

TOWARDS A CELEBRATION OF 50 YEARS OF EUROPEAN UNION

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On 25 March 1957 the treaties for the European Atomic Energy Commission (EURATOM) and the European Economic Community (the Common Market) were signed in Rome. This was revolutionary for the six states that signed the Common Market Treaty, and then and since has continued to be of great significance to states other than the parties.

The impact for the countries of the South Pacific has also been great and, as illustrated by papers in this collection, continues. For New Zealand and Australia the creation of the European Economic Community was not greeted with enthusiasm particularly because of the likelihood that the United Kingdom might become a member. That concern about the impact on traditional patterns of trade was well-based, though, with the benefit of hindsight the positions need not have been as negative as they were. They indicated a certain lack of independence of spirit and economic flexibility that later generations have regarded more as a hindrance than a benefit.

The United Kingdom was clearly ambivalent about the Common Market. That ambivalence and the strain that the Suez crisis had placed on United Kingdom/French relations affected initial negotiations for entry, and under the leadership of the United Kingdom a rival economic group was set up in Europe - the European Free Trade Association (EFTA). That group did not flourish and finally in 1973 the United Kingdom joined the Common Market.

In New Zealand in 1957 the likely impact of the Common Market was hard to imagine. Exporters were aware of possible immediate consequences for them, but the long term possibilities were largely beyond imagination even though the advent of the Common Market stimulated the creation of the New Zealand Australia Free Trade Agreement (NAFTA) in 1965. In the 1970s, the suggestion that British entry into the Common Market could affect New Zealand laws was met with disbelief. The result is now plain to see.

The success of the Common Market has been much greater than its architects could have imagined and its impact on New Zealand law is still only beginning to be realised. The abiding

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significance of the European Union (EU) for New Zealand is illustrated by two recent simple examples – one in the field of trade and the other in the development of the Common Law.

In the field of trade, the EU impact on New Zealand exporting is seen in the recent *Fonterra* case.¹ In that case, a German company claimed that New Zealand's import arrangements with the EU were discriminatory. This was because import licences for butter were awarded by the United Kingdom authorities only for New Zealand butter and those licences were issued only to subsidiaries of Fonterra. Fonterra is the largest dairy exporter in the world and enjoys an export monopoly on butter from New Zealand. The decision in favour of the German company which suspended New Zealand butter exports caused shockwaves in the dairy export community in New Zealand. The European Commission as a consequence of the decision proposed new and more restrictive arrangements for the import of New Zealand butter into the EU.²

On the Common Law front, the EU has indirectly influenced judicial reasoning in New Zealand. The Common Law, the default law for most Commonwealth countries, has changed both perceptibly and imperceptibly because of the ever increasing harmonising of English laws with those of Continental Europe and because of the direct impact of European law on English law through decisions of the European Court of Justice and Commission Regulations. *Chamberlains v Lai*³ is a case in point. In 2000, the House of Lords held unanimously in *Arthur J S Hall v Simons*⁴ that barristerial immunity for negligence in the conduct of a case was no longer justified (this case overruled the previous position of English law in *Rondel v Worsley*.⁵ The New Zealand Supreme Court in *Chamberlains v Lai* followed the English precedent of *Arthur J S Hall v Simons*. Although, strictly speaking, New Zealand was influenced by English precedent, there was also an indirect influence from Europe because the House of Lords in reaching its decision in *Arthur J S Hall v Simons* considered the law relating to immunity of advocates in other countries of the EU.

The impact and influence of the EU in the South Pacific also deserves recognition. First, in many ways the EU sees itself as a role model for regional integration of a kind the Pacific aspires to through the Pacific Islands Forum. Although the influence was not directly from the EU, regionalisation in the South Pacific is again highlighted by the Pacific Island Countries Trade

1 See, *Franz Egenberger GmbH Molkerei und Trockenwerk v Bundesanstalt für Landwirtschaft und Ernährung* (Case C-313/04) Court of Justice of the European Communities (Grand Chamber) [2006] All ER (D) 142 (Jul) (Approved Judgment).

2 The new arrangements are regulated by the Commission Regulation (EC) No 1118/2006 of 20 July 2006 on the suspension of the issuing of import licences for New Zealand butter imported under a tariff quota and by Commission Regulation (EC) No 2020 /2006 of 22 December 2006 amending Regulation (EC) No 2535/2001.

3 *Chamberlains v Lai* [2006] NZSC 70.

4 *Arthur J S Hall v Simons* [2002] 1 AC 615.

5 *Rondel v Worsley* [1969] 1 AC 191.

Agreement (PICTA), the Pacific Agreement on Closer Economic Relations (PACER), and the Australia New Zealand Closer Economic Relations and Trade Agreement (CER). These ties in the Pacific reflect generally the 'regional integration' trend led by the EU. Second, in terms of trade, the EU has actively encouraged regional integration in the Pacific. From the Yaoundé Treaty base, the Lomé Treaties developed to the present Cotonou Agreement which has promoted the development of Pacific Regional Economic Partnership Agreements (EPAs).

It is the purpose of this collection to mark and in its own way celebrate the creation of the EU. The papers in this collection reflect on a range of topics – all of them of current interest and many of them with direct relevance to the peoples and countries of the Pacific region.

The papers give clear evidence of the dynamism of the EU. All argue with cogency for or against particular developments of European law or on the impact or potential impact of EU law or its institutions and concepts in the South Pacific. The law of Europe will continue to have an impact on the law of the South Pacific countries either via precedents from England or as models for antipodean law reform.

The papers by Professor Schurr and Professor Murschetz, indicate positive and negative aspects of European law that may one day influence South Pacific laws. An area of law in the EU that remains highly diverse is contract law. Professor Schurr points out how true harmonisation of European contract law might be achieved despite the EU's past failed attempts. The EU's promotion of regionalism and the harmonisation of domestic laws ought to be encouraged as a continuing process. The results are positive provided integration is within bounds and does not unreasonably impinge on the democratic decision-making process. Professor Murschetz identifies how the European Court of Justice may have overstepped strict jurisdictional limits to achieve the favoured level of integration instead of awaiting the express authorisation which it would have had, had the European Constitution been adopted. She critically discusses the development of implied supranational criminal law within the EU.

Not only does the EU affect the development of domestic laws, but it also impacts on national constitutional structures. Dr Hopkins identifies how the EU has blurred the traditional distinction between domestic and international matters. His article examines in particular sub-national governments and their role in the EU. The EU is one of the first major supra-national organisations. Accordingly, the issues and problems it raises in terms of constitutional law can be a lesson for other regions such as the Pacific.

Dr Pastorel taking the present situation in France as the example shows how the mechanisms of adaptation account for the development of integrated inter-communal structures "which open the way to large urban metropolises, which are themselves connected to more or less vast regional areas which redraw the contours of the new directions of development."

Professor Ziller analyses the nature of the special relations that the EU has with the overseas territories of the Member States. This is particularly enlightening because Professor Ziller

illuminates the difficulties in determining the field of competence of a supra-national body such as the EU, which cannot strictly be assimilated to a state, with the various communities related to its Member States.

Maitre Gudin considers the status of the islands of the Pacific which are part of the EU because they are territories of France but which in another sense are not part of the EU because of their semi-autonomous status within France. A special provision is made for these territories in Part Four of the EC Treaty. The particular concern of the Treaty for these territories is to avoid their marginalisation by the effect of globalisation and to assist their adaptation to the regimes of the EU. This in large part was also an impetus of the Cotonou Agreement. Maitre Gudin explores these matters with particular relation to the status of French Polynesia in the EU.

Taking the matter further in relation to French Polynesia, Professor Dropsy considers the decision of the government of French Polynesia to adopt the Euro in place of the present currency CFP (Comptoirs Français Pacifique) franc. It is interesting to note, given the ease with which currencies have a de facto status around the world, that the EU requirements for a country to come officially within the Euro zone are cumbersome and time-consuming. From his in-depth study of the matter, Professor Dropsy concludes that the best for French Polynesia would be for the territory to come within the Euro zone.

Professor Kelsey's article explores the EU influence in the South Pacific. The Pacific as a region is in the process of negotiating a new trade agreement (the Pacific EPA) with the EU. However, the Pacific countries have concerns, vulnerabilities, and goals that are different from those of the members of the EU. Her article identifies two tensions that are evident from the draft text of the EPA: "one between its trade liberalisation and development agendas, and the other between the affirmation of sovereign integrity and supranational institutional arrangements."

At the time of the 1962 report by EEC Commission to the Council of Ministers, Walter Hallstein, the President of the Commission commented inter alia:

There are certain milestones in the life of an international organization, as in that of an individual, at which we must stand back from day-to-day happenings and take stock of what has been achieved and what is still to be done. By laying down a transition period in three stages each lasting four years, the Treaty establishing the EEC made the beginning of 1962 a critical date, whose significance was all the greater as there was associated with it a decision that the Council had to take by unanimous vote.

When Robert Schuman launched the idea of the coal and steel pool, the main concern – as expressed in the famous declaration of 9 May 1950 – was to make any new conflict in Europe "not only unthinkable, but materially impossible".

Five years later, on the eve of the Messina Conference, European statesmen were a prey to new anxieties, as a result of changes in the balance of power in the world.

The Common Market and the establishment of a united Europe were recognized as indispensable, according to the terms of the Messina resolution, "to maintain Europe's place in the world and to restore its influence and its authority".

It is in relation to this objective that we must evaluate the progress made since the beginning of 1958, progress that has been achieved on both the economic and political planes.

Even when solemnly signed and ratified, a treaty is no more than a piece of paper, inert save for the vitality infused into it by the human beings, governors and governed, to whom it is addressed. It must be acknowledged in the first place that the Governments are steadfast in their resolve of the Governments to bring the treaty fully into operation. This resolve has been manifested with particular clarity in the decisions to speed up the reduction of customs tariffs between Member States, and particularly in the decisions embodying the first and the most important of the common policies – that relating to agriculture.

It is also noteworthy that the reaction of business circles to the creation of the Common Market has been very favourable. Confidence in the development of the Community and the remarkable dynamic which this confidence has bred, have had a great deal to do with the increase in trade and the high level of activity reflected in the statistics of recent years.

The results on the political plane, though not always so immediately apparent, are also positive. The clearest confirmation of this comes from outside the Community. Let us recall how at its birth it was greeted by many with indifference or scepticism, sometimes even with alarm and hostility. And now behold the number of nations who wish either to join us or to become associates, or to settle in conjunction with the Community the lines of the commercial and economic system of the free world. Moreover, the ever more virulent attacks upon the Community from the Communist camp are a further pointer to our success.

Developments in the first months of 1962, both within the Community and with regard to other countries, show that the Community is continuing on its course after the flying start of the first four years.

It can now be claimed with certainty that the Common Market can no longer be called in question and that there will be no going back; it may also be affirmed that this economic unification is part of an advance towards political unification which is being pursued on parallel lines, going beyond economic and social policy and extending to the spheres of defence and diplomacy.

These thoughts provide interesting historical reminders and remain pertinent today to an understanding of the conception of the EU and of the areas of its continuing development.

