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THE PRIVY COUNCIL - AN AUSTRALIAN PERSPECTIVE

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For a generation devoted to moving on, rather than looking back, what happened 20 years ago is ancient history; what happened 100 years ago is primeval. Many young Australian lawyers would be only dimly aware that, for most of the twentieth century, the apex of Australia's court system was in London, not Canberra. Many English lawyers would be unfamiliar with the continuing role of the Privy Council, and some may be surprised at the demands it still makes upon the time of the Law Lords. Yet, for Australian lawyers of my age, the Privy Council was a real and powerful presence. During most of my time at the New South Wales Bar, which was from 1963 until 1988, appeals

* Chief Justice of Australia. Some of the material in this paper appeared in an address given to the Australian Chapter of the Anglo-Australasian Lawyers Society in May 2007. This paper has been prepared with less emphasis upon information of purely Australian interest and more upon matter that may be of relevance in the United Kingdom.

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could be taken to the Privy Council from the High Court, from State Supreme Courts, and even from single judges of State Supreme Courts. Australian appeals were abolished by a gradual, and messy, legislative process that began in 1968 and ended with the *Australia Acts* 1986. Until the 1986 legislation took effect, litigants, by appealing from State Supreme Courts to the Privy Council, could by-pass the High Court in many cases, and it was not uncommon for appellants to do so where an existing decision of the High Court appeared to be adverse precedent. An appellant thus had a tactical advantage in the form of a choice of forum. Of course, for most litigants considerations of cost weighed against going to London, but increased availability of air travel meant that the Privy Council was probably hearing more Australian appeals in the 1970's than in the 1930's.

Looked at functionally, the Privy Council was (and is) a supra-national tribunal resolving disputes most of which were (and are) local. Relatively few of the cases before it were trans-national. Today, they come from the smaller members of the Commonwealth of Nations. Some of the tensions that existed in relation to appeals from countries such as Australia or Canada are likely to affect any supra-national tribunal with jurisdiction to resolve local disputes within several nations.

The final abolition of Australian appeals was not controversial. When it happened, it seemed to have been inevitable. The same cannot be said of the arrangements made when Australia became a federal union in 1901. The question of appeals to the Privy Council was the last

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significant obstacle in Australia's path to Federation. Unlike the *British North America Act* of 1867, the Australian Constitution was written locally. It emerged in draft form from two Conventions, one in 1891, and one in 1897-1898. The draft agreed by the second Convention was approved by the colonial parliaments, and endorsed by a process of popular referendum. To have legal effect, it had to be enacted as legislation of the United Kingdom Parliament. The Imperial authorities seem to have taken a rather detached approach to most of the issues of federalism that agitated the Australian colonies, but they were closely interested in appeals to the Privy Council.

Before Federation, appeals went from the colonial Supreme Courts to London. The draft Constitution required the establishment of a Federal Supreme Court, to be called the High Court of Australia. After Federation, the High Court was to have a general jurisdiction to hear civil and criminal appeals from what became State Supreme Courts. The draft provided that decisions of the High Court were to be final and conclusive. The Commonwealth Parliament was to have legislative power to end appeals to London from the States, subject to a certain exception. In addition to its general jurisdiction, the High Court was to be the final constitutional court. The draft provided that there should be no appeal to the Privy Council in constitutional matters. As will appear, the Founding Fathers believed there was a good reason for this.

The Secretary of State for the Colonies, Joseph Chamberlain, opposed these aspects of the draft Constitution. As there was no

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process for reconsideration of the draft, which had been approved by the colonial parliaments and by referendum, this raised delicate problems both of substance and procedure. The resolution of those problems is an interesting part of Australia's constitutional history, but it is not my present purpose to go into it. The final result was a compromise. Appeals from State Supreme Courts to London were to remain, although, for reasons of convenience and cost, it was assumed, correctly, that the great majority of appeals from State Supreme Courts would go to the High Court, and end there. Appeals could also go to London from the High Court, subject to the qualification that there were to be no such appeals on any question as to the limits inter se of the constitutional powers of the Commonwealth and the States, or as to the limits inter se of the constitutional powers of the States, unless the High Court certified that such an appeal was appropriate. In brief, appeals could go from the High Court in all cases except constitutional cases that raised so-called inter se questions, and they could also go direct from State Supreme Courts, although for practical reasons they were not likely to be in large numbers.

The reason for the attempt to exclude all appeals to the Privy Council in constitutional cases was explained in the course of an early, and acrimonious, disagreement between the High Court and the Privy Council in some cases about the powers of the Commonwealth and State Parliaments to impose taxes on each other's government

instrumentalities¹. The High Court considered this to be an inter se question, and, furthermore, a question upon which it looked for guidance to the United States, where the Supreme Court was experienced in dealing with such issues. Moreover, the framers of the Australian Constitution believed that the Privy Council's record in relation to the Canadian Constitution was a matter for concern.

Sir Samuel Griffith, the first Chief Justice of the High Court, wrote, in a rather pugnacious judgment, in 1907²:

"It was common knowledge [at the time of Federation], not only that the decisions of the Judicial Committee in the Canadian cases had not given widespread satisfaction, but also that the Constitution of the United States was a subject entirely unfamiliar to English lawyers, while to Australian publicists it was almost as familiar as the British Constitution. It was known that, even if there should be any members of the Judicial Committee familiar with the subject, it was quite uncertain whether they would form members of a Board that might be called upon to determine a question on appeal from an Australian Court, by which it must necessarily be dealt with in the first instance. It could not be predicted of the Board, which would sit to entertain an appeal, that it would be constituted with any regard to the special familiarity of its members with the subject. And no disrespect is implied in saying that the eminent lawyers who constituted the Judicial Committee were not regarded either as being familiar with the history or conditions of the remoter portions of the Empire, or as having any sympathetic understanding of the aspirations of the younger communities which had long enjoyed the privilege of self-government. On the other hand, the founders of the Australian Constitution were familiar with the part which the Supreme Court of the United States, constituted of Judges imbued with the spirit of American nationality, and knowing that the nation must work

¹ eg *Deakin v Webb* (1904) 1 CLR 585; *Webb v Outrim* [1907] AC 81.

² *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1111-1112.

out its own destiny under the Constitution as framed, or as amended from time to time, had played in the development of the nation, and the harmonious working of its political institutions."

That is the kind of complaint likely to be made about any supra-national body exercising constitutional jurisdiction. It will be said that it does not understand, or is insufficiently sensitive to, local conditions. Australia had not come to full nationhood in 1907, yet the Founding Fathers, who were happy to have the benefit of the services of senior United Kingdom judges to decide civil and criminal appeals, were not happy to have them decide constitutional issues.

The Canadian cases, to which Sir Samuel referred, included a series of Privy Council decisions which reversed decisions of the Supreme Court of Canada and adopted a restricted meaning of the power of regulation of trade and commerce which the *British North America Act 1867* (UK) (now the *Constitution Act 1867*) gave to the Dominion Parliament. On its face, that power looks more extensive than the power given by s 51(i) of the Australian Constitution, or the corresponding power given to the United States Congress. Yet the Privy Council, overruling the Canadian Supreme Court, adopted a view that confined Dominion power, and extended provincial power. One of the cases to which Griffith CJ was referring was *Attorney-General for Ontario v Attorney-General of Canada*³, decided in 1896. Privy Council

³ [1896] AC 348. See also, for example, *Citizens Insurance Company of Canada v Parsons* (1881) 7 App Cas 96; *Hodge v The Queen* (1883) 9 App Cas 117; *Attorney-General of Ontario v Mercer* (1883)

decisions on the sensitive issue of minority language rights also were controversial. In 1892, in *Winnipeg v Barrett*⁴, the Privy Council overruled a decision of the Canadian Supreme Court on an issue affecting the Catholic school system. Questions of education, religion and language were closely connected in Canada. According to the authors of a Canadian work on language rights⁵:

"Before Confederation, the British colonies which would later form Canada had reached a *modus vivendi* between the Church and the State regarding control over education, and religious homogeneity for Catholics and Protestants. The drafters of the *Constitution Act, 1867* took notice of this fragile equilibrium and sought to have it reflected in section 93, which aimed to ensure a parity between the existing rights and institutions of the Catholic minority of Ontario and the Protestant minority of Quebec."

In 2006, Anne Roland, the Registrar of the Supreme Court of Canada, wrote a paper entitled "Appeals to the Judicial Committee of the Privy Council: A Canadian Perspective"⁶. In it, she set out the history of discontent leading to the abolition of appeals from Canada, which was finally effected by legislation in 1949. Ms Roland quotes a parliamentary speech, in 1949, which referred to claims that, in a series of decisions over a long period, the Privy Council had so whittled down the powers

8 App Cas 767; *Bank of Toronto v Lambe* (1887) 12 App Cas 575; *Attorney-General of British Columbia v Attorney-General of Canada* (1889) 14 App Cas 295.

⁴ [1892] AC 445.

⁵ Power and Foucher, "Language Rights and Education", in Bastarache (ed) *Language Rights in Canada*, 2nd ed (2004) at 376.

⁶ (2006) 32 (4) *Commonwealth Law Bulletin* 569.

which the Constitution conferred on the Dominion Parliament that Canada was left with a constitution in which the division of powers between federal and provincial authorities was completely different from that which had been agreed upon in 1867⁷. I am not qualified to comment on the merits of that complaint. Australian experience shows that any decision affecting the distribution of power between the constituent units of a federation is bound to be declared, by the losing side, to be contrary to the original intentions of the framers. This is an inescapable part of the rhetoric of political, and sometimes of legal, argument in a federal system. Even so, the Privy Council's work on the Canadian Constitution caused dissatisfaction in Canada, and the dissatisfaction was well known to Australia's Founding Fathers, three of whom were the first members of the High Court. The Australian Constitution was in many respects modelled on the United States Constitution, and its framers were sceptical about whether their work would receive a sympathetic understanding in London.

It is important to distinguish between the early Australian attitude towards appeals to the Privy Council in constitutional matters and the attitude towards appeals in other cases. In relation to civil and criminal cases generally, Australians recognised and greatly valued the legal capacity of the senior United Kingdom judges. They expected it would continue to be available to them. At the time of Federation, so strong

⁷ Ibid at 575.

was the assumption within some quarters that the Privy Council was to remain the final court of appeal in non-constitutional cases that there was resistance to the creation of the High Court as a permanent full-time court. There were some suggestions that all that was needed, at least for the time being, was a "scratch court" composed of State Chief Justices sitting part-time⁸. There was then real doubt about whether the High Court would be fully occupied in the foreseeable future.

This reflects a practical problem of continuing significance. In some jurisdictions there is a serious question whether the volume of local litigation is sufficient to sustain a full-time, second-tier, local appellate court. If it is not, the creation of such a court carries the risk that the most senior judges in the jurisdiction will not be fully occupied. They will be, as it were, to a substantial extent be taken out of the play. For some of the smaller jurisdictions in the Commonwealth of Nations, if the Privy Council had not existed, it would have been necessary to invent something like it. Indeed, from time to time there have been suggestions of possible alternatives, designed to secure the availability of a court of last resort in cases where the volume of appellate work produced in individual jurisdictions could not support or justify a court made up entirely of local judges. In 1900, there was a view that Australia may have been in that position. Its population at the time was less than one-fifth of its present population. As things turned out, the

⁸ See Blackshield, Coper and Williams (eds) *The Oxford Companion to the High Court of Australia* (2001) at 193.

High Court was always busy, but when it was set up it consisted of only three members.

The High Court was established in 1903. Australia's first Prime Minister, Edmund Barton, and Senator O'Connor, who joined Chief Justice Griffith on the first High Court, had both expressed in the new Federal Parliament, before their appointment, their opposition to constitutional appeals to the Privy Council. Mr Barton said that the right of appeal incorporated in the Constitution was there "only as the price that had to be paid to prevent more drastic amendments to the Constitution"⁹ and that if he had his own way he would have no constitutional appeals to the Privy Council¹⁰. Senator O'Connor described the Privy Council as "altogether an unsatisfactory body to interpret our Constitution" and as "a most unsatisfactory tribunal"¹¹. On the other hand, there was no consensus in Australia that the High Court should be the court of last resort in ordinary civil and criminal cases, and there was strong support for retaining appeals to London in non-constitutional cases.

The exclusion from the jurisdiction of the Privy Council of constitutional cases involving inter se questions, notwithstanding the

⁹ Australia, House of Representatives, *Parliamentary Debates* (Hansard) Vol 13 at 803.

¹⁰ Ibid at 815.

¹¹ Australia, Senate, *Parliamentary Debates* (Hansard) Vol 15 at 2699.

difficulty of defining the scope of that exclusion, together with the fact that, after the initial series of cases that provoked the anger of Sir Samuel Griffith, there was not a history of significant overturning of constitutional decisions of the High Court, may explain why there was not, in Australia, by the middle of the twentieth century, the same intensity of feeling about the constitutional role of the Privy Council as there was in Canada. Furthermore, at about the time Canadian appeals were abolished, there came to power Australia's longest-serving Prime Minister, Mr R G Menzies, a former barrister, who famously declared that he was "British to [his] boot straps". In the 1940's and 1950's, what was described as the Anglo-Celtic section of Australia's population was dominant, and many people referred to the United Kingdom as "home". Australian society in that respect was much more cohesive than Canadian society.

Some of the major Australian constitutional cases of the first 60 years of Federation went to London. In 1923, the Privy Council dismissed an application for special leave to appeal from the decision of the High Court in the *Engineers Case*¹²; a decision that brought about a major expansion of Commonwealth legislative power. In the 1950's, the *Boilermakers Case*¹³, which had a powerful effect on the Australian

¹² *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

¹³ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

understanding of the principle of the separation of powers as reflected in the Constitution, was decided in the High Court by a majority of four to three. The Privy Council dismissed an appeal, adopting the reasoning of the majority in the High Court, which included Dixon CJ. Many s 92 cases ended up in the Privy Council. That section declares that, upon the imposition of uniform duties of customs in the new Commonwealth, trade, commerce and intercourse among the States was to become and remain absolutely free.

Section 92 provoked a great deal of litigation. There is a mismatch between the simplicity of its language and the complexity of the issues it covers. Everyone understood that it meant there were to be no internal customs barriers. What else did it mean? How did it apply to compulsory acquisition of goods for wartime purposes or for marketing schemes; or taxes levied on the use of interstate highways; or discriminatory State laws enacted for the protection of local producers? In the *Bank Nationalization Case*¹⁴ of the late 1940's, both the High Court and the Privy Council held that it operated to prevent the nationalization of the private banks. They treated s 92 as conferring an individual right of free trade, inconsistent with the socialist ideas underlying the nationalization. It is an interesting turn of history that a rights-based approach to s 92, which prevailed in the middle of the 20th century, was discarded by the High Court in 1988, at about the same

¹⁴ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; (1949) 79 CLR 497.

time as Australia's lack of constitutionally entrenched rights was seen to set it at odds with comparable jurisdictions. The *Bank Nationalization Case* was decided at a time when socialism was more fashionable than it is now, and the Privy Council's decision produced a remarkable protest from one of its former members.

In 1954, Lord Wright, then in retirement, contributed to the Sydney Law Review an article on s 92¹⁵. He expressed the opinion that the notorious difficulties that had arisen in interpreting the provision would all disappear if it were treated as nothing more than a clause designed to deal with, but limited to, fiscal matters. On such a view, the decision in the *Bank Nationalization Case*, and many other decisions, were wrong. A Privy Council decision that had been followed in the *Bank Nationalization Case* was *James v The Commonwealth*¹⁶, in 1936. That was a case in which the judgment of the Privy Council had been written by Lord Wright. Lord Wright said he had been wrong, and explained his reasons for changing his mind. One of the comments he made was that, in the course of argument in *James*, leading counsel had referred dismissively to an argument that he had now come to believe was correct. He implied that the case had not been argued adequately. The counsel he mentioned included R G Menzies KC (by 1954, Prime Minister of Australia) and Sir Stafford Cripps KC. Menzies KC was

¹⁵ (1954) 1 Sydney Law Review (No 2) at 145.

¹⁶ (1936) 55 CLR 1.

leading Gavin T Simonds KC and The Hon H L Parker. This was, by any standards, a provocative piece of post-judicial commentary.

One of the advocates experienced in s 92 cases was a cousin of Mr R G Menzies, Mr D I Menzies, who later became a Justice of the High Court. In 1968, Sir Douglas Menzies wrote¹⁷ that the Privy Council had decided five s 92 cases on appeal from the High Court; that it had reversed the High Court in two of those five cases; and that in those two cases the Privy Council's decision was substantially in accordance with prevailing professional opinion in Australia. Sir Owen Dixon's assessment of the constitutional work of the Privy Council, and its work on s 92 in particular, was rather less supportive¹⁸.

In 1988 the High Court comprehensively reinterpreted s 92 in *Cole v Whitfield*¹⁹. That reinterpretation was not consistent with the *Bank Nationalization Case*. It was also not consistent with the views expressed by Lord Wright either in *James v The Commonwealth* or in the Sydney Law Review. It is fair (and I hope not tempting fate) to say that, at least for the time being, there has been a calming effect on s 92 jurisprudence. In March this year, the High Court was able to deal with a

¹⁷ "Australia and the Judicial Committee of the Privy Council" (1968) 42 ALJ 79 at 83.

¹⁸ See, for example, Ayres, *Owen Dixon*, The Miegunyah Press (2003) at 245-246.

¹⁹ (1988) 165 CLR 360.

major s 92 case in a unanimous decision. In *Betfair Pty Ltd v State of Western Australia*²⁰, the Court invalidated certain State legislation on the ground that it was discriminatory in a protectionist sense. The legislation was not concerned with fiscal issues; it was about internet gambling.

The reference to unanimity may make this a convenient point at which to mention a matter of judicial method. A so-called appeal to the Privy Council was a petition to the Sovereign in Council and the judgment took the form of an advice. For most of the twentieth century there was no provision for the publication of dissenting opinions. When Sir Garfield Barwick, then Chief Justice of Australia, in accordance with settled practice, was invited to sit from time to time on the Privy Council, he accepted on condition that arrangements were made for the publication of dissents. Even after that, dissents were rare. In more recent times, dissenting opinions, and even separate concurring opinions, are not unknown. Consistently with the earlier practice, at least during the time of Australian appeals, decisions of the Privy Council tended to be put upon relatively narrow grounds, perhaps because they represented the lowest common denominator of agreement between the judges who participated in the advice. Reasons of the Privy Council were more tightly expressed than reasons of either the High Court or the House of Lords.

²⁰ [2008] HCA 11.

In 1968 and 1975, the Commonwealth Parliament legislated to limit appeals involving Commonwealth law, and appeals from the High Court²¹. Until the 1968 legislation took effect, the Privy Council heard Australian income tax appeals. Until the 1975 legislation took full effect, the Privy Council heard appeals from the High Court in certain other cases. As noted earlier, it was not until 1986 that legislation cut off appeals from State courts. An example of a litigant by-passing the High Court is the 1985 case of *Candlewood Navigation Corp v Mitsui OSK Lines*²², which went direct to the Privy Council from a single judge of the Supreme Court of New South Wales. The case concerned tortious liability for what is sometimes called relational economic loss. The English courts had taken a strong stand against such liability but the High Court, in *Caltex Oil (Australia) Pty Limited v The Dredge "Willemstad"*²³ had taken a more flexible approach. The single judge in New South Wales, as he was bound to do, applied *Caltex*. The Privy Council refused to follow the High Court's decision, and allowed the appeal.

Leaving to one side the problems that arose during the rather lengthy transitional period, when inconsistency between the Privy Council and the High Court was possible, and appellants enjoyed a

²¹ *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth).

²² [1986] AC 1.

²³ (1976) 136 CLR 529.

tactical advantage, Australia derived great benefit from the work of the Privy Council over many years.

In 1901, the authors (Quick and Garran) of a leading text on the Constitution quoted, with approval, a statement that had been made about the Privy Council in 1871²⁴:

"[T]he controlling power of the Highest Court of Appeal is not without influence and value, even when it is not directly resorted to. Its power, though dormant, is not unfelt by any Judge in the Empire, because [the judge] knows that [the] proceedings may be the subject of appeal to it."

In 1981, Hutley JA of the New South Wales Court of Appeal wrote²⁵:

"The evaluation of the effect of the Privy Council upon Australian law has yet to be done. The existence of a superior court has a constricting effect upon a lower court, and this type of constriction by a foreign court offends nationalistic sentiments. On the other hand, the forcible hitching of the legal system of a small State to one of the great legal systems of the world has provided stimulus to us. The development of the law of torts and contracts in so far as it had been effected by the judiciary has been largely guided by English leadership. That leadership would have operated anyway without the existence of the Privy Council, but its existence guaranteed its success ... In a relatively provincial country (though very litigious) such as Australia, the tendency to lapse into self-satisfaction has been restrained by the continual presence of a major legal system, not as a distant exemplar, but as a continual force for change."

²⁴ Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, 736.

²⁵ "The Legal Traditions of Australia Contrasted with Those of the United States" (1981) 55 ALJ 63 at 69.

Whether it remains fair to describe Australia as "relatively provincial" may be a matter of dispute, but it was true over most of the time before 1981. Hutley JA's assessment was just. The constricting effect to which he referred, like the British leadership in matters of common law doctrine, was palpable. In non-constitutional matters, decisions of the High Court could be reversed by the Privy Council, and not infrequently they were. Furthermore, litigants could take their appeals directly to London provided, in civil cases, a very modest amount of money was involved. This limited the capacity of the High Court to develop a distinctively Australian common law, but that was not necessarily seen as a bad thing. For a substantial part of the 20th century, Australia saw itself as part of the British Empire, later the Commonwealth of Nations, and the idea that the common law might vary throughout the Empire, later the Commonwealth of Nations, was barely contemplated. In terms of judicial authority and leadership, the distinction between the House of Lords and the Privy Council was largely technical. They were the same judges, and they declared the law for all those courts from whom appeals might come to them. Major developments in the common law, such as those brought about by *Donoghue v Stevenson*²⁶ in 1932, *Woolmington v Director of Public Prosecutions*²⁷ in 1935, or *Hedley Byrne & Co Ltd v Heller & Partners*

²⁶ [1932] AC 562.

²⁷ [1935] AC 462.

*Ltd*²⁸ in 1964, were immediately taken up in Australia. Those were decisions of the House of Lords, but it was obvious that the Privy Council would apply them in Australian appeals and they were simply accepted in Australia as binding authority. The *Wagon Mound*²⁹, which, in 1961, overruled earlier English authority on remoteness of damage and causation, was a Privy Council decision on an appeal from the Full Court of the Supreme Court of New South Wales. The second decision³⁰ in the same case, in 1967, was an appeal to the Privy Council from a single judge of the Supreme Court of New South Wales. Apart from decisions effecting major changes in the common law, there was a regular flow of decisions effecting incremental changes, or reinforcing and applying established principles.

It used to be said within the profession that banks, shipping companies and insurers, many of whom had their headquarters in London, looked to the Privy Council to protect their commercial interests. In my experience, it would be more accurate to say that commercial interests had, and still have, a particular regard for certainty and uniformity in the law, and they valued the certainty and uniformity that flowed from the capacity of the Privy Council to review decisions of

²⁸ [1964] AC 465.

²⁹ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388.

³⁰ *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd & Anor* [1967] AC 617.

Australian courts. I see nothing surprising about that. Globalisation is now accepted as a force for economic rationalisation. For most of the 20th century Australia, through the Privy Council, was linked to an international force for legal globalisation. Commercial interests in Australia were generally pleased that the services of the United Kingdom's most senior judges were made available to Australian litigants at the expense of the United Kingdom Government. They thought that was a good arrangement. As to the capacity of the High Court to develop a distinctive Australian common law, they were either indifferent or suspicious. That also reflected the attitude of many in the legal profession.

An example of the commercial aspect of the Privy Council's role is the last appeal that went there from the High Court. In an appeal from New Zealand in 1974³¹, a shipping case, the Privy Council upheld the efficacy of a contractual provision designed, in favour of carriers and their agents, to circumvent the House of Lords decision in *Midland Silicones Ltd v Scruttons Ltd*³². In *Midland Silicones* the House of Lords had endorsed a decision of the High Court of Australia in *Wilson v Darling Island Stevedoring and Lighterage Co Ltd*³³. The issues concerned agency and privity of contract. The decision in the New

³¹ *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154.

³² [1962] AC 446.

³³ (1955) 95 CLR 43.

Zealand appeal enabled carriers to pass on to their agents, such as stevedores, the benefit of clauses limiting or excluding liability even though the agents were not parties to the contract of carriage. It was a decision, with a strong practical commercial flavour, in favour of shipowning interests. When the issue next came to the High Court, it formally accepted the decision of the Privy Council, but not with enthusiasm, and confined its effect narrowly³⁴. Stephen J said³⁵:

"While it is in the interests of great fleet-owning nations that their ocean carriers, and the servants and independent contractors they employ, should be as fully protected as possible from liability at the suit of shippers and consignees, the interests of those nations which rely upon their import and export trade is to the contrary."

This was a fairly direct way of saying that, while Britain's interests lay in supporting shipowners, and their agents, Australia's interests lay in supporting cargo owners and consignees. The Privy Council reversed the decision of the High Court³⁶. Their Lordships did not appear to be greatly moved by the reference to Australia's interests, which was perhaps blunted by the fact that Barwick CJ dissented in the High Court. They simply took the view that their earlier decision was right in principle, and they were not prepared to see it watered down in favour of cargo interests. The High Court's decision was in 1978. I had not appeared in the case in the High Court, but I appeared for the appellant

³⁴ *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231.

³⁵ (1978) 139 CLR 231 at 258.

³⁶ (1980) 144 CLR 300.

in the Privy Council. The hard part was getting special leave to appeal. In 1979, their Lordships appeared deeply reluctant to take on an appeal from the High Court. After all, such appeals had by then been abolished, and this case could go to London only because of a grandfather clause in the 1975 legislation. A point in my client's favour was that the High Court had stopped argument on what turned out to be the decisive issue and, perhaps in consequence, had made an error of fact. There was a question of procedural fairness. Once the problem of special leave was overcome, the Privy Council had no hesitation in giving full effect to its own earlier decision, and upholding the dissenting opinion of the Australian Chief Justice. The last appeal from the High Court to the Privy Council was allowed.

Inconsistency in the reasoning of decisions of the High Court and decisions of the Privy Council sometimes caused confusion for other Australian courts, and the rules of judicial precedent could be complex. The High Court itself from time to time found difficulty in accepting the reasoning in decisions of the Privy Council. An open break came in 1978, with *Viro v The Queen*³⁷, concerning the law of self defence. The High Court held that since the 1975 legislation it had not been bound by decisions of the Privy Council. It may be added that *Viro* was not a success – see *Zecevic v Director of Public Prosecutions (Vic)*³⁸. In his

³⁷ (1978) 141 CLR 88.

³⁸ (1987) 162 CLR 645.

1977 State of the Judicature address, Sir Garfield Barwick announced that the High Court did not regard itself as bound by decisions of the House of Lords and in future would not regard itself as bound by decisions of the Privy Council³⁹. Subsequently, the High Court on a number of occasions has taken a course different from that of the Privy Council. Sometimes the Privy Council decisions had already been doubted, or criticised, by the House of Lords.

There came a time when the Privy Council accepted that the common law of Australia could differ from that of England. One example concerned awards of damages in defamation cases⁴⁰. Another concerned the liability of shipowners and their agents to compensate harbour authorities for damage to property⁴¹. That case also involved the approach of the High Court to overruling its own previous decisions and the balance between judicial and legislative law reform. The Privy Council said: "The High Court of Australia can best assess the national attitude on matters such as these."⁴²

³⁹ Barwick, "The State of the Australian Judicature", (1977) 51 ALJ 480 at 485.

⁴⁰ cf *Rookes v Barnard* [1964] AC 1129; *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590.

⁴¹ *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* [1974] AC 810.

⁴² [1974] AC 810 at 821.

The role of the Privy Council in Australia's judicial system, while it lasted, necessarily exposed the Australian judiciary, including the High Court, to a powerful and formal source of international influence. The influence of English decisions, although no longer formal, remains strong. In one respect, however, the end of appeals to the Privy Council may have opened Australia to a wider range of international influences. The High Court now regularly consults the jurisprudence of Canada, New Zealand, the United States, and other common law countries, and, although not nearly as frequently, the jurisprudence of civil law countries. Problems which confront modern courts throughout the world are often similar, and the solutions developed in other jurisdictions are naturally of interest in Australia. We continue to benefit from the assistance of the work of the United Kingdom courts and, in particular, from their wide experience, but the severing of our formal connexion has enabled us also to look directly to other valuable sources of guidance.

Developments in the United Kingdom's role in Europe, including constitutional and other legal developments, have brought their own pressures for conformity; pressures to which Australia is not subject, although such influences may affect us indirectly. This may explain some more recent examples of divergence between our two legal systems. Europe's influence on the law of England is not (or not yet) directly comparable to the United Kingdom's influence on the law of Australia, but it is perhaps not entirely different. One hundred years ago, Canadians and Australians complained that English lawyers were not familiar with federalism. Thirty years from now, or even sooner, English

lawyers may be immersed in federalism, and their legal system may be subject to civilian influences that remain foreign to us.

A factor in Australia's severance of its links with the Privy Council was the increasing importance and localisation of statute law. The last quarter of the 20th century saw a major development of legislative activity, at both federal and State levels, intruding into many areas of the law. The first legislation limiting appeals to the Privy Council, in 1968, concerned cases involving the interpretation and application of federal statutes, such as the *Income Tax Assessment Act 1936* (Cth). Since then, income tax legislation has become increasingly complex, and is replete with what Sir Owen Dixon would have called autochthonous expedients. The interpretation of the *Income Tax Assessment Act* often requires knowledge of related laws and administrative practices. Our tax laws are in many respects different from those of the United Kingdom which, as I understand it, are in turn influenced by European directives. The output of Parliament and the work of the courts in that field involves a constant interaction. It is impossible to imagine that Parliament, or the public, would now accept a United Kingdom court as the final interpreter of our income tax legislation, or that a United Kingdom court would want to take on that role. Similar considerations apply to other legislation. Australian legislation, State and federal, on a wide range of topics affecting trade practices, commercial law, contracts, tort law and criminal law, is now different from English legislation; and such legislation occupies much of the field that in earlier times was the province of the common law. The expansion of statute law, and the distinctiveness of

much Australian legislation, have altered the legal environment. Fifty years ago, Australian statutes dealing with matters such as bills of exchange, sale of goods, criminal law, stamp duties, relations between landlord and tenant and other topics that were the stuff of everyday litigation would have been familiar to English lawyers. Those days are gone. Speaking at a legal convention in 1963⁴³, where there was discussion of a proposal to create the Federal Court of Australia, Mr E G Whitlam QC, later Prime Minister, said that judges who interpret and apply statutes should be appointed by governments responsible to the parliaments which passed those statutes, and that, on principle, federal judges should interpret and apply federal laws. That view would probably be held widely now by politicians in Australia. It appears to have a corollary concerning the appointment of judges who interpret State statutes, but the judges who now have the final authority to interpret State statutes, that is, the members of the High Court, are appointed by the Federal Parliament. In the United Kingdom, not only has there been the same increase in the importance of legislation, but, in addition, there is a growing European influence. As United Kingdom lawyers come to be more closely acquainted with federalism, they will observe a phenomenon that is familiar in Australia, the United States, and Canada: the centripetal force of demands for uniformity. In modern federations, there are constant pressures to break down regional differences, especially in matters that affect business, the environment,

⁴³ (1963) 36 ALJ 308 at 327.

movement of persons and goods, and health and safety. Pressures of this kind within Europe, coupled with the modern trend towards legislative intervention, will increase the gap between English United Kingdom and Australian law. If the United Kingdom becomes caught up in European movements to codify the law of contract, or torts, or private international law, it may be subject to an increasing civilian influence.

There was a time, about 40 years ago, when the possibility of a peripatetic Privy Council, hearing appeals from Commonwealth courts, was mooted. The larger Commonwealth jurisdictions no longer have appeals to the Privy Council but I gather that in recent years the idea of travel has taken on: the Privy Council sat last year in the Bahamas, and is soon to visit Mauritius.

One respect in which the disappearance of appeals to London has involved a cost to Australia is that Australian lawyers no longer have the opportunity to argue cases, in London, before leading United Kingdom judges. It is important that we foster other forms of professional contact to make up for that. This is part of the reason for the existence of the Anglo-Australasian Lawyers Society.

Times change, but we inherited our common law and our independent judiciary from the United Kingdom and for most of the first century of our Federation the Privy Council was a major force in securing that inheritance. It is a matter of great satisfaction to acknowledge that.

