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**THE INFLUENCE OF THE PRIVY COUNCIL ON AUSTRALIA**

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Owen Dixon KC took silk in March 1922, having been admitted to the Victorian Bar twelve years earlier. Later that year<sup>1</sup>, he travelled to London to represent the Governments of New South Wales, Western Australia and Tasmania in an application for special leave to appeal to the Judicial Committee of the Privy Council from the decision of the High Court in the *Engineers Case*<sup>2</sup>. The application was unsuccessful<sup>3</sup>. While he was in London, Dixon appeared in two other matters in the Privy Council: "a Western Australian metals case and a New South Wales landlord and tenant case"<sup>4</sup>. He travelled to London with his wife and children, and his parents. The sea voyage, which began on 21 October 1922, took six weeks. The first case in which Dixon was briefed was heard on 8 December 1922, and the third was heard on 1 February 1923. The family left London on 3 February, and arrived back in Melbourne on 14 March 1923<sup>5</sup>.

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This brief episode in the life of a busy Australian barrister in the 1920's is interesting for two reasons. First, it is a reminder that, for most of the twentieth century, the apex of Australia's legal system was in London, not Canberra. When I started at the New South Wales Bar in 1963, and throughout almost the whole of my time at the Bar, some Australian barristers travelled regularly to London to argue cases, in the Privy Council, before United Kingdom judges, and against English barristers. Indeed, with air travel, access to the Privy Council became easier in the second half of the twentieth century. Furthermore, appeals could be taken direct to the Privy Council from State Supreme Courts, and even from single judges. This was a method of by-passing the High Court in cases where the prospects of success in that Court were considered unfavourable. The Judicial Committee was a real and forceful presence for lawyers of my generation. Justices of the High Court sometimes sat on the Privy Council. Sir Harry Gibbs and Sir Ninian Stephen were the last two to do that. Dixon's experience also reminds us that, even in constitutional cases, Australian governments went, or at least attempted to go, from the High Court to the Privy Council. His first brief in the Privy Council, as a new silk, was in the case that, perhaps more than any other, affected the distribution of power between Federal and State governments by changing radically the interpretive method used to construe grants of legislative power to the Federal Parliament. His client States wanted to restore what they regarded as the original and proper balance. Leave to appeal was refused, virtually without reasons. It is evident, however, that the Privy

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Council regarded the case as raising questions of federalism meant by the Constitution to be for the final decision of the High Court.

Some of the major Australian constitutional litigation of the twentieth century ended up in the Privy Council. Three examples will suffice. First, some of the disputes concerning s 92 of the Constitution, before that provision was reinterpreted by the High Court in *Cole v Whitfield*<sup>6</sup>, went to London. The High Court's capacity to reinterpret the section was assisted by the abolition of appeals to the Privy Council. Since *Cole v Whitfield* there have been relatively few s 92 cases. Secondly, the *Boilermakers' Case*<sup>7</sup>, which had a major effect on the structure of the industrial relations system, and which gave a new 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 matter then went to the Privy Council, which confirmed, and adopted, the reasoning of the majority, which included Dixon CJ<sup>8</sup>. Thirdly, the *Bank Nationalization Case*<sup>9</sup> was finally decided in the Privy Council, where the unsuccessful appellant was the Commonwealth, seeking to overturn the decision of the High Court. Leading counsel for the Commonwealth was Evatt KC, a former Justice of the High Court, and later Commonwealth Attorney-General. Leading Australian counsel for the banks was Barwick KC, later Commonwealth Attorney-General and, later still, Chief Justice of the High Court. The Barwick sequence was more orthodox. It has been said that Sir Garfield Barwick made his name in the *Bank Nationalization Case*. That can hardly be correct. A barrister who had not already made his name would not have been

briefed as leading counsel to represent banks fighting for their corporate survival. It is, however, correct to say that, after that success, his place as leader of the Australian Bar was secured, and he went on to build up a record of professional achievement in the Privy Council that was never equalled by any Australian barrister.

To return to the *Engineers Case*, the Privy Council had not always been as careful to stay out of federal issues as it was in 1923. In the early days of the High Court, there was an acrimonious struggle between the High Court and the Privy Council involving some cases about the powers of Commonwealth and State Parliaments to impose taxes on other government instrumentalities<sup>10</sup>. Section 74 of the Constitution, which dealt with appeals to the Privy Council, sought to give the High Court the final say on inter se questions, and the High Court regarded this as such a question. In a judgment written by Sir Samuel Griffith in 1907, the following admonition appeared<sup>11</sup>:

"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

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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 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."

The Canadian cases, to which Sir Samuel Griffith 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. Without doubt, one of the cases to which Griffith CJ was referring was *Attorney-General for Ontario v Attorney-General of Canada*<sup>12</sup>, decided in 1896. Privy Council decisions on the sensitive issue of minority language rights also were controversial. In 1892, in *Winnipeg v Barrett*<sup>13</sup> 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 rights<sup>14</sup>:

"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

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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."

Last year, 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"<sup>15</sup>. 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<sup>16</sup> 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 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 1867. I am in no position to assess the merits of that complaint. However, Australian experience shows that any decision affecting the distribution of power between the constituent units of a federation is bound to be declared, by supporters of the losing side, to be contrary to the original intentions of the framers. It is an inescapable part of the rhetoric of political, and sometimes of legal, argument in a federal system. The Privy Council's work on the Canadian Constitution evidently caused some dissatisfaction in Canada, and the dissatisfaction was well known to Australia's founding fathers.

Even so, appeals from Australia to the Privy Council were not finally abolished until 1986. At the time of the framing of the Constitution, the determination of some people in Australia, as well as

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some people in London, to retain such appeals created the last obstacle on the path to federation. The final draft of the Australian Constitution was the product of two Conventions, one in 1891 and one in 1897-1898. That draft was then approved by the colonial Parliaments, and endorsed by a process of referendum. To take legal effect, however, it had to be enacted by the United Kingdom Parliament. The Imperial authorities objected to cl 74 of the draft. The clause provided that there should be no appeal to the Privy Council in any matter involving the interpretation of the Constitution, or the Constitution of a State, unless the public interest of some part of Her Majesty's Dominions other than the Commonwealth or a State were involved. Subject to that qualification, there was to be a right in the Privy Council to grant special leave to appeal from the High Court, but the Commonwealth Parliament was to have power to make laws limiting the cases in which such leave might be requested. Nothing was said about appeals from State Supreme Courts direct to the Privy Council<sup>17</sup>.

Those in Australia who opposed cl 74 included the Chief Justice of South Australia, Sir Samuel Way<sup>18</sup>. Another influential figure was Sir Samuel Griffith, by then Chief Justice and Lieutenant-Governor of Queensland. He wrote to the Secretary of State for the Colonies saying that he had "reason to believe that the people of these Colonies would gratefully welcome any suggestions that may be made by Her Majesty's advisers with the view of perfecting this most important instrument of government"<sup>19</sup>. Perfecting the draft Constitution meant altering it. That which was to be altered had already been approved by the colonial

Parliaments and by referendum. There was no process for reconsideration of the draft by the colonial people or their Parliaments. Nevertheless, it was altered, and there is little doubt that Sir Samuel Griffith had a hand in the alteration. In brief, s 74 as enacted provided that there were to be no appeals from the High Court to the Privy Council on any question as to the limits inter se of the constitutional powers of the Commonwealth and the States, unless the High Court certified that the question was one that ought to be determined by the Privy Council. Otherwise, there was to be a right of appeal by special leave from the High Court to the Privy Council, but the Commonwealth Parliament was to have power to make laws limiting the matters in which such leave might be sought. Again, nothing was said to limit appeals from State Supreme Courts to the Privy Council.

At the time of Federation, so strong was the assumption within some of the States that the Privy Council was to remain the final court of appeal in criminal and civil cases, that there was resistance to the creation of the High Court as a permanent full-time court. (Alfred Deakin's powerful advocacy, in his speech in the House of Representatives in support of what became the *Judiciary Act* 1902 (Cth), reflected a need to overcome this resistance.) There were, for example, some suggestions that all that was needed, at least for the time being, was a "scratch court" composed of State Chief Justices sitting part-time<sup>20</sup>.



Prime Minister Edmund Barton and Senator O'Connor, later to become two of the first three members of the High Court when it was set up in 1903, expressed in the new Federal Parliament their opposition to appeals to the Privy Council. 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"<sup>21</sup> and that if he had his own way he would have no appeals to the Privy Council<sup>22</sup>. Senator O'Connor described the Privy Council as "altogether an unsatisfactory body to interpret our Constitution" and as "a most unsatisfactory tribunal"<sup>23</sup>. These comments were directed to constitutional cases. It has already been noted that the draft Constitution said nothing about appeals to the Privy Council from State courts. At the time of Federation there was no consensus in Australia that the High Court should be the court of last resort in ordinary civil and criminal cases.

In 1968 and 1975, the Commonwealth Parliament legislated to limit appeals involving Commonwealth law, and appeals from the High Court<sup>24</sup>. Until the 1968 legislation, for example, the Privy Council could, and did, act as a court of final resort in income tax appeals. Until the 1975 legislation, the Privy Council could, and did, hear appeals from the High Court in all other cases, except inter se constitutional cases. Furthermore, so long as appeals direct from State Supreme Courts were possible, litigants could by-pass the High Court. That is what occurred in 1985 in *Candlewood Navigation Corp v Mitsui OSK Lines*<sup>25</sup>, which went direct to the Privy Council from Yeldham J of the Supreme Court of

New South Wales. The case concerned liability in tort for what is sometimes called relational economic loss. The English courts had taken a strong stand against such liability but the High Court had taken a more flexible approach. Yeldham J, as he was bound to do, applied the decision of the High Court in *Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"*<sup>26</sup>. The Privy Council refused to follow the High Court's decision, and allowed the appeal. This problem of inconsistency between decisions of the High Court and the Privy Council, and tactical considerations in deciding which avenue of appeal to pursue, existed during most of my time at the Bar. It was good for barristers, but not for the administration of justice. Ultimately, appeals from State Supreme Courts to the Privy Council were ended by the *Australia Acts* 1986. (Appeals to the Privy Council from Singapore were limited in 1989 and abolished in 1994. Appeals from Hong Kong ended in 1997. Appeals from Malaysia were limited in 1978 and abolished in 1985. Appeals from New Zealand were abolished in 2003.)

The exclusion from the jurisdiction of the Privy Council of constitutional cases involving inter se questions, notwithstanding the 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, probably explains why there was not, in Australia, the same intensity of feeling about the role of the Privy Council as there was in Canada. In 1968, Sir Douglas Menzies wrote 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<sup>27</sup>. As was noted above, the Privy Council refused leave to appeal in the *Engineers Case*, and it later upheld the decisions of the High Court in the *Boilermakers' Case* and the *Bank Nationalization Case*. It is difficult to think of any Privy Council decisions about the Australian Constitution that are now cited in argument in the High Court. Of course, all three of the cases just mentioned are often cited, but it is the Australian judgments that are referred to. The s 92 jurisprudence in which the Privy Council was once involved has become, since *Cole v Whitfield*, largely irrelevant. There is a personal factor that might account in part for a relatively non-interventionist approach by the Privy Council to Australian constitutional matters over much of the mid-twentieth century. Sir Owen Dixon's influence and reputation extended beyond the High Court. For decades, he was a dominant influence on constitutional decisions in the High Court, and it is likely that the Law Lords of his time were slow to disagree with him on constitutional questions.

In matters other than constitutional matters, that is, civil and criminal appeals, whether involving the common law or statutory interpretation, naturally the United Kingdom judges gave full effect to their own learning and experience.

In 1981, Hutley JA of the New South Wales Court of Appeal wrote<sup>28</sup>:

"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."

Whether, 25 years later, it remains fair to describe Australia as "relatively provincial" may be a matter of dispute, but many would accept that it was true over most of the time before 1981. That apart, 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. It arose from matters already mentioned. In non-constitutional matters, decisions of the High Court could be reversed by the Privy Council, and not infrequently they were. Furthermore, litigants could bypass the High Court and take their appeals directly to London provided, in civil cases, a very modest amount of money was involved. This greatly limited the capacity of the High Court to develop a distinctively Australian common law. In any event, for a substantial part of the 20th century, Australia saw itself as part of the British Empire, and the idea that the common law might vary throughout the Empire 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*<sup>29</sup> in 1932, *Woolmington v Director of Public Prosecutions*<sup>30</sup> in 1935, or *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>31</sup> 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*<sup>32</sup>, 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 decision in the same case<sup>33</sup>, 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 simply 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 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 on 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. They were not interested in the *amour propre* of Australian judges. As to the capacity of the High Court to develop a distinctive Australian common law, they were either indifferent or suspicious. That, I might add, 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 1972<sup>34</sup>, 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*<sup>35</sup>. 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*<sup>36</sup>. The issues concerned agency and privity of contract. The decision in the New 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 narrowly<sup>37</sup>. Stephen J said<sup>38</sup>:

"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 Court<sup>39</sup>. 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 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. For example, the reasoning of the Privy Council in its 1966 decision in *Utah Construction & Engineering Pty Ltd v Pataky*<sup>40</sup>, concerning the validity of certain scaffolding and lifts regulations, was inconsistent with the High Court's 1957 decision in *Australian Iron and Steel Ltd v Ryan*<sup>41</sup>, but the relevant regulations were not identical. Subsequently, the New South Wales Court of Appeal decided, on the basis of the reasoning in *Pataky*, that regulations held valid in *Ryan* were invalid. This brought a rebuke when the case - *Jacob v Utah Construction and Engineering Pty Ltd*<sup>42</sup> – went to the High Court. Barwick CJ said<sup>43</sup>:

"Unless [Ryan's] case was overruled by the Privy Council, it was binding on the Court of Appeal of the Supreme Court of New South Wales ... It is not ... for a Supreme Court of a State to decide that a decision of this Court precisely in point ought now to be decided differently because it appears to the Supreme Court to be inconsistent with reasoning of the Judicial Committee in a subsequent case."

The High Court itself from time to time found difficulty in accepting the reasoning in decisions of the Privy Council. For example, in *Mayfair Trading Co Pty Ltd v Dreyer*<sup>44</sup> in 1958, a moneylending case, Dixon CJ explained<sup>45</sup> that reasoning in earlier English cases, which appeared to him to be impregnable, had been undone by the judgment of the Privy



Council in *Kasumu v Babe-Egbe*<sup>46</sup>, a Nigerian appeal. In *Rejfeek v McElroy*<sup>47</sup> in 1965, the High Court held that the Queensland Supreme Court had erred in following a dictum of the Privy Council in an Indian appeal<sup>48</sup> instead of the earlier High Court decision in *Helton v Allen*<sup>49</sup>. In *Johnson v The Queen*<sup>50</sup> in 1977, a case about homicide and provocation, there was critical examination of the reasoning of the Privy Council in *Parker v The Queen*<sup>51</sup>. In relation to the new principles established in *Hedley Byrne*, the High Court in *L Shaddock & Associates Pty Ltd v Council of the City of Paramatta*<sup>52</sup> in 1981, criticised the Privy Council's decision in *Mutual Life & Citizens Assurance Co Ltd v Evatt*<sup>53</sup>. An open break came in 1978, with *Viro v The Queen*<sup>54</sup>, 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)*<sup>55</sup>. In his 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 Council<sup>56</sup>.

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. In *R v Darby*<sup>57</sup>, in 1982, the High Court refused to follow *Dharmasena v The King*<sup>58</sup>, but that decision had previously been departed from by the House of Lords<sup>59</sup>. An illustration of the law of both the United Kingdom and Australia developing, and overtaking Privy

Council decisions in the process, is in the area of liability of occupiers to entrants on land, including trespassers<sup>60</sup>. Dissatisfaction on the part of the High Court with some Privy Council decisions has sometimes been anticipated by similar dissatisfaction on the part of the House of Lords, and does not necessarily reflect a divergence between English and Australian common law. In the recent case of *Barns v Barns*<sup>61</sup>, the High court declined to follow the Privy Council's decision in *Schaefer v Schuhmann*<sup>62</sup>. Those were cases about the construction of legislation which originated in New Zealand and had been taken up in all Australian States. *Schaefer* was itself in conflict with the earlier Privy Council decision in *Dillon v Public Trustee of New Zealand*<sup>63</sup>.

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 cases<sup>64</sup>. Another concerned the liability of shipowners and their agents to compensate harbour authorities for damage to property<sup>65</sup>. 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<sup>66</sup>: "The High Court of Australia can best assess the national attitude on matters such as these."

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 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.

In recent years, and after the severance of our links with the Privy Council, the law of England has been increasingly under the influence of European law. 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. 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 foreign court as the final interpreter of our income tax legislation, or that a foreign court would want to take on that role. Similar considerations apply to legislation generally. 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 law; and such legislation occupies much of the field that in earlier times was the province of the common law. The expansion of statute law, the distinctiveness of much Australian legislation, and the increasing importance of statutory interpretation, have profoundly 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 1963, 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<sup>67</sup>. 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, 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 United Kingdom and Australian law. We have already seen some of this with human rights law, but as the United Kingdom becomes caught up in European

movements to codify the law of contract, or torts, or private international law, it will be subject to an increasing civilian influence. The original source of our legal traditions, represented for most of the 19th and 20th centuries by the Privy Council, will become increasingly distant.

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- \* Chief Justice of Australia. I am grateful to my Associate, David Hume, for his assistance.
- <sup>1</sup> Philip Ayres, *Owen Dixon*, (2003) at 32-33.
- <sup>2</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
- <sup>3</sup> *Minister for Trading Concerns (Western Australia) v Amalgamated Society of Engineers* [1923] AC 170.
- <sup>4</sup> Ayres, op cit. at 33.
- <sup>5</sup> Ibid at 36.
- <sup>6</sup> (1988) 165 CLR 360.
- <sup>7</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
- <sup>8</sup> *Attorney-General of the Commonwealth v The Queen* (1957) 95 CLR 529.
- <sup>9</sup> *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; (1949) 79 CLR 497.
- <sup>10</sup> eg *Deakin v Webb* (1904) 1 CLR 585; *Webb v Outrim* [1907] AC 81.
- <sup>11</sup> *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 at 1111-1112.
- <sup>12</sup> [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 Case 117; *Attorney-General of Ontario v Mercer* (1883) 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. Within a year of its establishment, the High Court held that the Privy Council's interpretation of the *British North American Act* did not govern the interpretation of the Australian Constitution: see *Deakin v Webb* (1904) 1 CLR 585.
- <sup>13</sup> [1892] AC 445.
- <sup>14</sup> Power and Foucher, "Language Rights and Education", in Bastarache (ed) *Language Rights in Canada*, 2nd ed (2004) at 376.
- <sup>15</sup> (2006) 32 (4) *Commonwealth Law Bulletin* 569.
- <sup>16</sup> Ibid at 575.
- <sup>17</sup> See La Nauze, *The Making of the Australian Constitution*, (1972) at 303.

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- 18 Ibid at 262.
- 19 Ibid at 248. See also Joyce, *Sir Samuel Walker Griffith* (1984) at 208-209.
- 20 See Blackshield, Coper and Williams (eds) *The Oxford Companion to the High Court of Australia* (2001) at 193.
- 21 Australia, House of Representatives, *Parliamentary Debates* (Hansard) Vol 13 at 803.
- 22 Ibid at 815.
- 23 Australia, Senate, *Parliamentary Debates* (Hansard) Vol 15 at 2699.
- 24 *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth).
- 25 [1986] AC 1.
- 26 (1976) 136 CLR 529.
- 27 "Australia and the Judicial Committee of the Privy Council" (1968) 42 ALJ 79 at 83.
- 28 "The Legal Traditions of Australia as Contrasted with Those of the United States" (1981) 55 ALJ 63 at 69.
- 29 [1932] AC 562.
- 30 [1935] AC 462.
- 31 [1964] AC 465.
- 32 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388.
- 33 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd & Anor* [1967] AC 617.
- 34 *New Zealand Shipping Co Ltd v R. M. Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154.
- 35 [1962] AC 446.
- 36 (1955) 95 CLR 43.
- 37 *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231.
- 38 (1978) 139 CLR 231 at 258.
- 39 (1980) 144 CLR 300.
- 40 [1966] AC 629.

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- 41 (1957) 97 CLR 89.
- 42 (1966) 116 CLR 200.
- 43 (1966) 116 CLR 200 at 207.
- 44 (1958) 101 CLR 428.
- 45 (1958) 101 CLR 428 at 453.
- 46 [1956] AC 539.
- 47 (1965) 112 CLR 517.
- 48 *Narayanan v Official Assignee, Rangoon* [1941] All India Reporter 93.
- 49 (1940) 63 CLR 691.
- 50 (1977) 136 CLR 619.
- 51 [1964] AC 1369.
- 52 (1981) 150 CLR 225.
- 53 [1971] AC 793.
- 54 (1978) 141 CLR 88.
- 55 *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.
- 56 Barwick, "The State of the Australian Judicature", (1977) 51 ALJ 480 at 485.
- 57 (1982) 148 CLR 668.
- 58 [1951] AC 1.
- 59 *Director of Public Prosecutions v Shannon* [1975] AC 717.
- 60 cf *Commission for Railways v Quinlan* [1964] AC 1054; *Hackshaw v Shaw* (1984) 155 CLR 614.
- 61 (2003) 214 CLR 169.
- 62 [1972] AC 572.
- 63 [1941] AC 294.
- 64 cf *Rookes v Barnard* [1964] AC 1129; *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590.
- 65 *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* [1974] AC 810.
- 66 [1974] AC 810 at 821.



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<sup>67</sup> (1963) 36 ALJ 308 at 327.