THE NEW ZEALAND MODEL OF FREE ASSOCIATION: WHAT DOES IT MEAN FOR NEW ZEALAND?

Alison Quentin-Baxter*

Using Professor Angelo's work in Tokelau as a starting point, Alison Quentin-Baxter examines the model of "free association" relationship that New Zealand has with the Cook Islands and with Niue, and was also to be the basis of Tokelauan self-government. She looks at both the legal and practical obligations that such relationships place on both parties, but particularly on New Zealand. The form of the model means the basis for New Zealand's obligations to an associated state are quite different from its provision of aid to other states.

I INTRODUCTION

It is an honour and a pleasure to contribute to this Special Issue of the VUW Law Review celebrating Professor Tony Angelo's 40 years as a leading member of the teaching staff of the Law Faculty. For the whole of that period he and I have been colleagues and friends.

Reflecting our shared interests, my topic is New Zealand's role as a partner in the relationships of free association with the self-governing States of the Cook Islands and of Niue, and potentially a self-governing State of Tokelau, if it, too, should decide to move to a similar status and relationship with New Zealand. The free association with the Cook Islands has been in place since 1965, and that with Niue since 1974. Twice in the last three years, the people of Tokelau have hesitated on the brink of a similar relationship.

Now, as they pause to catch their breath, it seems a good time to look at the New Zealand model of free association from the standpoint of this country's own constitutional law, as distinct from international law or the constitutional law of the associated State. Over the years, these last-mentioned perspectives have often been brought to bear. But little attention has been paid to a free

* Barrister who has specialised in advising small countries on their constitutional arrangements. She began her career in the Department of External Affairs (now the Ministry of Foreign Affairs and Trade), taught for a time in the Law Faculty at Victoria University of Wellington and was the Director of the New Zealand Law Commission from 1987 to 1994.

association as it operates at the New Zealand end. How does a free association with a small, neighbouring, self-governing State fit into New Zealand's sense of its own identity? What force does it have, legally and politically? What does it require New Zealand to do for the associated State? And the associated State to do for New Zealand?

Before I begin on the search for answers to those questions, I should like to say something about the easy and productive working relationship that Tony and I enjoy. It goes back to 1967 when we both became lecturers in the Law Faculty. We took over the responsibility for teaching Legal System from the redoubtable Roger Clark. I introduced the students to the common law and the case method by tracing the development of the law about remedies for workplace injuries. Tony then introduced the class to the New Zealand statute book and the principles and techniques of statutory interpretation.

That must have been the beginning of his lifelong interest in, and practice of, plain English drafting. He soon became involved also in the consolidation, compilation and reprinting of the statute law, particularly the law of small island countries which need help with that task. Tony makes a strong personal commitment to the quality of the resulting volumes. In the absence of official law reports and other public records, the compilations often include leading cases and other key documents, especially those in the constitutional and international law fields. He has followed up by ensuring that the Victoria University of Wellington Law Library, as well as other New Zealand libraries, have on their shelves up-to-date sets of the laws of the small countries concerned. They, and those of us who work with their law, have reason to be grateful for his unremitting efforts. His involvement in the compilation of the law is matched by a keen interest in its content, and in how different legal systems relate to one another. Tony's professional interests include private international law and comparative law, and all that is to be learned from those disciplines.

At the end of 1968, my husband Quentin joined the Law Faculty as a professor, and, a year later, I decided to leave full-time law teaching to him. So Tony and I ceased to work together, but my occasional part-time teaching and other Faculty activities kept us in touch. I shall always remember one occasion on which we met up again.

In 1973 I had to fly to Mauritius, and, after a day's stopover, change planes for Nairobi. Tony was then working in Mauritius on the compilation of that country's laws. In view of his language skills, the job was tailor-made for him, involving as it did the French law of the original colonists, and, after the surrender of Mauritius to the United Kingdom in 1810, English law as well. Tony was working with the then Solicitor-General of Mauritius, Mr Edwin Venchard QC, whom Quentin and I had got to know at the first Law of the Sea Conference in 1958. "Baby Venchard", as he was affectionately known, invited Tony and me to lunch at an excellent French restaurant. After that, Tony did his best to show me the whole of Mauritius in the remaining hours of my stay. I recall little of the detail, except that we passed more than once through a town with the extraordinary name of Curepipe (Pipe-cleaner). What remains vivid is Tony's enthusiasm for the island in which he was

working – with the result that I have never come so close, before or since, to missing an international flight.

II TONY ANGELO'S WORK IN TOKELAU

During my time at Victoria University, I also taught Constitutional Law. That experience was to lead me to a role in advising the peoples of small islands on making a constitution for self-government. Since then I have remained interested and involved in issues of constitution-making, decolonisation and the working of free association arrangements. From about 1994 on, that interest and involvement brought me back into close touch with Tony. By that time, he had become Constitutional Adviser to the people of Tokelau – a role he continues to fill.[1]

Later, Tony also took on the role of Constitutional Adviser to the Government of Niue, but, because that role has remained more episodic, I propose to concentrate on his work in Tokelau.

Tony has written extensively about the colonial history of the three atolls that make up the little country that now calls itself Tokelau, and the path it has taken towards nationhood.[2] Characteristically, he is silent about his own role. But from those writings, and from Tokelau's constitutional development up to now, and what we know of Tony himself, it is apparent that he brings special qualities to his task.

First, Tony is meticulous in researching the origin and development of the institutions he is dealing with. He draws from what has happened in the past an understanding of the present and perceptions about the future. Secondly, he is familiar with the Tokelauan language. That must give him real insights into the way people think, their hopes and their fears. He is sensitive to the nuances of Tokelauan culture and committed to helping its people to build on their traditional practices and structures, instead of relying on imported ideas. The people of Tokelau and their leaders have, of course, been the principal architects and builders of what was called "the modern House of Tokelau". But Tony's distinctive input is discernible. So far as possible, the developing constitutional and other laws of Tokelau are self-contained, made in Tokelau by Tokelauans, deal only with matters that reflect the practical needs of its people, and embody concepts and are expressed in language that they can understand.

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1 Tony's involvement with Tokelau dates back to late 1980, when MFAT asked him to produce a report on the legal system of Tokelau for the 1981 United Nations Visiting Mission. In 1983 he made his first visit to Tokelau. From then on he has acted as an independent adviser to the Tokelau authorities.

2 The Appendix to this article contains a list of Tony Angelo's main published writings on the subject of Tokelau.

III THE REFERENDUMS IN TOKELAU ON SELF-GOVERNMENT IN FREE ASSOCIATION WITH NEW ZEALAND

In February 2006, registered voters living in one or other of the atolls of Tokelau had the opportunity of voting in a referendum on the following proposal:

> That Tokelau become a self-governing State in free association with New Zealand on the basis of the Constitution and the Treaty.

The draft Constitution had been developed by the General Fono of Tokelau with advice from Tony Angelo, and in consultation with the Ministry of Foreign Affairs and Trade. The draft Treaty of Free Association was a collaborative effort between Tokelau and New Zealand. The people of Tokelau had decided that the proposal would need to be approved by a two-thirds majority. In the event, 349 of the 581 valid votes – 60.1% – supported the proposal. That was 6.7% – 39 votes – short of the 66.8% required.

In view of the closeness of the result, Tokelau, New Zealand and the United Nations took the view that the way remained open for another act of self-determination when the time was ripe. The General Fono decided to hold a second referendum in November 2007, on the same basis as before. This time, considerably more voters – 697 – took part in the poll. The proportion voting "Yes" was 64.4%. The result was closer, but still fell short of the required threshold.[3]

The General Fono accepted that, for the time being, Tokelau would retain its existing status as a New Zealand dependent territory. It has since decided that there will be a period of reflection before consideration is given to a possible further act of self-determination. During this period priority will be given to improving basic services and infrastructure on the atolls.[4]

The need to live for the time being with the status quo in Tokelau provides important opportunities for New Zealand as well as for Tokelau. At the New Zealand end, there is an opportunity to bring fresh thinking as well as accumulated experience to the existing free associations with the Cook Islands and with Niue, so that each relationship can better serve the

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3 See Andrew Townend "Tokelau's 2006 Referendum on Self-Government" (2007) 5 NZJPIL 121. At the time of writing, Andrew was a Legal Adviser in the Legal Division of MFAT (he has now been posted overseas). Before that, he had been a research assistant to Tony Angelo, and had accompanied Tony on some of his visits to Tokelau. He was thus able to comment from a wide perspective on the arrangements under which Tokelau proposed to become a self-governing State in free association with New Zealand. The draft Constitution of Tokelau and the draft Treaty of Free Association between New Zealand and Tokelau are appended to his article. Referendum results are also supplied in "Report of the United Nations Mission to Observe the October 2007 Referendum on Self-determination of Tokelau" (A/AC 109/2007/19).

4 Statement on the Question of Tokelau by the Administrator of Tokelau, David Payton, to the United Nations Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (23 June 2008) www.mfat.govt.nz (accessed 20 October 2008).

present-day needs of the parties, as well as remaining an option for Tokelau. In Tokelau itself, the existing constitutional arrangements already reflect most if not all of the important elements of the draft Constitution and many aspects of the draft Treaty of Free Association. There is now an opportunity for the people of Tokelau to try out these arrangements in practice, without the distraction of an imminent decision about their future.

I turn now to some of the factors that will need to be taken into account if each of these opportunities is to be used to the full.

IV DEEPENING THE FOCUS ON WHAT A FREE ASSOCIATION MEANS FOR NEW ZEALAND

Most people in New Zealand, not to mention the rest of the world, do not have a good understanding of New Zealand's existing relationships of free association with the self-governing States of the Cook Islands and of Niue, that were formerly its dependent territories. They are just as vague about what it would have meant if Tokelau, too, had decided to become a self-governing State in free association with New Zealand. The substantial media contingents that were present in Tokelau at the time of each referendum referred at random to Tokelau's prospective "self-government", "free association" or "independence" as if they were synonyms. They expressed some bemusement about the idea that 1500 people, living on three atolls too far apart for easy communication, and depending on New Zealand for around 80% of their annual budget as well as specialist skills, should be thinking of moving to a more independent status.

This article tries to dispel some of the mystery. I use "self-government" to mean the system of government established by the constitution and other laws of the associated State, and "free association" to describe the relationship between that State and New Zealand. Generalised references to "an associated State", its "self-government" or "the free association" are abstractions, reflecting concepts that are common to the self-government in free association with New Zealand already enjoyed by the Cook Islands and Niue as well as the proposed arrangements for Tokelau.

A What Does the New Zealand Model of Free Association Involve?

A constitution for the self-government of an associated State may be made in various ways and take various forms, depending on its constitutional history and the nature of its society. A common feature is the power of the self-governing State to make and execute its own laws. Those powers are limited only by the constitution itself. They are also exclusive, in the sense that any residual law-making or executive powers retained by New Zealand can be exercised only with the self-governing State's consent. The self-governing State has the constitutional capacity to enter into treaties with other members of the international community. In short, its constitution would be just as suitable for independence as it is for a free association with New Zealand.

The terms of the free association are substantially the same for each associated State. When the Cook Islands became self-governing, there was a shadowy expectation that the free association

relationship would be an evolving one, just as New Zealand's relationship with the United Kingdom had evolved in the period between 1919 and 1947. Consequently, the very existence of the free association and also its terms have to be deduced from the provisions of the Cook Islands Constitution Act 1964, the accompanying Constitution,[5] and the solemn assurances and settled practice of the partner governments. The free association with Niue and its terms must be sought in the same way, but, with the benefit of experience, rather more was spelt out in the Niue Constitution Act 1974 than in its Cook Islands predecessor.

As mentioned already, the existence and terms of Tokelau's free association were to be "recorded"[6] in a Treaty of Free Association between the Government of the newly-self-governing State of Tokelau and the Government of New Zealand. At one level, the proposal for a treaty reflected the desire to spell out, in the most solemn and binding way, New Zealand's commitment to provide ongoing financial and other support. At another level, it may suggest that the free association is purely a contractual relationship, similar in kind – though not in content – to the Treaty of Friendship between New Zealand and the then newly independent State of Western Samoa. That, however, would be an over-simplified view.

B Responsibility for the Free Association at the New Zealand End

At the New Zealand end, the perception of the free association relationship tends to be coloured by the identity of the government agency responsible for administering it. When the Cook Islands first became a self-governing State in free association with New Zealand on 4 August 1965, that responsibility remained with the Department of Island Territories. By the time that Niue became self-governing in free association with New Zealand on 19 October 1974, the Department of Island Territories had ceased to exist. Its responsibilities had been transferred to a pared-down Island Territories Unit in the Department of Maori and Island Affairs.

On 8 November 1974 the responsibility for the New Zealand end of the free association relationship was transferred to the Ministry of Foreign Affairs (which later became the Ministry of Foreign Affairs and Trade, and is referred to in this article as MFAT). The Ministry and its predecessor, the Department of External Affairs, had long taken a leading role in the decolonisation of the Cook Islands and Niue, as well as in the processes that had led, in 1961, to the emergence of the former Trust Territory of Western Samoa as an independent State. In assuming the responsibility for the relationship with the associated States, the avowed aim of the then Secretary of Foreign Affairs and Trade, Frank Corner, a main architect of the concept of self-government in free

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5 Since 1964, the Constitution of the Cook Islands has been amended from time to time by the Cook Islands Parliament.

6 The word "recorded" was used by Andrew Townend in describing the content of the treaty: see n 3 above. That usage is consistent with the view that, if it had entered into force, the Treaty would not itself have created the free association relationship. That matter is further discussed below.

association, was to give the two associated States, the Cook Islands and Niue, the opportunity to exercise their self-government free of what he saw as the unduly paternalistic attitude of the former colonial administrators.

The transfer of responsibility to MFAT brought with it a different culture. The Ministry was comfortable with those aspects of free association that make the relationship most like New Zealand's relations with another independent State. That, after all, was its main business. It has been harder for the Ministry to see the implications of the terms of the free association that make the relationship most like integration with New Zealand. There is therefore good reason to look more closely at those aspects.

V THE "INWARDNESS"[7] OF THE CONSTITUTIONAL ASPECTS OF THE FREE ASSOCIATION RELATIONSHIP

The New Zealand model of free association retains important constitutional links between the partners:

- The constitution of the self-governing State recognises that the Head of State continues to be Her Majesty the Queen in right of New Zealand;
- The people of the self-governing State remain New Zealand citizens as of right;
- The New Zealand Government has given a commitment to go on giving the government of the associated State financial and other support as it did before self-government; and
- There is an expectation that the laws and policies of both governments will reflect the shared values stemming from the common citizenship.

A A Charter of the Rights and Obligations Among New Zealand Citizens

These "constitutional" aspects of the New Zealand model of free association[8] should be seen as a fundamental charter setting out the interlocking rights and obligations of different groups of New Zealand citizens who live under separate governments, but, for certain purposes, still form a single entity. Those rights and obligations were not created by the free association. They were born when the island or island group concerned was brought within the sovereignty of the Crown and made part of New Zealand. They have been moulded out of all that has happened since. They remain,

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7 "Inwardness" was a favourite word of Quentin's. By that he meant the underlying significance rather than the superficial impression.

8 The role of the Queen as Head of State and the common citizenship are often described as the constitutional aspects of the relationship, but the other terms – continuing economic and other support and the commitment to uphold the shared values – stem from the common citizenship and are therefore of the same order.

because self-government in free association has not taken them away. That thesis can be tested by looking more closely at the rights and obligations themselves.

B A Constitutional Entity Comprising New Zealand and its Associated States

Under their own constitutions, the Queen in right of New Zealand continues to be the Head of State of New Zealand and also of each associated State. All continue to be part of the Queen's "dominions" (with a small "d"). The reference to the sovereign as "the Queen in right of New Zealand" does not give New Zealand any superior legal powers. In New Zealand and those associated States in which the executive authority continues to be vested in the Queen, she or her representative is separately advised, or has delegated the whole of the executive power to an organ of the government of the self-governing State.

The terms of the free association do not require New Zealand or the self-governing State to maintain the role of the Queen as the Head of State, but while all of them continue to do so, the prerogative instrument known as the Letters Patent Constituting the Office of Governor-General of New Zealand[9] has more than a symbolic effect. By that instrument, the Queen, acting with the approval of the Government of New Zealand and the Governments of each associated State, has appointed a Governor-General to represent her in the Realm of New Zealand. That entity comprises New Zealand together with its associated States, as well as the Ross Dependency. The powers and authorities conferred on the Governor-General in respect of the Realm as a whole are without prejudice to those of any other person who may be appointed to represent her in any part of the Realm, and are subject to the law of each part. The Letters Patent are part of the law of every part of the Realm. For certain purposes therefore, New Zealand and its associated States continue to be part of a single constitutional entity.

C The Shared New Zealand Citizenship

One of those purposes is the citizenship law which is common to the whole of the Realm.[10] The terms of the free association recognise the continuing right to New Zealand citizenship of persons born in an associated State of a parent who is a New Zealand citizen or a permanent resident of – in effect – any country that is part of the Realm. Persons born outside those countries to a parent who comes from the associated State and is a New Zealand citizen by birth or grant also have the right to New Zealand citizenship.

MFAT has always seen the right to New Zealand citizenship as having importance to the people of an associated State only or mainly because it carries with it the right to live, work and study in New Zealand. Certainly, the people of an associated State value the open door to New Zealand, but

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9 SR1983/225 as amended by SR 1987/8 and SR 2006/219.

10 Citizenship Act 1977.

the shared citizenship is fundamental to the relationship even while they remain in their own country.

The Universal Declaration of Human Rights recognises certain fundamental human rights. One is that everyone has the right to a nationality. No one may be arbitrarily deprived of that nationality.[11] The right of the people of an associated State to New Zealand citizenship therefore remains protected by New Zealand's obligations under the international law of human rights. The common citizenship underlies New Zealand's responsibility to provide ongoing financial and other support to the people of the associated State, and the commitment of the partner governments to respect the values that all citizens share.

D New Zealand's Responsibility to Provide Ongoing Financial and Other Support

By the time that the peoples of the Cook Islands, Niue and Tokelau were ready to contemplate self-government, each was receiving substantial financial support from the New Zealand Government. Free association involves a commitment by the New Zealand Government to continue its financial support of the associated State. That commitment was given to the Cook Islands through the solemn assurances expressly made for the record by the Prime Minister, the Minister of Island Territories and the Deputy Leader of the Opposition at the third reading of the Bill for the Cook Islands Constitution Act 1964.[12] In the case of Niue, Parliament itself provided that "It shall be a continuing responsibility of the Government of New Zealand to provide necessary economic and administrative assistance to Niue".[13] The draft Treaty of Free Association with Tokelau provided as follows: "New Zealand undertakes to provide ongoing economic support and infrastructure development support to Tokelau to maintain and improve the quality of life of the people of Tokelau".[14]

Shortly after assuming the responsibility for the free association relationships with the Cook Islands and Niue in late 1974, MFAT decided that, instead of continuing the separate appropriation of financial assistance to the self-governing States of the Cook Islands and of Niue (as well as funding for the administration of Tokelau), all of that assistance should be provided through the application of the Ministry's regular aid policies and procedures from the Official Development Assistance budget. The Ministry reports this assistance to the Organisation for Economic and Cultural Development as taking it nearer to its International Development performance target of 0.7 per cent of GNI.

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11 UNGA Resolution 217 (III) (10 December 1948) art 15. See also the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, art 24(3).

12 (10 November 1964) 341 NZPD 3271, 3260 and 3260 respectively.

13 Niue Constitution Act 1974, s 7.

14 As it turned out, the operation of the treaty commitment to Tokelau has not come into force, but the existing arrangements for financial support remain in place.

Because the financial support for an associated State is channelled through NZAID, there has been a tendency to lose sight of its true character. It is therefore pleasing that the NZAID Pacific appropriation is now allocated under headings that specifically include "Constitutional Relationships". All NZAID-funded assistance to the Cook Islands, Niue and Tokelau falls within this category. That should act as a reminder that the New Zealand Government's commitment to provide ongoing financial support to an associated State or a dependent territory is quite different from the Government's decision, in the exercise of its discretion, to give Overseas Development Aid to a small Pacific Island country that has no constitutional links with New Zealand.

Just as the maintenance of the New Zealand citizenship of the people of an associated State is protected by the doctrines of fundamental human rights, so also is the right of all citizens to social progress and access to better standards of life.[15] The Universal Declaration of Human Rights provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.[16] Everyone also has the right to education. These rights are further spelled out in the International Covenant on Economic, Social and Cultural Rights. New Zealand became a party to that instrument in respect not only of itself but also of the Cook Islands, Niue and Tokelau.

Although, in international law, an associated State can succeed to New Zealand's treaty obligations in respect of the New Zealand citizens living in its territory, in the constitutional law of both partner States, the duty to promote social progress and access to better standards of life continues to be a shared one. That was the position before self-government when the fledgling governments of the dependent territories were learning to use New Zealand funding for the benefit of their peoples. It remains the case after self-government because the recognition of that status by the New Zealand Parliament did not take the New Zealand Government's responsibility away. As has been seen, in the case of Niue the recognition was accompanied by an express provision that the New Zealand Government's responsibility would continue into self-government.

E The Commitment to Shared Values

That shared responsibility is alluded to in another seminal document which puts on record the commitment to shared values of the partners to a free association. That commitment, too, has a constitutional character because it is the vehicle for the necessary harmonising of New Zealand's continuing responsibility for the wellbeing of all of its citizens wherever they live within the Realm and the exercise of the self-government of an associated State.

The need for such a vehicle was recognised in the early years of the Cook Islands' self-government. In 1973, legislation proposed by the Cook Islands Government seemed likely to cut

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15 Preamble to the Universal Declaration of Human Rights, above n 11.

16 Ibid, art 25(1).

across the fundamental human rights of those New Zealand citizens living in that country. Although the initiative was clearly within the constitutional authority of the Cook Islands Government and Parliament, the New Zealand Government found it necessary to set out what it expected of its partner in the free association.

On 4 May 1973 the Prime Minister of New Zealand, the Rt Hon Norman Kirk, addressed a letter to the Premier of the Cook Islands, the Hon Albert Henry. Even at this distance in time, it is worth setting out in full what it describes as the central feature of the free association relationship:[17]

> By their own express wish, the people of the Cook Islands remain New Zealand citizens. Like other New Zealand citizens, they owe allegiance to her Majesty the Queen in right of New Zealand, and they acknowledge the Queen in Her New Zealand capacity as their Head of State. In this way the Cook Islands people retain the right to regard New Zealand as their own country, even while they enjoy self-government within the Cook Islands.
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> The very survival of a state may depend upon the belief of its citizens in common ideals and their sense of loyalty towards each other. It is therefore unusual for a state to extend its citizenship to people living in areas beyond the reach of its own laws. That New Zealand has taken this step in relation to the Cook Islands is the strongest proof of its regard for, and confidence in, the people of your country.
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> For the reasons I have already indicated, the bond of citizenship does entail a degree of New Zealand involvement in Cook Islands affairs. This is reflected in the scale of New Zealand's response to your country's material needs; but it also creates an expectation that the Cook Islands will uphold, in their laws and policies, a standard of values acceptable to most New Zealanders.

Mr Henry's reply confirmed that the Cook Islands Government shared the views expressed in the letter and wished to maintain the free association relationship.

Since then, what has become known as the commitment to shared values has been regarded as an essential term of the New Zealand model of free association. That term applies to both partners and to every aspect of the relationship. Essentially, it means that no interest or concern of either Government is outside the duty of the other to give it serious consideration, and to take due account of it, before acting in the exercise of its own executive or legislative authority.

VI NEW ZEALAND AND ITS ASSOCIATED STATES REMAIN A SINGLE POLITY FOR SOME PURPOSES

The New Zealand model of free association has to be looked at differently, depending on whether the focus is outward, looking to the relationship of an associated State with the rest of the international community, or inward, looking at the associated State's relationship with New Zealand.

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17 Exchange of Letters between the Prime Minister of New Zealand and the Premier of the Cook Islands concerning the nature of the special relationship between the Cook Islands and New Zealand, Wellington, 4 and 9 May, 1973 [1973] I AJHR A10,

Although, to begin with, the vista looking outward was far from clear, it was gradually established that the Cook Islands and later Niue are States in international law with the same attributes as States that are constitutionally independent. The way remains open for Tokelau to follow the same path. On behalf of both the Cook Islands and Niue, MFAT put in a considerable diplomatic effort in explaining to other States and international organisations that those remaining links with New Zealand did not affect the associated State's constitutional capacity to conduct its own foreign relations, and its freedom to do so under the terms of the free association.

When the focus is inward, on the nature of the relationship between New Zealand and the associated State, New Zealand citizens remain a single polity, whether they are in New Zealand itself or in the associated State. They are like the members of a family, when the children have grown up and left home but parents and children retain an abiding concern for one another's wellbeing. That homely analogy becomes increasingly apt as the population within New Zealand includes an increasing proportion of citizens of Cook Islands, Niuean, Tokelauan or other Pacific Islands descent. Those who represent the country's voters in Parliament and the voters themselves seem unlikely to be surprised by the notion that New Zealand retains the same sort of responsibility for the wellbeing of its citizens in an associated State as it does for its citizens in New Zealand itself.

In constitutional law as informed by the international doctrines of human rights, the difference between self-government in free association and independence is the New Zealand Government's residual responsibility for the wellbeing of its citizens in an associated State, coupled with the mutual commitment to respect the values that most citizens share. That difference needs to be taken into account in the practical working, as between the partners, of the free association relationship.

VII THE IMPLICATIONS FOR THE WORKING OF THE FREE ASSOCIATION RELATIONSHIP

A Implementing New Zealand's Obligation to Provide Ongoing Financial and Other Support

In terms of quantity, New Zealand's financial support to its associated states, as well as to Tokelau, has been generous**.** In a general way**,** none of those States or territories has suffered from a lack of money. Even so, uncertainties about the purpose of the promised financial and other support, the form in which it should be provided, how it should be quantified, and how long it should continue, have, at times, strained the relationships between the Governments of the existing associated States and the Government of New Zealand. The following analysis attempts to distil the governing principles from the experience of the last 40 years.

B The Main Purpose of Financial Support is to Maintain and Improve living standards in the Associated State

As the conscientious administering authority of dependent territories in the course of transition from a subsistence to a money economy, New Zealand's natural response was to make money available for better standards of health care, education, housing and other amenities. As a result, the

people of the territory came to enjoy a standard of living that their own islands could not sustain. There was, however, a supposition that "development", mainly in the form of tropical agriculture, would make it possible for the territory to increase its own revenue-earning capacity and thus relieve New Zealand of at least some of the burden of providing for its needs. In general, the focus on development projects coincided with the aspirations of the people of the territory, although not necessarily with their ability to compete, in the longer term, with larger scale producers elsewhere.[18]

With the benefit of hindsight, it has become clear that, for several reasons, New Zealand's first priority has to be the maintenance and gradual improvement of living standards in the associated State. The amount of money provided must take account of the difficulties of life in the associated State, including its remoteness and its need for adequate means of communication, internally as well as externally. It must also enable the people of the associated State to enjoy a standard of living that is reasonably comparable with the standard of living in New Zealand.

The New Zealand standard of living is the measuring rod for three reasons. First, as more of the associated State's people come to New Zealand for education, training, health care, work, family visits or settlement, New Zealand living conditions become the norm of what is desirable. Secondly, the shared citizenship itself sets a standard for the way in which people should be expected to live. It is therefore reasonable to compare the facilities in an associated State with what would be available in a remote part of mainland New Zealand. Thirdly, the open door to New Zealand means that the associated State is, in effect, in competition with New Zealand, and Australia as well, for the continuing presence of its people as members of its labour force and its community. Money alone

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18 In 1984, Geoff Bertram and Ray Watters described the Cook Islands, Niue and Tokelau as having MIRAB economies, an acronym for Migration, Remittances, Aid and Bureaucracy. Their purpose was to challenge the thinking behind the strenuous efforts of aid donors and international agencies, both then and since, to drive small island economies away from what seems to be their natural and preferred pattern of resource allocation and to force them into a development mode transferred from mainland Asia (and before that from the writings of the classical economists): Geoff Bertram "The MIRAB model Twelve Years On" (1999) 11 The Contemporary Pacific, 105. The model has since been widely used to analyse the processes of resource allocation and decision-making in small islands in the Pacific and elsewhere.

More recently, other economists have identified the abilities of some small societies, particularly island jurisdictions, linked to, but separate from, their European partners, to restructure their economies away from tropical agriculture and towards tourism, offshore finance or high-value manufacturing exports. These have been described, by the combination of two more acronyms, as PROFIT/SITE islands: Ashley Oberst "Contrasting Socio-Economic and Demographic Profiles of Two, Small Island Economic Species: MIRAB versus PROFIT/SITE" (2007) 2 Island Studies Journal 163. The author classifies the Cook Islands as having made a transition from a MIRAB economy to PROFIT/SITE. The economies of small islands are now the subject of a substantial body of literature that challenges accepted ideas about what is likely to work in a small Pacific Islands economy like that of a New Zealand associated State and also what should be regarded as the true measure of success.

will not necessarily keep people in their own islands, but reductions in the level of support – actual or threatened – will certainly encourage them to go.

The Cook Islands, Niue and Tokelau have all experienced some loss of population since numbers were at their height. The outflow must be accepted as an inevitable response to the opportunities available elsewhere. The consequent per capita increase in the cost of providing the necessary services and amenities must also be accepted. Cost-cutting measures like the privatisation of certain government-run services may have been endurable in New Zealand. But, in the totally different economy and culture of an associated State, the introduction of such measures may be totally destructive.

It is a truism that the money provided to an associated State needs to be spent wisely. Initiatives that give people real – as distinct from theoretical – opportunities to earn a living on their own islands also give them greater reason to stay. They are therefore important for their own sake, as well as for any additional revenue they may bring in. But that does not mean that the people of the associated State should be held to a certain standard of living unless they can improve it from their own resources. Still less does it mean that, when they do manage to increase the revenue from local or other sources, that should automatically trigger a reduction in what New Zealand provides.

I come back later to the complex question of what the people of an associated State should be required or be free to do in order to reduce their need for New Zealand's financial support. There can, however, be no presumption that, in principle, the people of an associated State ought to be more self-supporting. The difficulty of achieving that goal except by returning to subsistence living is the main reason why they chose free association rather than independence. The only safe assumption is that New Zealand's financial support is likely to be needed indefinitely.

C Budgetary Support

The form of New Zealand financial support to an associated State must suit the purpose for which it is given and be consistent with its self-government. The associated State must be able to set its own priorities about how the support should be used, subject to the safeguards described below.

In preparation for self-government, all three dependent territories, the Cook Islands, Niue and Tokelau, received substantial financial support in the form of a lump sum grant. The legislature of the territory was free to authorise the spending of the grant in accordance with its own budgetary priorities. As the local legislatures gained confidence and experience, but needed more certainty about the future levels of funding, the size of the grants was determined on a triennial basis. That form of funding became known as budgetary support.

In each case there was an expectation that budgetary support would continue after self-government. The Cook Islands received budgetary support from 1965 to 1997. Niue still receives that form of support (as does Tokelau which remains a dependent territory). From the beginning, there appears to have been an assumption that, once a dependent territory had become self-

governing, the goal was to reduce, and eventually bring to an end, that form of financial support.[19] Recently, however, there has been a greater willingness to recognise that there may continue to be good reason for providing that form of financial support to an associated State.

Budgetary support involves the willingness of the New Zealand Parliament to appropriate a lump sum grant and allow the legislature of the associated State to treat that grant as revenue. From that and any other revenue at its disposal, the legislature then makes its own detailed appropriations. The purpose of those appropriations is to meet the recurrent expenditure of the associated State, in accordance with its legal obligations and its policy priorities and programmes.[20] Although the legislature of the associated State is not fully subject to the discipline normally imposed by the need to consider what sort of burden its taxpayers will accept, it still has to honour any assurances it has given to its New Zealand funder in negotiating the level of the budgetary support.

NZAID now accepts that an associated State needs to have reasonable certainty about the level of budgetary support it can count upon over a rolling three-year period, together with an assurance that an allowance will be made for inflation. In return, it requires an undertaking that the Government of the associated State will ask its legislature to approve a balanced budget. There is a clear implication that the Government must manage its expenditure in a way that avoids cost over-runs.

As before self-government, the associated State must publicly account for that expenditure in accordance with its constitution and other law. The only difference is that, before self-government, the New Zealand Parliament and Government retained some legal powers in respect of the territory that could, if necessary, be used to control the expenditure of the money appropriated by Parliament. In fact those residual powers have never had to be used. With self-government, the residual powers disappear and the mutual commitment to shared values takes their place. Those values are potentially compelling.

The continuing acceptability of budgetary support to the New Zealand Government, Parliament and taxpayers depends on the wisdom and integrity of the associated State in handling the money

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19 In 1968, the New Zealand Government decided to build and operate an international airport on Rarotonga in the Cook Islands, mainly for the benefit of its own airline. It was recognised, however, that better air services to and from the Cook Islands were likely to benefit the Cook Islands also, through the growth of tourism and in other ways. The two Governments entered into a Civil Aviation Agreement under which the Government of New Zealand had sole control of air traffic rights into and out of the Cook Islands. The agreement was to remain in force for 21 years, "or until financial aid from the Government of New Zealand to the Government of the Cook Islands is restricted to loans or grants for specific capital purposes, whichever period is the longer". The Agreement was terminated by mutual agreement on 1 April 1986, although budgetary support continued until 1997.

20 Budgetary support to an associated State is no different in principle from the New Zealand Government's financial assistance to the Chatham Islands Council. See the increasing levels of assistance to be provided over the 2009 – 2012 financial years and beyond: Chatham Islands Annual Plan 2008/9, 3.

received in that way. It is not a matter of the New Zealand Government or its officials wanting to substitute their own priorities for those of the associated State. That would be inconsistent with self-government. But there is no way of quantifying the amount of budgetary support that ought to be provided over a given period except by negotiation and agreement between the two governments. Unless the associated State honours any assurances it has given in the course of reaching that agreement, that source of funding will simply dry up.

On the other hand, an associated State may have little if any ability to borrow money on the security of its own revenues. Occasionally, therefore, if the associated State is faced with a deficit because of unforeseen circumstances, it will be reasonable for New Zealand to accept the role of provider, lender or guarantor of last resort. After all, that is what New Zealand had to ask the United Kingdom Government to do in its own earlier years when it was still itself in the position of an associated State.

Once committed or spent, the money provided in the form of budgetary support must be properly accounted for. The necessary constitutional and other mechanisms for this purpose will almost certainly be part of New Zealand's legacy at the time of self-government. They include the presentation to the legislature of audited government accounts, together with the auditor's report, and their detailed examination by a committee with the power to recommend any necessary remedial action. If the Auditor makes any specific recommendations, those must be addressed. Scrupulous and public adherence to these requirements by the government of an associated State is an important way of demonstrating its reliability both to its own voters and also to the voters in New Zealand, its partner State.

It is harder to transmit to the people of an associated State the culture of transparency and probity that supports the accountability mechanisms just described. At times, the shared values on which the New Zealand model of free association depends may be in conflict with a cultural attachment to reciprocity in the giving and receiving of benefits. But, if New Zealand is to remain the funder, then the expectations of most New Zealanders about the use that may properly be made of public money need to be given full weight. Nothing would destroy an arrangement for continuing budgetary support more quickly than the slightest hint of veniality or corruption. That includes the misuse of government funds, allowances or property for personal or political benefit, or unmeritorious preferences to a person's own family or village, as well as such offences as misappropriation, bribery or theft.

D Administrative Assistance

The willingness to provide any necessary administrative assistance to the associated State has always been an element of the New Zealand model of free association. "Administrative assistance" means something more than the provision of funds with which to purchase the services of qualified personnel from outside the associated State. That, too, may be necessary, but is unlikely alone to meet the associated State's needs. Self-government means that the range of policy advice and

government services required is potentially almost as broad as in New Zealand itself. An associated State with a very small population or in the early years of self-government, or both, cannot be expected to put in place and maintain an administrative structure that is capable of undertaking every aspect of government administration. It needs to have ways of deepening its resource pool and achieving economies of scale.

One way is to look to New Zealand office-holders and institutions and ask them, in effect, to act as organs of, or advisers to, the associated State. The examples of such "borrowing" are wide-ranging. Like a number of independent States in the Pacific, the Cook Islands and Niue look to retired or serving members of the New Zealand judiciary to be the judges of their superior courts. Tokelau was planning to continue its reliance on the New Zealand courts, sitting as courts of Tokelau. All three countries originally used or planned to use the Auditor-General of New Zealand as the auditor of their public accounts, though the Cook Islands has since made provision for an auditor of its own.

At a less formal level, access to the advisory services of a number of New Zealand government departments which had established working relationships with the former island territories continued into self-government. Subsequent events, however, brought most of those relationships to an end. One was the transfer of responsibility for the New Zealand end of the relationship to MFAT with its different culture. Although individual officers have often tried to be helpful, the Ministry has been slow to accept that it may need to give an associated State ongoing support, as if it were part of its machinery of government. Another was that, in May 1986, New Zealand departments providing advisory or other services to an associated State or a dependent territory were required to charge for them at the full commercial rate.[21] As no additional funding was provided to meet the cost involved, that decision cut off the former relationships with a number of departments.

In 2003, the New Zealand Government sought to restore a departmental responsibility to provide administrative assistance to Niue and Tokelau across the whole of government. As a general rule, staff time would be contributed from within departmental baselines, while non-staff costs, such as travel and accommodation would be funded from the Niue or Tokelau budgets or from NZAID.[22] It is not clear how well departments have responded to this exhortation. Cooperative arrangements with New Zealand government departments and other public bodies are an essential element in enabling a very small associated State to govern itself, but those arrangements may need to be in the form of a properly funded contract. In appropriate cases, NZAID is willing to provide funds for this purpose in addition to the amount already provided as budgetary support.

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21 See *Report of the Niue Review Group* (Niue Review Group, Wellington, New Zealand and Alofi, Niue, August 1986) 29.

22 Memorandum dated 30 June 2003 to Chief Executives of government departments and other agencies from Michael Wintringham, State Services Commissioner, and Simon Murdoch, Secretary of Foreign Affairs and Trade.

Notable examples are the arrangements that Niue and Tokelau have entered into with Counties-Manukau District Health Board and Capital and Coast District Health Board respectively. Both Boards are New Zealand Crown-owned entities. Each has undertaken to support and cooperate with the local health authorities in enhancing the capacity of health services within the island or islands concerned and in handling referrals to New Zealand.[23] The arrangements permit the Governments of Niue and Tokelau to exercise autonomy and participate actively in the development of health services for their own populations, even though they are not the funders or the providers of the services concerned. The arrangements are seen as reducing the inequalities in the field of health care as between New Zealand citizens in Niue and Tokelau and New Zealand citizens in New Zealand.

This example shows that there is no limit to the kind of inter-agency cooperation that can be put in place to support the self-government of an associated State. The current concept is "capacity-supplementation". It involves much more than simply training individuals in the public or private sector. "Making things work well" may require New Zealand officers and institutions to act as if they were officers or institutions of the associated State concerned, acting under the authority of its government. Arrangements for this purpose may need to include provision for regular monitoring, including peer review and evaluation. The only limit is that, if New Zealand officers or officials are formally advising the government of an associated State, they must be able to do so independently, free of any competing duty to the Government of New Zealand.[24] With that kind of administrative support, even the smallest associated State should be able to survive as a functioning political entity.

E The Need to Keep Things as Simple as Possible

I have not discussed the funding of capital projects in an associated State at the level of principle because all but minor projects will almost certainly need to be carried out by outside contractors. In those circumstances the provision of funding on a project basis seems sensible, as long as the project reflects the associated State's priorities, in terms both of the split between recurrent and capital

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23 Tokelau: Memorandum of Understanding Between Capital and Coast District Health Board and the Tokelau Department of Health (8 September 2004).

Niue: The arrangement with Counties-Manukau District Health Board came into force on 1 January 2005. It was made under the umbrella of Halavaka ke he Monuina Arrangement between the Government of New Zealand and the Government of Niue for a Programme of Strengthened Cooperation, 2004-2009.

24 The need to avoid direct conflicts of interest is illustrated by the provisions of the Constitution of the Cook Islands in its original form under which the High Commissioner was a representative of the Government of New Zealand in the Cook Islands (s 3(1)) and also a member of the Council of State (s 4(1)). The members of the Council of State were jointly the representatives of her Majesty the Queen in the Cook Islands (s 4(2)). That arrangement had been the wish of the pre-self-government legislature of the Cook Islands for the period immediately after self-government. The constitutional advisers had warned that the combination of the different roles of the High Commissioner might be unworkable. So it quickly proved. A separate New Zealand Representative had soon to be appointed, and the office of High Commissioner was eventually replaced by the office of Queen's Representative.

expenditure, and the choice of the capital project itself. There is, however, a need for real practicality at all stages of the exercise.

There can be no assumption that what works well in New Zealand will also work well in the associated State. Experience suggests the opposite. Whether the project involves a new administrative or electronic system, a new building, or a new means of generating electricity or some other new facility or equipment, it needs to be purpose-designed for the circumstances of the associated State – its climate and weather patterns, including the heat, humidity, corrosive salt-laden air and the risk of cyclones, the high cost and perhaps the irregular supply of electricity, the limited ability to obtain spare parts quickly and the limited technical skills likely to be immediately available. The practical ability to maintain the new asset and the cost of doing so should always be taken into account.

Those dealing with the associated State at the New Zealand end need to have a good understanding of the State, its people and its circumstances. There needs to be enough continuity to build up a body of institutional knowledge and experience not only of the associated State concerned but also of New Zealand's responsibilities under the free association relationship. Experience has shown that reliance on standard bureaucratic procedures is seldom the best way of finding people who are likely to be able to make a real contribution to an associated State. As in the case of Tony Angelo himself, people who are asked to take on the demanding and sometimes difficult task of helping an associated State to use the talents of its own people to best advantage need to be recommended for the job by someone who has a good knowledge of their capabilities and also of what the job requires.

F Should the Associated State Try to Reduce the Need for New Zealand Financial Support?

The answer to the question whether an associated State should try to reduce its need for New Zealand financial support is complex. In this article I can do no more than refer briefly to some of the relevant factors. Each partner is likely to be faced with competing considerations. Each must try to be realistic about what is achievable and to reach a balanced view about the course that ought to be followed.

The natural pride of the associated State and its people will almost certainly give them the ambition to be as self-reliant as possible. They may also want to be free of the constraints that accompany a need for outside support. But the means of achieving greater self-sufficiency are limited. On the New Zealand side, the goals of the Overseas Aid programme have themselves been modified and officials have moved away from the initial assumption that those goals necessarily apply in full to an associated State. While long-term or sustainable development and lessening dependency on aid may, in some cases, still be an element, other goals, like strengthening the linkages between the counterpart agencies of each partner government, building social and economic resilience and population retention, have also been recognised.

If, however, some form of "development" is still a goal, there is a real question about the kind of development that is likely to be possible and desirable. After serious efforts in the Cook Islands and also in Niue, the production for export of tropical fruit, vegetables and other primary produce, in a natural or processed form, has been found not to be viable in the long term, except in marginal cases, such as the shipment by air-freight of a small-volume, high-value, long shelf-life product like vanilla. Tokelau's only product is coconuts, and then only in small volume and with limited labour to exploit them. In the exclusive economic zones of the three countries the main species, tuna, are migratory. The associated state may, however, be able to share in the revenue through the operation of the 1987 Treaty on Fisheries with the United States.[25] So far, few if any other opportunities for profitable commercial fishing have been identified.

Tourism is the best money earner, but only the Cook Islands, with its many high islands and atolls and broad lagoons, has been able to earn substantial revenue from that source. Even that became possible because it had suited New Zealand to build the international airport in Rarotonga and to provide the air services that gave the tourism industry the necessary initial boost. Niue's one flight a week linking it with Auckland and the pristine condition of its reefs are the basis for a modest tourism industry in a niche market. Tokelau's dependence on sea transport limits its prospects of becoming a tourist destination, and, in any event, the vulnerability of its environment and culture would make tourism unacceptable except on a very small scale.

Like other small island countries in the Pacific and elsewhere, the Cook Islands, Niue and Tokelau have all, in some degree, tried to increase their revenue by, in effect, selling or renting out their sovereignty. They use some aspect of their governmental authority to provide a product or service that they can sell to people offshore. Some of these initiatives are entirely acceptable, for example the issue of collectibles such as coins and stamps, though there is a question-mark about their real profitability. Others, such as the renting out of the country's Internet domain name or the operation of an offshore financial centre or an "open" shipping registry providing ship owners with a "flag of convenience", raise important issues for other States, including New Zealand.

Initiatives of this kind allow those who make use of them to escape the more onerous legal and financial obligations imposed by their home countries. As a result, those countries are likely to lose tax or other kinds of revenue. All other members of the international community may also be adversely affected by the use of an offshore financial centre for the money-laundering of the proceeds of drug-smuggling or other organised crime; the use of an Internet domain name to circulate pornography; or the use of a flag of convenience to avoid the imposition of more onerous safety standards or engage in illegal, unreported or unregulated high seas fishing – matters that, in

25 See also the Agreement among Pacific Islands States concerning the Implementation and Administration of the Treaty on Fisheries between the Governments of Certain Pacific Islands States and the Government of the United States of America (2 April 1987) entered into at the same time.

international law, the flag State is required to regulate. If there is no real connection between the flag State and the ship concerned, it may be unable to carry out that responsibility.

An associated State that engages in activities of this kind comes under considerable pressure from other members of the international community to control the worst abuses of it or otherwise give it up altogether. It is therefore likely to "clean up its act", at least to the point of avoiding some kind of retaliation. Even so, other States, including New Zealand, may still be exposed to the adverse effects of the activity. The New Zealand Government is entitled to expect that the associated State will refrain from activities that undermine "the values generally acceptable to New Zealanders" which the associated State has undertaken to uphold. That principle was expressly affirmed in a decision of the New Zealand Court of Appeal arising out of the notorious "Wine-box Affair".[26]

Obviously, if the activity contravenes or undermines New Zealand law or international law, the commitment to shared values will require the associated State to bring the activity to an end. If, in the absence of illegality, there is still a clash of policies, then the Government of the associated State has an obligation to be receptive to any approach by the New Zealand Government aimed at reconciling their competing priorities. The aim should be agreement on a course of action that, so far as possible, meets the policy objectives of both. There can be no question of the associated State trying to hold New Zealand to ransom, but, in fairness, if the parties are to agree that the associated State will abandon a revenue-earning activity because it is harmful to New Zealand interests, then the provision by New Zealand of some form of income substitution may need to be part of the

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26 The Cook Islands Government set up an offshore financial centre in 1981**.** In 1994, the Hon Winston Peters tabled in Parliament a large number of documents contained in a wine-box. They concerned certain financial transactions, including some in the Cook Islands, involving the European Pacific group of companies. One was the so-called Magnum transaction. The New Zealand Government set up a Commission of Inquiry to inquire into the legality and propriety of the actions of those responsible for enforcing New Zealand tax law, and the adequacy of the tax law itself. The Cook Islands Government also commissioned an inquiry into the Magnum transaction. The New Zealand Commission's description of that transaction, and the references to it in the subsequent New Zealand litigation, relied on the findings of the Cook Islands Commission of Inquiry.

It appeared that the Cook Islands Government had, in effect, been selling tax credit certificates to foreign companies. The bulk of the tax shown as having been paid was in fact returned to the group of companies concerned, in return for a fee. The Cook Islands Government was aware that the tax credit certificates would be used to claim a refund in New Zealand of the full amount shown. The New Zealand Court of Appeal refused to grant the Government of the Cook Islands the sovereign immunity it would otherwise have been entitled to on the ground, among others, that the special relationship between the Cook Islands and New Zealand was expressly based on the international law principle of good faith. It would be indefensible for a friendly State to be party to an attempt to evade or abuse New Zealand tax laws. It would also undermine the values generally acceptable to New Zealanders which the Cook Islands had committed itself to uphold. See *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278, 306 (CA) Richardson J with whom McKay J agreed, (307). See also 290 Cooke P, 309 Henry J and 316 Thomas J.

package. In short, it is not in the interests of either party for the associated state to grab at every opportunity of earning revenue regardless of its consequences.

That comment applies also to aid that may be available from an international organisation or another government. These opportunities, too, need to be taken up with caution. Unless they are truly consistent with the associated State's policies and priorities, and it has the human and other resources to make good use of them, they can turn out to be worthless or even costly. The associated State also needs to consider the political implications of accepting aid from a particular source. In doing so it may need to take account of the views of New Zealand as the partner State. Obviously, however, New Zealand cannot urge the political disadvantages of what would otherwise be a useful source of funding and at the same time resist any increase in its own contribution to the associated State, or, still less, seek to reduce that contribution, unless an acceptable alternative source of funding is available.

The limited revenue-earning opportunities of Niue and Tokelau have led those Governments, in conjunction with the New Zealand Government, to establish Trust Funds for each country. Capital sums are being invested with the objective of building up the funds to the point at which income can be paid to the government concerned, to be treated as revenue. Other States, international organisations and private foundations have been invited to contribute. The income from these trust funds should eventually make a useful contribution to each country's budget, but it is almost certainly unrealistic to suppose that it will be sufficient to replace New Zealand budgetary support, or even permit it to be significantly reduced.[27]

New Zealand's constitutional responsibility for the wellbeing of its citizens in an associated State means that neither the New Zealand Government and taxpayers nor the Government and people of the associated State itself should measure success or failure by reference to the level of New Zealand's financial and other support that the associated State requires. That would be like asking whether too much money is being spent on Auckland – or the Chatham Islands. The necessary level of support for the associated State will, of course, remain a matter for wise judgment on both sides. New Zealand, as a small country itself, will always be subject to constraints. As in any other polity, there will always be debate about what a government should provide for its citizens out of taxpayers' money.

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27 Compare the Compact of Free Association as Amended signed on 30 April 2003 by the Government of the United States of America and the Government of the Republic of the Marshall Islands, Title Two, Grant Assistance, s 211(a) and the provision for the establishment of a Trust Fund so that income from the Fund can take the place of grant assistance when that form of assistance comes to an end: idem, s 216. For the text of the Compact as amended, see the Compact of Free Association Amendments Act 2003, Public Law 108-188, 108th Congress, Title II. It is doubtful, however, whether income from the Trust Fund will be sufficient for this purpose: United States Government Accountability Office, Testimony before the Committee on Energy and Natural Resources, US Senate, Statement of David B Gootnick, Director International Affairs and Trade (25 September 2007) GAO-07-1258T, 13-16.

The goal must be the building of a consensus about what is a reasonable level, having regard to the pervasive influence of New Zealand living standards and the difficulty of earning additional revenue in practicable and acceptable ways. Greater self-sufficiency should, of course, enable the people of the associated State to enjoy a higher standard of living. But not all small island countries have the same opportunity to become more self-sufficient. Nor, as I have tried to show, is the associated State's self-sufficiency at any price necessarily in the best interests of New Zealand.

The "values generally acceptable to New Zealanders" – in an associated State as in New Zealand itself – no doubt include a sense that, in any community, people ought to pull their weight according to their ability. In an associated State which is, or is becoming, a money economy, people should therefore do what they sensibly can to earn a money income. Its government's policies should promote that objective in realistic ways. Opportunities to earn money will help people to lead satisfying lives. That is important, especially in an associated State that is in danger of losing its people to New Zealand and other places. But people leave the country in which they were born for many reasons. The retention of its population or other aspects of its demography should not become another test of the success or failure of an associated State or its relationship with New Zealand. What, then, is an appropriate test?

I suggest that, as in the case of the relationships between different communities within New Zealand, the success of a free association relationship is to be measured by the existence of mutual respect, a frank and productive working relationship that allows differences of opinion to be worked through and resolved, and a sense that, for some purposes, New Zealand and its associated States continue to form part of a single entity, not just on paper, but in peoples' hearts and minds and the use they make of the resources at their disposal. The colonisation of New Zealand and nearby Polynesian islands was to have far-reaching consequences. Even though a particular people may have been "decolonised", all the peoples affected – the colonisers as well as the colonised – are still working through the after-effects of colonisation and its impact on their present-day relationships.

Ingenuity has devised a way in which the peoples of New Zealand's former dependent territories can have the best of both worlds – independence in governing themselves and in their dealings with other States, and retention of their New Zealand citizenship and the right it gives them to New Zealand's ongoing financial and other support. Equal ingenuity is now required in working out how to make the best use of the resources at the disposal of each partner Government in ways that benefit not only the citizens who elect that government but also the citizens in the partner State.

VIII TOKELAU IN THE IMMEDIATE FUTURE

Because one purpose of this article is to acknowledge Tony Angelo's role as constitutional adviser to the people of Tokelau, it is appropriate to end with a brief look at what seem likely to be the main priorities of Tokelau's people in the period immediately ahead. As I see it, they now have the opportunity to bed in the constitutional arrangements they have already put in place.

A Making Village and National Government Work Well

In the moving introduction to an article in an earlier volume of this journal, Tony pointed out that Tokelau as a political entity existed only in the oral tradition. "What the communities of Tokelau have in common today is a shared ancestry, a shared culture, a shared language, a shared experience of life in a subsistence oriented environment, and a shared political aspiration".[28] He implies that people will need to look beyond these common attributes if they are to work well together at a national level. Since then, the architecture of the necessary structure has become clear and the institutions themselves have been put in place.

Under the customary law, all governmental authority is vested in the village councils – the *taupulega* – of the three atolls, Atafu, Nukunonu and Fakaofo. They have an inherent plenary authority to govern the people of the atoll. For that reason any authority at a national level must be conferred by the *taupulega.* Tony has traced the origins, role and legal status of a central body, usually called the General Fono.[29] That body gradually developed to the point where the administering authority, the Government of New Zealand, devolved upon it a measure of executive, and later legislative, power. When the Administrator's executive powers have been delegated or subdelegated to the General Fono and that body is not in session, the Council for the Ongoing Government is empowered to act.[30]

The recognition that the villages are the true source of governmental authority led, in 2004, to a new arrangement more accurately reflecting that concept. The Administrator revoked the earlier delegation of his executive authority in respect of Tokelau to the General Fono and delegated them instead to each village, "to be exercised by it jointly and cooperatively with the other villages of Tokelau and in the interests of Tokelau".[31] Then, in accordance with the authority expressly conferred by the Administrator, the *taupulega* jointly delegated to the General Fono their authority for the government of Tokelau in respect of certain listed matters described as being beyond those properly undertaken by each village alone.[32]

Tony himself has contrasted this autochthonous approach to constitution-making with "the Westminster-style approach to the grant of self-government that was used in the Cook Islands and

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28 Tony Angelo "Establishing a Nation – Kikilaga Nenefu" (1999) 30 VUWLR 75, 76.

29 Ibid.

30 Tokelau Administration Regulations 1993 (SR 1993/257) r 7.

31 Delegation of Powers to the Villages of Tokelau, separate instruments of Delegation in respect of Atafu, dated 29 May 2004, Nukunonu dated 28 May 2004 and Fakaofo dated 27 May 2004, Tulafono A Tokelau (Laws Of Tokelau) 2005, 511, 513, 515.

32 Delegation of Authority made at Atafu, Tokelau 1 June 2004, Tulafono A Tokelau (Laws Of Tokelau) 2005, 517.

Niue".[33] Other commentators have taken up that point, sometimes with an inference that the constitution-making in those associated States was less validly based.

It is necessary to remember, however, that the Westminster system has evolved into a well-tried, pragmatic way of delivering effective democratic government. The relationships among the various actors, political and non-political, are relatively clear. There are strong incentives for sufficient cooperation among them. The Westminster system has been adopted by the peoples of many countries, often, in the case of former British colonies, as a matter of course, and occasionally as a matter of deliberate choice, by a people who never came under British colonial rule.[34] I do not suggest that, in either case, the Westminster system of government comes naturally to a people who have little to support it in their own history or culture. But, because that system has been hammered out over time until it is capable of working well, they are usually able to make it their own, although they will almost certainly give it their own distinctive twist.

The people of Tokelau may benefit from putting their own very different constitutional arrangements to the same kind of test, in order to find ways of ensuring that their institutions work well together. The village councils have a long experience behind them, but, even after excluding the areas of authority delegated to the national government, their remaining responsibilities are greater than at any time in the recent past. Will they have to develop new ways of carrying them out? Then there are the working relationships within the national government. The three *faipule* are separately elected by the people of each village. Each in turn serves for a year as the *Ulu o Tokelau* (head of the government). Will the three of them work well together? What leadership will the *Ulu* be able to provide? The three *pulenuku* (village mayors) are also members of the Council for the Ongoing Government. There may be other members as well. What will be the working relationships within the Council for the Ongoing Government as a whole? And with each Village Council or *taupulega*? What will be the relationship between the Council for the Ongoing Government and the General Fono? Or the General Fono and the *taupulega*?

All these relationships, formal and informal, will affect the exercise of both the executive and the legislative functions of government. My questions about them are the kinds of question that a Westminster system would probably be able to answer fairly readily – in principle if not in practice. Because, in Tokelau, the system of government is based on different traditions, the political actors there must themselves find workable answers to questions about their relationships. The patterns that these answers take over time will become part of Tokelau's political and constitutional tradition. Then its three atolls will truly be a nation. That seems task enough for the years immediately ahead. Tony's wise counsel will be needed as much as ever.

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33 Angelo "Establishing a Nation – Kikilaga Nenefu" above n 28, 88.

34 The Republic of the Marshall Islands is one example.

B Where Does Ultimate Responsibility Lie?

After the second referendum in Tokelau and the recognition that things are likely to remain as they are for some time to come, the New Zealand authorities responsible for Tokelau have more than once asked publicly where ultimate responsibility ought to lie for the well-being of the people of Tokelau, in view of the delegations of the Administrator's authority. The legal position remains clear. The Administrator's delegation of authority is revocable at will and does not prevent the exercise of any power by the Administrator.[35] The Administrator is subject to the control of the Minister of Foreign Affairs and Trade in the exercise of his or her functions and powers. The Administrator's delegation of powers did not affect the General Fono's powers to make rules for the peace order and good government of Tokelau,[36] nor the Administrator's power to disallow all or part of a rule so made.[37]

Referring to the post-referendum consequences of the delegations by asking the rhetorical question "Who will be held to account if something goes seriously wrong [in Tokelau]?" seems to be a veiled warning that, in those circumstances, the Minister and the Administrator might have to intervene.[38] That is as it should be, because the people of Tokelau should not be left without the protection of the New Zealand Government's residual powers to take appropriate remedial action, if that should become necessary, until they have freely agreed to do without them.

It is to be hoped, however, that the Administrator will not have to do more than exercise the same kind of responsibility as New Zealand's Head of State and her representative – that is to "encourage, advise and warn" the Government of Tokelau about the exercise of its responsibility for executive government, including proposals for the making of rules by the General Fono. In the last resort, however, the Minister and the Administrator remain accountable for the wellbeing of the people of Tokelau. The whole thrust of my argument in this article is that the Government of New Zealand would retain a more remote, but nevertheless real responsibility for that well-being, although not one backed by any legal powers, even if the people of Tokelau were to become self-governing in free association with New Zealand.

C New Zealand's Responsibility to the United Nations

Some who have closely followed the development of self-government in the Cook Islands, Niue and Tokelau but, in most cases, have not been directly involved have the impression that the pace,

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35 Tokelau Administration Regulations 1993 (SR 1993/257) r 6(4).

36 Tokelau Act 1948, s 3A.

37 Tokelau Act 1948, s 3F.

38 Neil Walter, reviewing *The Future of Tokelau: Decolonising Agendas 1975-2006* by Judith Huntsman with Kelihiano Kalolo (2008) 33 New Zealand International Review 28, 29. Neil Walter is a former Secretary of Foreign Affairs and Trade and recently retired from the position of Administrator of Tokelau.

and perhaps even the direction of constitutional development has turned more on meeting United Nations expectations than on the real wishes of the peoples of those islands. While not sharing that impression (but acknowledging that, at times, I have been closely involved), I should therefore like to say something about what I see as the scope of New Zealand's obligations under Article 73 of the United Nations Charter in the present circumstances in Tokelau.[39]

It is now clear that the sixteen non-self-governing territories still on the list of those needing to be reported on by the administering authority under Article 73(e) remain there essentially of their own volition. Either they want to retain their existing form of government and relationship with the administering power, in preference to any alternative status that is on offer, or they want to make a decision about moving to some other status at some time in the future, through processes of their own devising. Other States are generally accepting of this situation. Most of the remaining listed territories enjoy a large measure of self-government. If the 1960 resolutions of the United Nations General Assembly can now be seen as permitting the constitutional status of a territory and its relationship with the administering authority to be judged by its substantive content rather than its label, they could fairly be said to enjoy "a full measure of self-government" within the meaning of Article 73.[40]

The people of Tokelau should feel that they are free to retain their existing constitutional arrangements and relationship with New Zealand for an indefinite period. As I have suggested, their first concern should be to make those arrangements work well. Only then should they start thinking again about their future status. The decision, by slightly more than a third of the voters in the second referendum, not to support a change to free association on the basis of the Constitution and the Treaty cannot be regarded as a positive decision to retain Tokelau's present relationship with New Zealand for all time.

The two referendums were, however, a clear exercise of the people's right of self-determination. That relieves them from any obligation to consider their future again for some time to come, and can even be seen as making such a step inappropriate. By the time the people of Tokelau are again ready to exercise that right, all concerned may see the present level of self-government, or something close to it, as an acceptable long-term option. That would represent one end of the spectrum represented by the concept of self-government in free association. At the other end is the model of self-government in free association as offered by the draft Constitution and the Treaty. No doubt it would also be possible to find middle ground in the form of negotiated variations of either model, if that is what the people of Tokelau desire.

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39 Charter of the United Nations (26 June 1945) 59 STAT 1031, art 73.

40 The absence of a full measure of self-government triggers the reporting obligation under Article 73(e). That is why the UN General Assembly's recognition of a non-self-governing territory's decolonisation usually takes the form of an acknowledgement that such reports are no longer required.

APPENDIX

TONY ANGELO'S MAIN PUBLISHED WRITINGS ON THE SUBJECT OF TOKELAU

A H Angelo "The Common Law in New Zealand and Tokelau" (1988) 16 Melanesian Law Journal 1.

A H Angelo, H. Kirifi and A. F. Toy, "Law and Tokelau" (1989) 12:3 Pacific Studies 29.

A H Angelo "Tokelau" In M A Ntumy (ed) *South Pacific Islands Legal Systems* (University of Hawaii Press, Honolulu, 1993).

A H Angelo "Tokelau Constitutional Development" (1995) 8 Otago Law Review 413.

T Angelo "The Last of the Island Territories? The Evolving Constitutional Relationship with Tokelau" *Stout Centre Journal*, 1996.

A H Angelo "Self-determination, Self-government and Legal Pluralism in Tokelau" (1996) 8 Law and Anthropology 1.

A Angelo "Healthy, wealthy & wise: the national government of Tokelau after 150 Years" (1997) 21 Journal of Pacific Studies 215.

A Angelo "Tokelau – the last colony?" (1997) 7 New Zealand Studies 8.

A Angelo "Re-establishing a Nation – Kikilaga Nenefu" (1999) 30 VUWLR 75.

A Angelo "Establishing a Nation – A Second Look" (2001) 1 numero hors serie: Revue Juridique Polynesienne 235.

A Angelo "To be or not to be integrated - that is the problem of the islands" (2002) 2 numero hors serie: Revue Juridique Polynesienne, 87.

A Angelo and T Vulu "Decolonisation by Missionaries of Government - The Tokelau Case" In Sabine Fenton (ed) *For Better or Worse" Translation as a Tool for Change in the South Pacific* (St Jerome, Leuven, 2004) 207.