

**GOVERNMENT HOUSE
WELLINGTON, NEW ZEALAND**

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AN AUSTRALIAN TRIBUTE TO CHIEF JUSTICE EICHELBAUM

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Tena koutou katoa kua hui hui mai nei i tenei ahiahi

Kai te mihi i te tuatahi ki te rangatira Sir Thomas me to hoa rangatira Lady Eichelbaum. Tena korua.

Kaore e roa ake aku mihi ki a koutou.

Tena kourua, tena koutou, tena koutou katoa.

EARLY DAYS

I remember the first time that I met Chief Justice Eichelbaum. He was then an up and coming junior barrister. I was already a judge and was attending the New Zealand Law Conference in Auckland. The year was 1976. In two years he would take silk, continuing the trajectory of his meteoric rise in the New Zealand legal profession.

From the start, Tom Eichelbaum took me under his wing. He gave me the gentle instruction that every Australian needs when crossing the

Tasman. Never talk about underarm bowling. Never make jokes about putting the clocks back. Never mention old motor cars. Always talk in reverence about rugby. Be careful with the milk at breakfast; it might turn out to be cream. Remember that on the dial of the analogue phone "1" is where zero is in every other land. To turn the lights off push the switch down and not up. If you are privileged to go to Wellington, never mention the wind. To this day I have faithfully observed these precepts.

Tom Eichelbaum returned the compliment by visiting Australia in the 1980's for a conference commemorating the work of Sir William Blackstone. He was then, I think, the President of the New Zealand Law Society. His presentation was given at the plenary session which was opened by Sir Zelman Cowen, then Governor-General of Australia. So gracious, learned and perceptive was Tom Eichelbaum's address on Blackstone, and on his influence in the antipodes, that I knew that I was in the presence of someone who would attain high office. The thought crossed my mind that he would become Governor-General of New Zealand. But he was destined for another high constitutional position - and who knows what the future may yet hold in store.

Later, I returned to New Zealand. By this time Tom Eichelbaum was a judge, universally respected. With the foolhardy rashness of youth, I took as the theme of a series of lectures the desirability of reviving the consideration of federal union between New Zealand and Australia¹. For my

* Justice of the High Court of Australia. Formerly President of the Court of Appeal of the Supreme Court of New South Wales and President of the Court of Appeal of Solomon Islands.

¹ See M D Kirby "CER Trans-Tasman Courts and Australasia" (1983) NZLJ 304. See also "CER - A Trans-Tasman Court?" in *CER - The Business and Law Essentials*, Part I, Legal Research Foundation Seminar Papers, University of Auckland, July 1983, 16ff and "Integration of Judicial Systems" in K M Vautier, J Farmer and R Baxt

pains, I was assailed by the then Prime Minister, Sir Robert Muldoon. He demanded to know who this "judicial comic" was. He challenged me to a debate on Radio Pacific. The battle lines were drawn. Tom Eichelbaum, always a friend of Australia and Australians gently consoled me for Sir Robert's unceasing attacks. Sometimes, in later years, I have wondered whether he was just mischievously urging me on to see what would occur.

As it happens, Sir Robert Muldoon was an easy opponent in the federal stakes. He was quickly converted to the merits of exploring the idea. All that it needed was my promise that 400 large, rotund bronze statues of him would be unveiled in every hamlet of Australasia. The thought of all that bronze, immortalising his visage from Hawkes Bay in the east to Port Hedland in the west quickly converted Sir Robert Muldoon to the merits of a trans-Tasman federation.

Tom Eichelbaum was a harder nut to crack. In midnight negotiations in smoke filled rooms, I ultimately persuaded him to agree to the proposal; but I had to promise that Australia would recognise New Zealand as two states of the federation: Northland and Southland. What I had not counted on was Lady Eichelbaum. She quickly deployed her negotiating skills. She extracted first the promise of Statehood for Stewart Island. Not content with this she demanded Statehood for Campbell Island. When, not satisfied with this, she required Statehood for some unmapped atoll occupied by penguins, I knew that my brave idea was doomed. Everyone who has dealt with the Eichelbaums has a healthy respect, as well as affection, for Vida Eichelbaum.

CHIEF JUSTICESHIP

When Justice Eichelbaum was appointed Chief Justice of New Zealand in 1989, he was the eleventh person to hold that office. He was the first appointed from within the ranks of the judiciary. In this sense, New Zealand was the obverse of India where the Chief Justice is always chosen from the most senior puisne judge, even if his retiring birthday is but weeks or days away. Happily, Chief Justice Eichelbaum had ten years to serve.

It is for New Zealand judges and lawyers to speak of his achievements as a judicial administrator and jurist in New Zealand. I speak for the Chief Justice and Justices of the High Court of Australia and the judiciary of Australia who are represented on this occasion by the presence of Chief Justice Michael Black of the Federal Court of Australia and Chief Justice John Doyle of the Supreme Court of South Australia.

Chief Justices Black and Doyle could tell better than I of the special contributions which Tom Eichelbaum made as a member of the Council of Chief Justices. I was reminded by Chief Justice Black that it is the Council of Chief Justices of Australia and New Zealand. In that sense the Chief Justice of New Zealand is a member in his or her own right. It is not a matter of attending and observing a wholly Australian affair. I have no doubt that, in part, the constitution of the Council in this way is a tribute to Chief Justice Eichelbaum. But it is also a tribute to the unique relationship between Australia and New Zealand in history, law, economics, defence, sport and everything else that matters.

When I asked the Chief Justices to reveal to me the secrets of the Council - a veritable banco of Chief Justices - their eyes were downcast. They would tell no secrets of that most exclusive of bodies. But they agreed

that if ever there were any differences in the Council (which they hastily assured me there were not) Tom Eichelbaum was the person they would want to be present to smooth the disagreements and to find common ground.

The creation of the Council of Chief Justices, together with the establishment of the Judicial Conference of Australia and the ongoing work of the Australian Institute of Judicial Administration (in which New Zealand jurists also take part) reflect the need that has been felt in recent years to create new institutions to steer the judiciary and the legal profession through newly troubled waters. It was Chief Justice Eichelbaum's fate to come to his office at a time of unprecedented attacks on the judiciary both in New Zealand² and in Australia and elsewhere. Coinciding with these attacks were new challenges to the independence of the judiciary, to their salaries, pension and other entitlements and to the recruitment of the finest talent to serve as judges. As well, the times involve a substantial growth in the incidence of litigants in person, of complaints against judges and of organised groups who will not accept judicial decisions and who secure media space for personal calumny of the judiciary such as had never occurred before³. Through these difficult times, Tom Eichelbaum was steady and steadfast. He won the respect of his judicial colleagues in New Zealand and the appreciation of their counterparts in Australia. He also won the support of the legal profession.

During Chief Justice Eichelbaum's service, many important legal changes have come about in the wake of the Closer Economic Relations

² T Eichelbaum, cited in "Judges and Politics" [1996] NZLJ 361.

³ M D Kirby, "Attacks on Judges - a Universal Phenomenon" (1998) 72 ALJ 599 at 600; cf J J Spigelman, "Comments on the 175th anniversary of the Supreme Court of New South Wales", *The Australian*, 14 May 1999.

Treaty between Australia and New Zealand. Inevitably, that treaty has begun to affect Australian legislation in the field of the administration of justice⁴. It has begun to affect judicial attitudes to the development of a "common law of Australasia"⁵. Cases are now presenting in which the courts are invoked to implement both the letter and spirit of CER⁶. This has been an extremely important time in the legal relationships between New Zealand and Australia. It has been important to have the benefit of the steadying hand of Sir Thomas Eichelbaum. He has always been a good friend to Australia. Perhaps because of his own family history, he never took a narrow, insular or provincial attitude to the law or to life.

When, as President of the Court of Appeal of New South Wales, I would visit New Zealand I found much common experience and many shared viewpoints with Chief Justice Eichelbaum. In particular, we shared the conviction that the court of appeal and the trial court, although separate and distinct, were both members of the same judicial family. I believe that the reinforcement of that understanding has been a major contribution which Chief Justice Eichelbaum and Sir Ivor Richardson have added to the relationships between the Court of Appeal and the High Court in New

⁴ *Federal Court of Australia Act 1976 (Cth) Pt IIIA Trans-Tasman Market Proceedings.*

⁵ See eg *Dominion Rent-a-Car Ltd v Budget Rent-a-Car Systems (1970) Ltd* [1987] 2 NZLR 395 at 407; *Vicom New Zealand Ltd v Vicomm Systems* [1987] 2 NZLR 600 at 605; *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1 at 39; *Wineworths Group Ltd v Comite Acute Interprofessional du Vin de Champagne* [1992] NZLR 337 at 331 per Cooke P; *Bates v McDonald* (1985) 2 NSWLR 89 at 94; Cf M D Kirby and P A Joseph, "Trans-Tasman Relations Towards 2000 and Beyond" in P A Joseph (ed) *Essays on the Constitution* (1995) 129 at 136-137.

⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 72 ALJR 841 (HC).

Zealand. I consider that this was an important change that was also achieved in New South Wales at roughly the same time.

In 1993 I visited the House of Lords in London and found the Right Hon Sir Thomas Eichelbaum was sitting with their Lordships in his capacity as a member of Her Majesty's Privy Council. I confess to a momentary sense of envy that the tide of history had eliminated that possibility in my case; for then we would have sat together as judges.

As I took lunch with their Lordships in the gilded chamber, they could doubtless see a sense of antipodean anxiety on the faces of both of us. It was not discomfiture at the formalities of that very English place with its structures and traditions so different from those that we in Australia and New Zealand have built. Still less was it a judicial questioning of the survival, in the case of New Zealand, of this imperial link which was finally abolished in Australia in 1986⁷. In such matters, judges must leave the decisions to the elected representatives of the people. The real source of our anxiety was the restraint which both of us felt obliged to observe from taking a photograph of the historic scene, unlikely to be repeated. My interest in photography has been described as "quirky". Sir Thomas Eichelbaum has an equal devotion to recording history, people, institutions and circumstances. Many of us have been recorded in his splendid photographs. In years to come, archivists will call his named blessed for the record of our judicial times that he will leave. Perhaps he has simply been following V I Lenin's instruction that the person who writes the minutes of the organisation is destined to control its history. Sir Thomas Eichelbaum's claim on history is sure. His photographs represent the insurance policy.

⁷ *Australia Acts 1986, s 11(1).*

AN APPRECIATION

Was ever a newborn boy born in Germany destined to become Chief Justice of New Zealand, ever better named? Johann Thomas Eichelbaum. Like an oak he took root in his adopted country. Strong, upright and true did he grow. His name was a happy augury for his career and for his adopted land. But also for us the judges and lawyers of Australia who have enjoyed his friendship, benefited from his counsel, appreciated his judicial opinions and shared the respect in which he and his wife were held by the lawyers of his own land.

This is why three of us - a representative of the constitutional and final appellate court of Australia, and of the federal and state courts of Australia, have come to Wellington to do honour to Sir Thomas and Lady Eichelbaum. It is not uncommon for a Chief Justice, on departure, to be respected. In a sense, the office attracts respect. But, in addition, Chief Justice Eichelbaum and his wife have earned the affection and appreciation of Australian judges and lawyers. We have come to say this not only to him but to the legal profession and people of New Zealand.

Tena kourua, tena koutou, tena koutou katoa