

Vive la difference — two countries two systems

Anglo Australasian Lawyers' Society

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The United Kingdom and Australia have deep historical and constitutional connections and much in common in their culture and legal systems. However, there are important differences. Each is, with respect to the other, a foreign country.

How that all came to be is part of the story of Australia's evolving nationhood. I say 'evolving nationhood' because even though 1 January 1901 was the birth date of the Commonwealth it did not mean that Australia sprang into existence fully formed as an independent nation in the global community of nations. Sir Owen Dixon, in an article published in the *Law Quarterly Review* in 1935, expressed the general view of our Constitution:

It is not a *supreme* law purporting to obtain its force from the direct expression of a peoples' inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.¹

Even after the Australian Constitution came into existence, the British Parliament retained legal sovereignty over Australia. The *Colonial Laws Validity Act 1865* (Imp), another Imperial Act, continued in force. It provided for the invalidation of any colonial legislation which was repugnant to a British law applying to the colony by paramount force.² In 1979, three Justices of the High Court in *China Ocean Shipping Co v South Australia*³ looked back and described the Australia of 1901 as a self-governing colony lacking political and constitutional independence.⁴ For nearly three decades after the Commonwealth came into existence, its executive power was not exercised as that of an independent nation in

¹ Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597.

² See George Winterton, 'The Acquisition of Independence' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds) *Reflections on the Australian Constitution* (Federation Press, 2003) 31.

³ (1979) 145 CLR 172.

⁴ Ibid 182 (Barwick CJ), 210–11 (Stephen J), 240 (Aickin J agreeing generally with Stephen J).

connection with its external relations. As a matter of convention rather than law, Australia's relations with other countries remained largely in the hands of the British Government. It did not regard itself as having the power to declare war.⁵ In 1916, Sir Isaac Isaacs, then a Justice of the High Court, later to become its Chief Justice and then the first Australian born Governor-General, said of the executive power of the Commonwealth under s 61:

The creation of a state of war and the establishment of peace necessarily reside in the Sovereign himself as the head of the Empire, but apart from that, the prerogative powers of the Crown are exercisable locally.⁶

All that changed in 1926. The executive independence of British Dominions, including Australia, in the conduct of their international relations was recognised by a Declaration at an Imperial Conference held that year. It spelt out that Great Britain and its Dominions were:

*equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*⁷

The Declaration did not require legislation to support it because deference to the British Government in international relations was a matter of practice or convention and not of law.

A further important step in the direction of national executive independence was taken at an Imperial Conference in early November 1930 when a resolution was passed that advice to the King about the appointment of a Dominion Governor-General would be tendered only by the Dominion Ministers.⁸ That meant that from then on the Australian Government would decide who would be the Governor-General of Australia and so advise the King. As the late

⁵ *Farey v Burvett* (1916) 21 CLR 433, 452; *Welsbach Light Co of Australasia Ltd v Commonwealth* (1916) 22 CLR 268, 278.

⁶ *Farey v Burvett* (1916) 21 CLR 433, 452.

⁷ Inter-Imperial Relations Committee, *Imperial Conference, 1926: Report, Proceedings and Memoranda* (1926) 2 (emphasis in original).

⁸ George Winterton, 'The Evolution of a Separate Australian Crown' (1993) 19 *Monash University Law Review* 1, 8–12.

Professor George Winterton put it, that resolution, like the Declaration of 1926, did not involve any change to our Constitution. All that was changed was the identity of the King's advisors. In the result, Britain, Australia, Canada and New Zealand enjoyed what he called a 'personal union' of Crowns, not a shared monarchy. Thus Australia, in the relevant sense, became an independent kingdom from 1931.⁹

The decision that Dominion Ministers should be the King's advisors on the appointment of Dominion Governors-General meant that it was Prime Minister Scullin who advised King George V that Sir Isaac Isaacs, the Chief Justice of the High Court of Australia, be appointed as the first Australian born Governor-General. The King was opposed to the appointment. Isaacs was a 'local man', the King did not know him, he was elderly, in his mid-70s, and there had been no prior consultation. However, Scullin held his ground in a personal audience with the King in November 1930 and as the late Sir Zelman Cowen wrote in the *Australian Dictionary of Biography*, 'the King reluctantly approved, and the announcement of Isaacs' appointment was made with a clear implication of the King's displeasure.'¹⁰

The next development, which was in the direction of full legislative independence, removed the possibility of British laws continuing to have paramount force over Commonwealth laws by operation of the *Colonial Laws Validity Act*. The United Kingdom Parliament enacted the Statute of Westminster on 11 December 1931. It provided that Dominion laws would no longer be invalid for repugnancy to paramount laws of the United Kingdom. Dominion Parliaments, including the Australian Parliament, could repeal or amend British legislation applying to them. They could also legislate extra-territorially. No future British Act was to extend to a Dominion as part of its law unless it was expressly declared in that Act that the Dominion had requested and consented to its enactment.

The Statute was only to apply to the Dominion of Australia upon adoption by the Commonwealth Parliament. It did not affect the operation of the *Colonial Laws Validity Act* with respect to the States. Professor George Winterton has described the Statute as a testament to the paranoia of Australian States. They were far more willing to trust the British

⁹ Ibid 36.

¹⁰ Zelman Cowan, 'Isaacs, Sir Isaac Alfred (1855-1948)' in Bede Nairn, Geoffrey Serle, Christopher Cunneen (eds), *Australian Dictionary of Biography. Vol 9: 1891-1939* (Melbourne University Press, 1983) 444, 448.

than their own Commonwealth compatriots whom they viewed as 'competitor[s] for power'.¹¹ In the event, legislative independence at the national level was not secured fully until the adoption of the Statute of Westminster by an Act of the Commonwealth Parliament in 1942, introduced by the Curtin government. The adoption was made retrospective to 3 September 1939.¹² A rather bizarre result of the 'State paranoia' was that State laws could be invalidated if repugnant to a British law purporting to extend to Australia, while Commonwealth laws could not. The effect, as Sir Owen Dixon pointed out, was 'to treat the State and federal legislatures as if they operated in different countries'.¹³ The possibility of appeals to the Privy Council from the decisions of the State Supreme Courts remained in place as an alternative to appeals to the High Court save for appeals involving questions arising under the Commonwealth Constitution. That continued to be the case until the enactment of the *Australia Acts* in 1986.

The Imperial connection loomed large in Australian jurisprudence for a long time. In 1949, the High Court decided *R v Sharkey*¹⁴ which concerned the validity of a law making it an offence to excite disaffection against the Sovereign or the Government or Constitution of the United Kingdom or against either House of Parliament of the United Kingdom. Latham CJ said that the Government and the Constitution of the United Kingdom and its Houses of Parliament were 'part of the legal and political constitution of the Commonwealth'.¹⁵ Dixon J stated the proposition more broadly. He saw the challenged law as going to 'the constitutional relations of Australia as part of the British Commonwealth with the established Government of the United Kingdom'.¹⁶ Webb J regarded the House of Lords and the House of Commons as 'essential parts of the political and legal organization of Australia'.¹⁷ The power still reserved to the Imperial Parliament to legislate for Australia, if so desired by Australia, was a sufficient indication of that.¹⁸

The enactment of the *Australia Act 1986* (UK) and corresponding Acts of the Commonwealth and State Parliaments marked the end of the legal sovereignty of the British

¹¹ Winterton, above n 2, 37.

¹² *Statute of Westminster Adoption Act 1942* (Cth).

¹³ Sir Owen Dixon, 'The Statute of Westminster, 1931' in Judge Woinarski (ed), *Jesting Pilate and other papers and addresses* (William S. Hein & Co Inc, 2nd ed, 1997) 82, 88.

¹⁴ (1949) 79 CLR 211.

¹⁵ *Ibid* 136.

¹⁶ *Ibid* 149.

¹⁷ *Ibid* 164.

¹⁸ *Ibid*.

Parliament over Australia and lent support to the proposition that ultimate sovereignty resided in the Australian people. The Act, as required by the Statute of Westminster, was the result of a request by the Parliament and Government of the Commonwealth, with the agreement of the States of Australia, directed to the United Kingdom Parliament. Section 1 said:

No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

Under s 3 the *Colonial Laws Validity Act* would not apply to any law made by the Parliament of a State after the commencement of the *Australia Act*. Further, no law could be void or inoperative on the grounds of repugnancy to the law of England or to the provisions of any existing or future Act of the United Kingdom Parliament.

The Australian Constitution contains no reference to Australian citizenship. The topic was debated by the gathering of colonial delegates drafting the proposed Commonwealth Constitution at the Australasian Federal Convention held in Melbourne in 1898. One proposal was to include in the Constitution a statement of the privileges and immunities of citizenship. Another proposal was to confer on the Commonwealth Parliament the power to make laws with respect to Commonwealth citizenship. There were suggestions that the Federation could include two citizenships, one of the Commonwealth, the other of the person's State. In the end the whole idea of providing for a form of citizenship in the Constitution was abandoned. Edmund Barton argued:

We are subjects in our constitutional relation to the empire, not citizens. 'Citizens' is an undefined term, and is not known to the Constitution. The word 'subjects' expresses the relation between citizens of the empire and the Crown.¹⁹

And so we were all British subjects. There was no such thing as a legal concept of an Australian citizen until the *Nationality and Citizenship Act 1948* (Cth), subsequently renamed

¹⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1786 (Edmund Barton).

the *Citizenship Act 1948* (Cth) and thereafter the *Australian Citizenship Act 1948*,²⁰ was enacted. Section 10(1) of that Act had the effect that a person born in Australia after the commencement of that Act, with some exceptions, was an Australian citizen by birth. A person who was a British subject immediately before the Act commenced became an Australian citizen if he or she was born in Australia and would have been an Australian citizen if s 10 of the Act had been in force at the time of his or her birth.²¹ I was born in Perth in 1947. I became an Australian citizen by force of the Act in 1948. As was pointed out by John Chesterman and Brian Galligan in their book on *Defining Australian Citizenship*, even after the Act of 1948 came into force on Australia Day in that year, there was nothing in it which set out the rights of an Australian citizen.²² However, the status of the Australian citizen was 'the foundation on which further conditions of disqualification or qualification are built'.²³ By way of example of its application — some very long term migrant residents of Australia who had not applied for Australian citizenship and then committed an offence rendering them subject to deportation found themselves removed from the country in which they had spent most of their lives and sent back to a country which to them was a foreign country.²⁴

In 1984, the Act was amended so that Australian citizens were not automatically British subjects.²⁵ From 1986 an applicant for Australian citizenship no longer had to renounce other allegiances.²⁶ It was possible therefore to be both an Australian citizen and a British subject. This had an interesting sequel. In a case called *Sue v Hill*²⁷ decided in 1999, the High Court held that an Australian citizen who had not renounced her British citizenship at the time she nominated for election to the Senate was not validly elected because she was under allegiance to a foreign power. Allegiance to a foreign power is a disqualifying

²⁰ The *Nationality and Citizenship Act 1948* (Cth) was renamed the *Citizenship Act 1948-1969* by the *Citizenship Act 1969* and further renamed as the *Australian Citizenship Act 1948-1973* by the *Australian Citizenship Act 1973* No 99 of 1973 and eventually replaced by the *Australian Citizenship Act 2007* (Cth).

²¹ *Nationality and Citizenship Act 1948* (Cth), s 25(1)(a).

²² John Chesterman and Brian Galligan, *Defining Australian Citizenship* (Melbourne University Press, 1999) 8.

²³ Commonwealth, *Report from the Select Committee on Voting Rights of Aborigines: Part I — Report and Minutes of Proceedings*, Parl Paper (1961), 1433 (Opinion of Geoffrey Sawyer).

²⁴ For a recent example, see *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1. The High Court recently refused Mr Stretton's application for special leave to appeal the decision of the Full Court of the Federal Court rendering him liable to deportation: *Stretton v Minister for Immigration and Border Protection* [2016] HCATrans 200.

²⁵ *Australian Citizenship Amendment Act 1984* (Cth), s 7 (repealing Part II of the Principal Act).

²⁶ *Australian Citizenship Amendment Act 1986* (Cth), s 11 (amending the Oath of Allegiance).

²⁷ (1999) 199 CLR 462.

condition for election under s 44(i) of the Commonwealth Constitution. In the course of their joint judgment, three of the Justices, Chief Justice Gleeson and Justices Gummow and Hayne, said:

Australia and the United Kingdom have their own laws as to nationality so that their citizens owe different allegiances. The United Kingdom has a distinct legal personality and its exercises of sovereignty, for example in entering military alliances, participating in armed conflicts and acceding to treaties such as the Treaty of Rome, themselves have no legal consequences for this country. Nor, as we have sought to demonstrate ... does the United Kingdom exercise any function with respect to the governmental structures of the Commonwealth or the States.²⁸

That last statement is a measure of Australia's movement from a self-governing colony in 1901, integrated legally and constitutionally with the United Kingdom, to an independent nation for which the United Kingdom is a 'foreign power', albeit a friendly foreign power with which we share deep historical and cultural connections.

The movement to nationhood which I have described raises another question and that is whether the Australian Constitution can any more be viewed as deriving its legal authority from the British Parliament despite it being s 9 of an Act of that Parliament?

Because it started out as a section of a British Act of Parliament and derived its legal authority from that, the Australian Constitution does not declare that the people are its source. There is no doubt that the impetus behind its creation was an emerging sense of Australian identity and nationalism among the people of the colonies. Sir Henry Parkes, one of the prime movers of the Federation Movement and given to rather purple prose, famously said at a conference in February 1890 at Parliament House in Melbourne '[t]he crimson thread of kinship runs through all of us.'²⁹ The importance of popular support was recognised from the outset in the first of the Constitutional Conventions in 1891. The press and the public were admitted to observe proceedings. Alfred Deakin reminded the delegates that the fate of their proposals would be determined by the people:

²⁸ Ibid 503 (footnotes omitted).

²⁹ Sir Henry Parkes, *The Federal Government of Australasia: Speeches Delivered on Various Occasions (November, 1889 - May 1890)* (Turner and Henderson, 1890) 75.

We know from the outset the bar of public opinion before which we are to be judged, and we know from the commencement of our labours that the conclusion of them rests in other hands than ours in hands of no less a body than the assembled peoples of all the Australasian colonies.³⁰

The draft Constitution which emerged in 1898 from the Convention Debates was submitted to referenda in the various colonies. Those referenda gave the draft Constitution the legitimacy it needed to be enacted by the United Kingdom Parliament. In the end the Preamble to the United Kingdom Act which gave effect to the Constitution began with the words:

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.

As we all know the people of Western Australia came in a little later, but in time to be joined in with the Proclamation, on 17 September 1900, of the coming into effect of the Constitution from 1 January 1901.

The concept of 'the people' in 1901 was not as inclusive as it is today, particularly with respect to women and Indigenous Australians. Nevertheless, popular support was the necessary condition for the creation of the Commonwealth. Over the years we have moved to a broader concept of 'the people' including women and Indigenous people. That broadening is irreversible — constitutionalised by conventions reflected in the statutes and practices of the Commonwealth and the States.

With the enactment of the *Australia Acts* the notion of the people as the repository of ultimate Australian sovereignty was enlivened. It was canvassed in the *Australian Capital*

³⁰ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 5 March 1891, 69–70 (Alfred Deakin).

*Television Case*³¹ in which the High Court held there is implied in the Constitution a freedom of political communication. In the course of his judgment, Mason CJ said:

Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people.³²

The historical and constitutional movement in the relationship between the United Kingdom and Australia from that of coloniser and colony to friendly foreign States has its parallels in the relationship between our judiciaries. At one time it was the practice of the High Court to follow decisions of the House of Lords. That changed following a decision of the House of Lords in a case called *Director of Public Prosecutions v Smith*³³ in 1961. The House of Lords held that a person who had been charged with an offence of murder requiring proof of an intention to kill could be presumed to have intended the natural and probable consequences of his acts. The accused in that case had been driving a car which was stopped by a police officer who suspected him to be in possession of stolen goods. The accused drove away with the police officer clinging to the side of the car. As a result the officer was thrown off the car, hit by another car and died. The principle that a person is presumed to intend the natural and probable consequences of his or her acts was not accepted by the High Court in *Parker v The Queen*³⁴, decided two years later. The Chief Justice of the High Court, Sir Owen Dixon, saw the decision of the House of Lords as forcing what he called 'a critical situation in our [Dominion] relation to the judicial authority as precedents of decisions in England.' He went on to say, with the agreement of the other Justices of the High Court:

Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case* I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and

³¹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

³² *Ibid* 138.

³³ [1961] AC 290.

³⁴ (1963) 111 CLR 610.

wrong. They are fundamental and they are propositions which I could never bring myself to accept.³⁵

With that, depending on your perspective, the rot had set in and it continued. In 1964, the House of Lords decided a case called *Rookes v Barnard*.³⁶ Lord Devlin, in a judgment with which the other members of the House of Lords agreed, said that the award of exemplary or punitive damages was restricted to two categories of case. They could be awarded in cases of oppressive, arbitrary or unconstitutional action on the part of a government official. They could also be awarded in cases in which the defendant's conduct had been calculated to make a profit which could well exceed the compensation payable to the plaintiff.³⁷ In 1966, in *Uren v John Fairfax & Sons Ltd*,³⁸ a defamation case, the High Court rejected Lord Devlin's limitations, which it saw as changing the law. Menzies J said that to accept the limitation adopted by the House of Lords would 'involve a radical departure from what has been regarded as established law.'³⁹ In 1980 the Chief Justice, Sir Garfield Barwick, described the decision of the House of Lords in *Director of Public Prosecutions v Majewski*⁴⁰ as 'a radical departure from those principles of the common law evolved over a period of time, but particularly elucidated in the last fifty or so years'.⁴¹

Different approaches to the common law continue to emerge from time to time. The High Court has recently declined to follow a change of direction adopted by the Supreme Court of the United Kingdom in relation to the doctrine of extended joint enterprise in criminal law.⁴² To follow that change of direction would have required the High Court to overrule one of its own earlier decisions,⁴³ which had applied the principles enunciated in a Privy Council decision that the Supreme Court held was a 'wrong turn'.⁴⁴

Sometimes differences emerge in the common law between our two countries because of the different statutory regimes within which the common law has to operate. A difference

³⁵ Ibid 632 (footnote omitted).

³⁶ [1964] AC 1129.

³⁷ Ibid 1226.

³⁸ (1966) 117 CLR 118.

³⁹ Ibid 145.

⁴⁰ [1977] AC 443.

⁴¹ *R v O'Connor* (1980) 146 CLR 64, 86.

⁴² See *Miller v The Queen* (2016) 90 ALJR 918.

⁴³ *McAuliffe v The Queen* (1995) 183 CLR 108.

⁴⁴ *R v Jogee* [2016] 2 WLR 681; 2 All ER 1, not following *Chan Wing Siu v The Queen* [1985] AC 168.

of that kind led the High Court in *Commonwealth Bank of Australia v Barker*⁴⁵ to hold that Australian courts should not imply into employment contracts a term of mutual trust and confidence between employer and employee. The House of Lords had taken a different approach in *Malik v Bank of Credit and Commerce International SA (in liq.)*⁴⁶ As Justices Bell, Keane and I pointed out in *Barker*, the regulatory history of the employment relationship and of industrial relations in Australia differs from that of the United Kingdom. There have been ebbs and flows in the levels of statutory protection for employers and employees. We said:

The statutory framework from time to time is not uniform across Australia because it comprises not only Commonwealth laws but also diverse State and Territory laws. Judicial decisions about employment contracts in other common law jurisdictions, including the United Kingdom, attract the cautionary observation that Australian judges must 'subject [foreign rules] to inspection at the border to determine their adaptability to native soil.' That is not an injunction to legal protectionism. It is simply a statement about the sensible use of comparative law.⁴⁷

The traffic of difference is not one way. In *Andrews v Australia and New Zealand Banking Group Ltd*,⁴⁸ decided in 2012, the High Court held that the principle under which contractual provisions imposing penalties were unenforceable was not limited to cases of contractual breach but could extend to non-satisfaction of a contractual stipulation. In the recent decision of the United Kingdom Supreme Court in *Cavendish Square Holdings BV v Makdessi*,⁴⁹ Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC (with whom Lord Carnwath JSC agreed) described the High Court's decision in *Andrews* in familiar terms as a 'radical departure' from what has been regarded as established law. There are a number of areas of divergence in common law, but as I recently observed in my judgment in *Paciocco v Australia and New Zealand Banking Group*,⁵⁰ channelling *The Game of Thrones*, differences between our jurisdictions have not heralded the coming of winters of mutual exceptionalism. The common law jurisdictions are primary sources of comparative law for each other and the jurisprudence of the United Kingdom as the first source of common law is worthy of

⁴⁵ (2014) 253 CLR 169.

⁴⁶ [1998] AC 20.

⁴⁷ (2014) 253 CLR 169, 184–85 [18] (footnotes omitted).

⁴⁸ (2012) 247 CLR 205.

⁴⁹ [2015] 3 WLR 1373; [2016] 2 All ER 519.

⁵⁰ (2016) 333 ALR 569.

particular respect. Nevertheless, we are different countries, with different legal systems, and while we have common elements in our histories they have diverged significantly, not least with the British engagement with the European Union.

Australia's written federal Constitution, and the absence of such a document in the United Kingdom, underpin some important divergences between our countries in the field of public law. A related difference is the absence in Australia of any national equivalent of the *Human Rights Act 1998* (UK) and, for the time being, the absence of any equivalent of the European Court of Human Rights as a kind of supranational court. We all share, of course, a common concept of the rule of law which requires that all official power be exercised in accordance with lawful authority.

It is a consequence of Australia's written Constitution that courts are empowered to determine the validity of legislation, both Commonwealth and State, where it is said that one or other legislature has exceeded its power or infringed a constitutional guarantee or prohibition or where a valid Commonwealth law is said to be inconsistent with a State law. The Commonwealth Constitution also entrenches the High Court's power to judicially review the decisions of Commonwealth officials, including Ministers, under s 75(v) of the Constitution.⁵¹ What that means is that the legislature is powerless to deprive the High Court of its jurisdiction to undertake judicial review for jurisdictional error.

The High Court has also developed doctrines under which a State Parliament cannot abolish the Supreme Courts of the States⁵² and, importantly, cannot deprive the Supreme Courts of the States of their traditional supervisory jurisdiction over official decisions for jurisdictional error.⁵³ A powerful principle of judicial review is thus entrenched at both Commonwealth and State levels.

In the case of the United Kingdom, the question arises: 'How would its courts respond if judicial review of administrative action were to be abolished or significantly abrogated?' There is no written constitution to say that that cannot be done. It may be that the focus of the courts in the United Kingdom would then turn to what is called 'common law constitutionalism' which suggests that even in the absence of a written constitution, there are

⁵¹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

⁵² *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.

⁵³ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

limits on what the Parliament can do to the fundamentals of the relationship between the Executive, the Parliament and the Courts.⁵⁴

There are many things that Australian and British judges and lawyers can learn from each other. There are many common legal problems both in private and public law where the approaches and solutions adopted by one of our countries is applicable to the other. We share an important common legal heritage and similar ways of thinking about the resolution of legal problems. We also have similar interests in the global economy and in international trade and commerce which gives rise to such things as model laws with respect to international commercial arbitration and transnational insolvency. We have a common interest in the standardisation of transactional instruments. We also have a common interest in the convergence of commercial law and practice.

All that being said, we are two countries. Our histories have been different. In Australia, we have a history which antedates that of British settlement — that is the 40,000 to 60,000 years of Indigenous occupation of our country. The great common law decision of the High Court in *Mabo v Queensland (No 2)*⁵⁵, introduced an element into our legal and constitutional arrangements that is not reflected in those of the United Kingdom. Indeed, the *Mabo* decision involved the rejection of a view of Australia's colonial history and of its Indigenous people which had been adopted by the Privy Council in 1889.⁵⁶ *Mabo* was described as a 'shift' in Australia's common law constitutional foundation.⁵⁷

We are two countries with two systems of law. We have in common traditions of representative democracy and responsible government, the rule of law and common law rights and freedoms developed over a long period. So long as we continue to share those essentials we can rightly celebrate our common heritage and our differences.

⁵⁴ See Lord Woolf MR, 'Droit Public — English Style' (1995) *Public Law* 57; Sir John Laws, 'Law and Democracy' (1995) *Public Law* 72. See also *R (Jackson) v Attorney-General* [2006] 1 AC 262, 302-3 [102] (Lord Steyn), 308 [120] (Lord Hope), 318 [159] (Lady Hale); *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, 913 [51] (Lord Hope).

⁵⁵ (1992) 175 CLR 1.

⁵⁶ *Cooper v Stuart* (1889) 14 App Cas 286.

⁵⁷ *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J).