emerged in the period after 1918. His response was the seminal pamphlet “What Federal Government Is”, published in 1941 to provide better framework in which federal ideas could be explored.⁴ This original piece became the basis of his authoritative work on the subject eventually published in 1946.⁵

2 P Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson/Brookers, Wellington, 2007) at 12.

3 K Wheare, *What Federal Government is* (Macmillan, 1941).

4 *Ibid.*

5 K Wheare, *Federal Government* (Oxford, 1946).

Wheare's response to the weak definitions being used in the 1930s was to develop a far more rigorous approach, with a strong institutional focus. It emphasised a number of elements, but crucially for the purposes of this paper, it focused strongly on the division of legislative power and the final dominance of central authority. The existence of federalism in Wheare's eyes was thus institutionally focused, reliant upon the formal division of legislative authority and centralising in its essence.⁶

Although this approach has been strongly challenged it has endured in British constitutional thought. It remains the starting point for most general constitutional texts in the United Kingdom. For cultural reasons that are beyond the scope of this paper, this "English" approach to federalism also extended its influence to New Zealand. It is this definition that continues to dominate approaches to the subject in New Zealand. Where federalism is mentioned at all in New Zealand's legal and political textbooks, it is Wheare's definition that predominates.⁷

It is important however that there is nothing inherently wrong with Wheare's approach to defining federalism. Wheare was a great constitutional and federal scholar and it is not the intention of this author to criticise his work. It is the legacy and its impact that are at issue here. In particular, Wheare's definition has tended to be used as a definition of federalism generally and to inform perceptions of federal governance but is it really a definition of federalism, or merely a form of federalism?

III. NEW FEDERALISM

The most obvious problem with Wheare's definition is that it excluded so much and, as a result, many have struggled with it over the years, despite its dominance in the Anglo-American world. It is a narrow approach, with limited application. In fact, according to Wheare, his "federal principle" recognised only four federations, namely the United States, Australia, Switzerland and Canada. He was even rather reluctant to include the latter three, with Canada being classified only as a quasi-federation. In fact, although Wheare himself criticised a slavish definition of federalism based upon the United States model, he largely fell into this trap himself.⁸

Such a definition was, of course, valid but whether it was useful is another matter. A definition that was so narrow in scope as to exclude all but a few types of government is of little use in trying to enhance our understanding of a form of government. Something that was so narrow in scope seemed inherently limited in its usefulness. Of course, Wheare was at a distinct disadvantage as he was working in a world largely before decolonisation and the growth of supra-nationalism. He worked with the examples he saw and developed his definition accordingly. In developing his "federal principle", Wheare clearly defined something, perhaps a particular variety of "formal" or "institutional" federalism but whether it had a wider use as defining the essence of federalism was to prove far less obvious.

6 Ibid.

7 Joseph, above n 2, at 99.

8 Wheare, above n 3, at 79.

The limits of Wheare's approach were exposed by the myriad of multi-level governance structures that emerged in the post-war era. It had little to say about the myriad of regional, "federal" and supra-national entities which were beginning to emerge at this time, none of which fell within Wheare's definition.⁹ At least partially as a response to these developments, alternatives to Wheare's views were developed and over time have come to dominate the study of federalism globally. Two of the most influential were developed by Daniel Elazar and Ronald Watts.¹⁰

The work of the late Daniel Elazar is notable for its fundamentally different starting point from that utilised by Wheare. Where Wheare devised his federal principle through an examination of existing federal government, Elazar started from the functional delivery of "federal elements" and avoided institutional definitions. In essence, he argued that Wheare was chasing a shadow. There were no pure "federations". Instead, in his work *Exploring Federalism*, Elazar emphasised the variety of "federal elements" that existed.¹¹ "The federal principle", he rightly explained, "should not be confused with its specific manifestation in the federal state". Such federal elements could exist in any state and recognition of them should be based upon the practical operation of the state. This may or may not be accompanied by the existence of formal constitutional frameworks or institutions. The widespread nature of Elazar's federal elements can be seen from the breadth of his work, *Federal Systems of the World*, first published in 1991.¹² In this he recognised over 100 examples of such arrangements in over 50 states, a somewhat larger group than the four begrudgingly recognised by Wheare. Wheare finds federalism hardly anywhere while for Elazar it is found under almost every stone.

Watts' approach was somewhat narrower than that of Elazar and in his *New Federations* he appears influenced by the structural approaches of his former Professor.¹³ His later work attempted to put some form of template over the explosion of federalism exposed by Elazar and others. In common with Elazar, Watts agreed that federal government was not a single concept. Rather than focusing on whether specific systems fulfilled its requirements, meaningful examination of federalism must focus on the federal features that exist across many systems of government. To make sense of this, he developed "the spectrum of federalism" with the unitary state at one end of the scales and a very loose association of states at the other.¹⁴ Most states would lie somewhere on the spectrum.¹⁵

9 The first of the new European federations, Germany, which did emerge while Wheare was still writing on the subject, was largely excluded from his definition.

10 Watts himself was a former student of Wheare.

11 D Elazar, *Exploring Federalism* (University of Alabama Press, Tuscaloosa, 1987).

12 D Elazar (ed), *Federal Systems of the World: A Handbook of Federal, Confederal, and Autonomy Arrangements* (2nd ed, Longman, Essex, 1994).

13 R Watts, *New Federations: Experiments in the Commonwealth* (Clarendon Press, Oxford, 1966).

14 R Watts, *Comparing Federal Systems* (2nd ed, McGill-Queens University Press, Montreal, 1999).

15 It could be argued that the spectrum metaphor used by Watts is more accurately a circle, with unitary state(s) at the end of both extremes.

The reader may at this point ask a very pertinent question. Why exactly does this academic debate matter to discussions of the trans-Tasman relationship? The answer is very simple. It matters because by utilising a definition based (perhaps unconsciously) upon Wheare's narrow definition of federalism, academics and the wider policy community in New Zealand have failed to understand the federal nature of their own governance systems.

In doing so, New Zealand lawyers and political scientists have incorrectly placed the New Zealand-Australia relationship in the basket of "international affairs". By admitting the "f" word, the true nature of the relationship and its relevance to domestic law becomes clearer. By extension the recognition of a federal relationship between the trans-Tasman partners brings into the focus the relevance of public law to the relationship. Federal elements imply systems of governance and where governance goes, so must public law. The trans-Tasman system may not comply with the strict requirements of Wheare's definition but the existence of federal elements means that they need to be answerable to those awkward requirements of democratic public law namely legitimacy, accountability and efficiency.

IV. FEDERALIST ELEMENTS IN THE TRANS-TASMAN RELATIONSHIP

One does not have to dig far to find federal elements in the trans-Tasman structure of governance. There is of course a long history of New Zealand's involvement in Australian affairs in the 1870s with the Australasian Federal Council and the concept of the pre-1900 Tasman world.¹⁶ Indeed prior to the 1900s, the concept of Australia was not widely accepted.¹⁷ In the post-1901 era the rupture of this Tasman world altered the dynamics, but not the desire for continued co-operation and low level federalist aspirations.

In the 1960s these continued attempts at a closer Tasman relationship were exemplified by the New Zealand Australia Free Trade Agreement (NAFTA) which came into force in 1966. In more recent times, this rather limited agreement (which required mutual agreement on specific areas of trade) was replaced with the open ended Australia-New Zealand Closer Economic Trade Relations Agreement in 1983. The CER, as it has become known, has become the focus for discussions of trans-Tasman federalism in the decades that have followed.

The CER is the crucial international trade agreement between Australia and New Zealand and it is traditional for examinations of federalism in the Tasman region to focus upon it. That it remains an important part of this relationship is not open to debate. However there are other authors who are far more knowledgeable than myself on this topic and several papers in this collection discuss it in more detail. For the purpose of this article it is sufficient only to sketch the aims of the CER and its operation to understand its part in the trans-Tasman federation.

The CER sets out to achieve four primary aims:

- Free Trade in Goods – achieved in 1990

16 Belich, above n 1.

17 See N Aroney, "New Zealand, Australasia and Federation" in this volume.

- Free Trade Services – achieved 1989 (with a few caveats)
- Mutual Recognition of Goods and Occupations
- Free Labour Market.

In addition, it aims to reduce technical barriers to trade. These aims have been advanced through the traditional international law instruments of formal inter-governmental treaty, memoranda of understanding (such as the recently updated Memorandum of Understanding on the Harmonisation of Business Law 2000) and executive agreements. In 2004 the overall aim of the CER was the creation of a Single Economic Market. However, as Walter Bagehot famously commented, such dignified constitutional relationships often hide an efficient reality. The Tasman federation is no different. The dignified inter-governmental face of the CER hides an efficient reality in the form of a variety of supra-national institutions that far pre-date it. It is the submission of this paper that it is in these institutions that the essence of the trans-Tasman federal relationship can be found.

V. THE EFFICIENT SECRET – COAG AND THE MINISTERIAL COUNCILS

The CER's success is almost universally acknowledged. The fact that this has been achieved through inter-governmental co-operation rather than supra-national institutions has often been highlighted, and many official documents surrounding the CER are at pains to point out the lack of institutions that underpin it. Such statements create a very misleading impression of the new Tasman world.

The official assertions of the lack of CER institutions are of course, correct. There are none, but this dignified cloak blinds us (perhaps intentionally) to the fact that, formally, the Tasman “federation” is institutionally based and that institutional basis pre-dates the CER by several decades. The efficient secret of the Tasman “federal” model is the Council of Australian Governments (COAG) and more specifically the Ministerial Councils that operate as part of it.

New Zealand's involvement in the Ministerial Councils of the COAG provides the institutional frame for the trans-Tasman “federation”. It does so quietly and without publicity, yet its role is vital. Perhaps surprisingly, academic work on the Ministerial Councils is extremely limited.¹⁸ However, even the most cursory examination of the institutions of Australian federalism reveals a surprising level of New Zealand involvement.¹⁹

Although at the plenary level of COAG New Zealand is not present, beyond this there are few areas in which New Zealand does not participate. Out of the 30 formal Ministerial Councils, only five have no New Zealand

18 A recent and notable exception is; C Saunders, “To be or not to be: The constitutional relationship between New Zealand and Australia” in D Dyzenhaus, M Hunt M and G Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Portland, United States) at 251-280.

19 See *Commonwealth-State Ministerial Councils Compendium*, Council of Australian Governments (COAG), Commonwealth-State Relations Secretariat, Commonwealth Government - Department of the Prime Minister and Cabinet, October 2009.

involvement. Six have New Zealand participation as an observer (although the practical extent of the New Zealand role remains unclear). In the remaining 19, New Zealand participates as a full voting member.

The depth of involvement should not be underestimated and in several cases, New Zealand participates as a full member when some Australian territories and at least one state (Tasmania) are only observers. The voting status of the New Zealand delegation also has significance as, although in the majority of cases where New Zealand participates the meetings operate by consensus, in a significant minority, majority voting applies. This is particularly important in instances involving the Trans-Tasman Mutual Recognition Agreement where a two-thirds majority rule applies, irrespective of any other procedures of the Council concerned.²⁰

This formal ministerial level of co-operation is only the tip of the iceberg. Beyond these, meetings of officials exist in tandem with most Ministerial Councils while a variety of task-forces and ad hoc discussion groups operate in partnership with the formal COAG Councils and Conferences. Finally, the COAG structure does not include an unknown number of consultative councils which have non-governmental involvement.

It is in these institutional locations that the hard yards of the CER and trans-Tasman functional co-operation have largely been achieved. They are the crucial but hidden link between the non-institutional frame of the CER and the need for institutional support to implement it.

Perhaps most importantly, the COAG Ministerial Councils allow New Zealand to participate at the level of a state in the Tasman federation without political consequences. Despite being a sovereign nation, New Zealand's economy, population and influence put it on the practical level of a large Australian state. The existence of the COAG and its acceptance of non-Australian members within the domestic Australian constitutional structure allow New Zealand practical and non-controversial access to the Australian political world. In response it allows the Australian government to be Australasian, without the need to develop institutions. Perhaps it is this dual system that is the "trick" of the trans-Tasman federation? While the dignified requirements of the international relationship are fulfilled by the CER, the efficient inter-governmental and supra-national reality of the Tasman world are delivered by institutions of the COAG.

VI. CONSTITUTIONALISING THE TASMAN FEDERATION

Applying Elazar's approach, the CER, the agreements that have emerged from it and the COAG structure are all clearly federal elements in the Tasman relationship. Their existence, alongside the various examples of functional co-operation explored elsewhere in this collection, place Tasman governance a significant way along Watts' federal spectrum.

There are several inter-related consequences to this federal reality. Firstly, academic discussions of the Tasman world are often asking the wrong questions. The question is not whether New Zealand and Australia wish to

20 Ibid.

enter into a federal relationship but how the existing federal arrangement should be managed. The existing federal nature of the Tasman relationship already leads to serious and difficult questions for constitutional lawyers and political scientists.

As Australian constitutional scholars are well aware, federal systems tend to empower the executive. Such is the nature of their co-operative elements. The Tasman variant is no different. Decisions are drawn up by “state” executives or their officials, with little input from electorates, legislatures or directly elected representatives. Parliaments, if they have a role at all, do so at the end of the process. Decisions taken through the existing executive-dominated mechanisms of the current trans-Tasman institutions thus risk a lack of legitimacy. As the Tasman federation develops, electorates on both sides of the Tasman may rebel and refuse to accept them. There is a hint in the recent fate of the Therapeutics Bill in New Zealand that this is already occurring. With respect to those such as Justice Kirby who have advocated a formal “federal” relationship, this is merely one way of answering these on-going questions.

Until now the Tasman federal relationship has been driven by a functional desire for open-markets, but as the European Union discovered beforehand, such a desire cannot be confined to the basics of business law and the removal of tariffs. Spill-over effects will likely demand ever greater co-operation and co-ordination and with it the reality of an ever closer relationship. The challenge for today is to ensure that the institutions that underpin the relationship can withstand the requirements of the future. It is this sidelining of constitutional questions in the rush for a “functional” and “pragmatic” Union that has left the current European structure struggling with the issues of accountability, legitimacy and efficiency. The European Union has therefore been forced into the uncomfortable position of establishing such frameworks in a time of constitutional and economic crisis.

The recognition of a federal relationship between Australia and NZ allows us to avoid these mistakes. It allows both Australia and New Zealand to address the important constitutional questions that the Tasman federation raises. Most importantly it allows them to ensure that the mechanisms that underpin this quiet form of federalism are robust enough to withstand the stormy seas that must surely come.