Dinner Address
The Birth, Life and Death of Section 74

Hon Chief Justice Murray Gleeson, AC*

It is a curious aspect of the history of the Australian Constitution that the provision that was the last significant obstacle on the road to Federation no longer matters.

The procedures that were adopted to prepare, and give legal effect to, the Constitution involved an obvious risk. While the United Kingdom government encouraged Federation, and, from time to time, made known its views on aspects of the proposed federal agreement, the framing of a draft Constitution was left to the colonists themselves. And it was considered necessary to obtain the approval of the people and Parliaments of the Colonies. In modern terms, that approval was necessary for Federation to have political legitimacy. There was never any possibility that the Imperial government would force Federation upon unwilling Colonies. But what if the terms on which the Colonies agreed to federate were unacceptable in London?

Unlike the *British North America Act* of 1867, the Australian Constitution was written locally, and resulted from two Conventions, one in 1891, and one in 1897-1898. The draft that finally emerged from the second Convention ultimately secured the approval of the colonial Parliaments, and was endorsed by a process of popular referendum. Everyone understood, however, that in order to take legal effect, the new Constitution had to be enacted as legislation of the United Kingdom Parliament. That was essential for constitutional legitimacy. Since the United Kingdom Government played no direct role in drafting the Constitution, there was at least a possibility that it might not approve all the terms upon which the people and Parliaments of the Colonies agreed to Federation. What was to happen in that event? Clearly, this was a delicate matter.

Looking back on it, it is the relative detachment of the Imperial authorities from the negotiations for the federal agreement, rather than any interference in them, that is striking. The issues that excited most attention, and division, among the colonists, such as the problem of reconciling federalism with responsible government, and the respective powers of the two Houses of the new Parliament, do not seem to have attracted a great deal of interest in London.

The officials in London who examined the final draft of the Constitution, as agreed and approved in Australia, including the Attorney-General of the United Kingdom and the Solicitor-General, had some objections to it. However, they were conscious of the importance of not raising unnecessary difficulties that might disturb the carefully negotiated agreement that had been reached, and approved formally, in the Australian Colonies. That agreement, in many respects, reflected hard-won compromise. If some of the terms of the agreement were to be rejected in London, there was no process for re-submitting any amended agreement for further approval in the Colonies. Would the Imperial Parliament force on the Colonies a federal agreement different from that which they had negotiated and approved?

There was one important respect in which the draft Constitution was unacceptable to Her Majesty's Government. The problem was especially acute because it concerned a matter about which there were strong and divided opinions in Australia. The matter was the continuation of appeals to the Judicial Committee of the Privy Council following the establishment of the High Court of Australia.[1]

At the time of Federation, there was a right of appeal, by leave, to the Privy Council, from the Supreme Courts of the Colonies. The draft Constitution required the establishment of a Federal Supreme Court, to be called the High Court of Australia. It was contemplated that appeals

to the new Court would lie from State Supreme Courts, and from other federal courts, in civil and criminal cases. It was also intended that the High Court would have the primary responsibility of interpreting and applying the Constitution. This aspect of the work of the new High Court was emphasised by Alfred Deakin in his speech in support of the Judiciary Bill in 1902.[2] It had also been stressed during the Convention Debates. Edmund Barton, for example, referred to the High Court as the body which would decide "those questions of dispute which arise, and which must arise, under the Federal Constitution".[3] What was to be the continuing role of the Privy Council in the Australian judicial system?

The draft Constitution produced by the 1891 Convention, in which Sir Samuel Griffith, then Premier of Queensland, played a prominent role, provided that the new High Court was to have a general jurisdiction in appeals from the Supreme Courts of the States, and that its decision in those cases was to be final and conclusive. There remained the possibility of direct appeals to the Privy Council from State Supreme Courts, but the Parliament of the Commonwealth was to have legislative power to end appeals to the Privy Council by directing that all appeals from State Supreme Courts should go to the High Court, and that there should be no further appeal from the High Court to the Privy Council. This was subject to the qualification that the Privy Council would retain its capacity to grant leave to appeal from a decision in any case which concerned the public interests of the Commonwealth, or of any State, or of any other part of the Queen's Dominions.

The same subject was dealt with, to different effect, in clause 74 of the draft Constitution that resulted from the second Convention. That was the draft ultimately approved by the colonial Parliaments and the people. Clause 74 provided that there should be no appeal to the Privy Council in any matter involving the interpretation of the Constitution, or of the Constitution of a State, unless the public interests 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 to the Privy Council, but the Commonwealth Parliament was to have power to make laws limiting the cases in which such leave might be asked.[4] Nothing was said about appeals direct to the Privy Council from State Supreme Courts.

The Secretary of State for the Colonies, Joseph Chamberlain, was strongly opposed to this proposal. So also were some in Australia, including the Chief Justice and Lieutenant Governor of South Australia, Sir Samuel Way, and Sir Samuel Griffith, who was by then Chief Justice and Lieutenant Governor of Queensland, and who had not participated in the second Convention. The significance of the fact that these two were Lieutenant Governors of their respective States was that, in that capacity, they were in a position to communicate directly with the United Kingdom government; a position of which they took advantage.

In October, 1899, after Queensland had voted, by referendum, to join the Federation, Griffith wrote to the Secretary of State for the Colonies stating 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 advisors with the view of perfecting this most important instrument of government".[5] The confidential solicitation of suggestions to "perfect" a Constitution that had been drafted in Australia, approved by the colonial Parliaments, and then agreed to by popular referendum, by someone who had been a leading figure in the federal movement, and who was now outside politics, is worth reflecting upon. According to Griffith's biographer, he suggested a number of alterations to the Australian draft, including clause 74.[6]

The influence of Griffith with the United Kingdom Government can be measured by the fact that, when a question arose as to how any difficulties about the draft Constitution might be resolved, inquiries were made from London, confidentially through Griffith, in his capacity as Lieutenant Governor of Queensland, as to whether the Colonies might appoint delegates to assist in the consideration of the Bill, and, if so, whether those delegates would be authorised to assent to

any alterations. The fact that such an inquiry had to be made demonstrates the absence of any clearly defined process.

Griffith must have given a positive response, because Chamberlain then officially contacted the colonial governments and arrangements were made for delegates to be sent from the Colonies to London.[7] The delegates included Barton, Deakin and Kingston. But they were instructed not to agree to any changes. They were aware of, and indignant about, the activities in Australia of opponents of clause 74. Kingston sent a message back to South Australia making the colourful and defamatory assertion that Sir Samuel Way was motivated by a desire to sit on the Privy Council, and be remunerated accordingly, and by the prospect of a life peerage.[8]

The story of the passage of the Constitution Bill through the United Kingdom Parliament, the lobbying that went on in Australia and London in relation to clause 74, and the final compromise resulting in the present s.74, a compromise in which Griffith himself evidently took a significant part, has been retold so frequently as part of our recent Centenary celebrations that it is unnecessary to repeat it. The outcome, in summary, was as follows.

Appeals from State Supreme Courts, by leave to the Privy Council, remained unaffected. Nothing was said about them. But it was contemplated that most appeals from State Supreme Courts would go to the High Court, as they did. As to the possibility of appeals from the High Court to the Privy Council, the most sensitive question concerned appeals in cases involving the interpretation of the Constitution itself. 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, or as to the limits *inter se* of the constitutional powers of the States, unless the High Court should certify that the question was one that ought to be determined by the Privy Council. Subject to that exception, 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.

In considering the effect of the Constitution on appeals to the Privy Council from the High Court, it is necessary to make two distinctions. The first is between civil and criminal appeals generally, and constitutional cases. The second, and less clear, is between constitutional cases involving the limits *inter se* of the powers of the units of the Federation, and other constitutional cases.

As to civil and criminal appeals generally, the importance of the Privy Council, at the time of Federation, and well into the 20th Century, was closely related to the power and influence of the British Empire, of which Australians saw themselves as part, and to the desirability of maintaining a reasonable degree of uniformity of the common law in those parts of the Empire that had common law systems. Quick and Garran, writing in 1901, quoted with approval a statement made about the work of the Privy Council in 1871:

> "[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".[9]

The expense associated with appeals to the Privy Council, whether direct from State Supreme Courts, or from the High Court, was always a limiting factor in their numbers; but the possibility of such appeals was a powerful influence on Australian jurisprudence. Writing in 1981, Mr Justice Hutley of the Court of Appeal of New South Wales said:

> "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 systems 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 has 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. The casuistical methods employed by the courts to adjust and modify the law work most effectively if there are competing doctrines confronting them. 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". [10]

When Australian appeals went to the Privy Council, the influence of senior English judges in Australian law was exercised not only through a capacity to overrule decisions of Australian courts, including the High Court; it was exercised at a more personal level. Justices of the High Court used to sit on the Privy Council, whose members were mainly English and Scottish Law Lords. The last two High Court Justices to do that were Sir Ninian Stephen and Sir Harry Gibbs. And Australian counsel regularly appeared before the Privy Council, and argued cases against leading English counsel. The advantages for Australian law of such personal contact were significant.

An examination of the effect of the Privy Council upon the work of Australian courts might usefully include, not only a consideration of principles of substantive law, but also of styles and techniques of judgment writing. In the years when there were appeals to the Privy Council, judgments in the High Court were written in a manner that closely reflected the methods of English judges, including the Law Lords. It might be an interesting exercise for a scholar to make a similar comparison today, provided, of course, the comparison was with the current Law Lords.

There was always a cost, apart from a financial cost, associated with the availability of these appeals. The capacity of litigants to appeal direct to the Privy Council from State Supreme Courts gave rise to the possibility of inconsistent decisions of the High Court and the Privy Council. An example occurred in a case in 1985 in which I appeared for the respondent.

My client had succeeded at first instance in the Supreme Court of New South Wales, in a claim for financial loss arising out of a collision between two ships. We relied on the authority of the High Court in *Caltex Oil (Aust) v. The Dredge "Willelmstad"*.[11] The defendant took the case direct from a single judge to the Privy Council.[12] It did so for the clear purpose of avoiding the High Court. It wanted to argue that the *Caltex* decision was wrong. (The fact that it was possible to appeal direct from a single judge to the Privy Council without going through any intermediate court of appeal was itself anomalous. It resulted from a legislative provision which made the judgment of a single judge the judgment of the Court. This enabled the appellant to by-pass the New South Wales Court of Appeal, which would have been bound to follow the decision of the High Court.) The Privy Council disagreed with *Caltex*, allowed the appeal, and overruled the decision of the New South Wales judge.

The last appeal that ever went from the High Court to the Privy Council was one in which I appeared for the appellant. It also concerned a question of shipping law. The case, *Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Aust) Pty Ltd,*[13] was decided in July, 1980. The majority of the High Court, with Barwick CJ dissenting, had declined to follow an earlier decision of the Privy Council, *New Zealand Shipping Co Ltd v. A M Satterthwaite & Co Ltd*,[14] concerning the effect of a standard limitation of liability clause in a shipping document. The appeal was heard some years after the passing of federal legislation blocking such appeals, but there was a grandfather provision in the legislation.

The most difficult part of the case was persuading the Privy Council to grant special leave to appeal. We had three things in our favour. First, the issue involved an important point of shipping law which affected international trade, and there was a strong dissent in the High Court by Sir Garfield Barwick. Secondly, the High Court had declined to follow an earlier decision of the Privy Council. Thirdly, the High Court had stopped argument on the point in question, and had not heard from counsel who had appeared in that court for my client. Even so, the special leave

application was difficult. Their Lordships obviously had serious reservations about taking an appeal from the High Court years after the Australian Parliament had legislated to stop such appeals. And the case had already been through two levels of appeal following the hearing at first instance. Once special leave had been granted, however, the Privy Council had little hesitation in applying its own earlier decision, and upholding the dissenting opinion of Barwick CJ.

The existence of appeals from State Supreme Courts to the Privy Council, or, less frequently, from the High Court, in matters of civil and criminal law meant that, for much of the 20th Century, the High Court was not the ultimate court of appeal in our legal system. This operated as a constraint upon the decision making of all Australian courts, including the High Court. But, as time went on, the Privy Council itself began to allow for the possibility that it might be appropriate for the common law to develop in Australia in a manner different from its development in the United Kingdom.

Two examples, one civil and one criminal, illustrate what occurred. In the area of defamation law, the common law of Australia took a line in relation to awards of punitive or exemplary damages that differed from the English approach. This departure was accepted by the Privy Council.[15] In a matter relating to the law of homicide, a departure also occurred and was accepted.[16] These differences were sometimes explained by a polite fiction that variations in the common law were justified by differing conditions and circumstances. In truth, however, they reflected a willingness to allow scope for local autonomy in legal development, and a more flexible approach to the need for uniformity of common law.

Beginning in 1968, the Australian Parliament legislated, in stages, to put an end to appeals, in general civil and criminal cases, to the Privy Council. (Appeals from Canada had been abolished by legislation in 1949).

The *Privy Council (Limitation of Appeals) Act* 1968 blocked appeals in which a Commonwealth law was, or might have been, involved. Once again there was a grandfather clause, and the last appeal to the Privy Council involving the application of a law of the Commonwealth was decided in November, 1970. The case was *McClelland v. Federal Commissioner of* Taxation,[17] an income tax case. It is of interest to note that in this case the Privy Council, (itself divided), also overturned the decision of the High Court, and upheld a dissenting judgment of Barwick CJ.

Parliament next enacted the *Privy Council (Appeals from the High Court) Act* 1975. That legislation effectively blocked all other appeals from the High Court in civil and criminal cases, although, as was noted, it took some years for that to take complete effect. And, for a time thereafter, it was still possible to appeal directly from a State Supreme Court the Privy Council. The case of *Candlewood Navigation* was one such appeal.

In the late 1970s and early 1980s there was a regular flow of appeals from State Supreme Courts to the Privy Council. One reason was that, with inflation, increasing costs of litigation, and a relative decline in the cost of international travel, the expense of taking a case to London was not necessarily disproportionate to the costs that had already been incurred in Australia. Some well-resourced litigants could choose between appealing to the High Court or the Privy Council, according to where they thought they were more likely to succeed. This gave appellants a tactical advantage over respondents. If a case was certain to go on appeal, it could be an advantage to lose at first instance, and so have the choice of the appeal path to follow. The effect on Australian jurisprudence was complex. It became necessary for Australian courts to develop principles as to how they would deal with conflicts of authority between the High Court and the Privy Council. And it impeded the development of an Australian common law.

Finally, appeals from State Supreme Courts to the Privy Council were abolished by the *Australia Acts* of 1986 (Cth and UK).

Occasionally, suggestions are made to the effect that what is seen as an increase in Australian judicial activism is in part the result of the abolition of appeals to the Privy Council.

Such comments assume that modern English judges are like those when we last had substantial contact with them. This is a questionable assumption. It overlooks an important aspect of developments in British jurisprudence in the last 20 years; developments now occurring at an increasingly rapid pace.

English judges are now strongly influenced by human rights jurisprudence. The *Human Rights Act* 1998 (UK) came into force in England in October, 2000. But for many years before that, litigants in the United Kingdom had the capacity to resort to the European Court of Human Rights in Strasbourg. The human rights jurisprudence of the European Union, based on the *European Convention on Human Rights*, has had a major impact on English law. Some commentators in the United Kingdom have remarked upon what they call the "judicialisation of British politics".[18] People who complain that Australian judges are no longer subject to what they assume would be the restraining influence of British judges may be unfamiliar with the work of modern British judges.

In a lecture at Oxford University in March, 2002, a senior Law Lord, Lord Steyn, said:

> "The causes of the change in legal culture can only be touched on briefly. Public law has been transformed over the last thirty years. The claim that the courts stand between the executive and the citizen, and control all abuse of executive power, has been reinvigorated and become a foundation of our modern democracy. The European dimension has played a large role. Subject to the principle of parliamentary supremacy, our courts must set aside Acts of Parliament if they are inconsistent with directly effective European Community law. Since the creation of the right of petition to the European Court of Human Rights in 1966 the influence of the *European Convention on Human Rights* has increased year by year. … [T]he Convention is effectively our constitutional Bill of Rights. The principles of judicial independence under article 6 of the Convention now apply to all courts of law including the highest court. … The incorporation of the Convention into our law has generally accelerated the constitutionalisation of our public law. A culture of justification now prevails. The renaissance in constitutionalism in democracies such as Australia, Canada, India, New Zealand and South Africa has not by-passed the United Kingdom". [19]

It should also be acknowledged that the House of Lords, and the Privy Council, have shown themselves responsive to developments in the common law in other Commonwealth countries, including Australia. For example, the House of Lords, in December, 2001,[20] altered its long-held approach to the question of the proper test for reasonable apprehension of bias, and has adopted the test that had been previously applied in Australia and other Commonwealth countries.[21]

More controversial from the beginning of Federation, was the subject of appeals from the High Court to the Privy Council on questions concerning the interpretation of the Australian Constitution. The compromise that ultimately appeared in s.74 narrowed the area of constitutional interpretation that was, subject to one qualification, committed exclusively to the High Court. Disputes about the constitutional limits, as between themselves, of the political units of the Federation, were not to be subject to an appeal from the High Court to the Privy Council, unless the High Court gave a certificate permitting such an appeal.

This limitation on the powers of the Privy Council gave rise to an early conflict with the High Court. In 1907, *Webb v. Outrim,*[22] an appeal to the Privy Council directly from the Supreme Court of Victoria, raised a question concerning the capacity of the Commonwealth and State Governments respectively to legislate in such a way as to impose a burden on other government instrumentalities. In the earlier case of *Deakin v. Webb*[23] the High Court had applied a principle, from which the Privy Council departed in *Webb v. Outrim*. In *Baxter v. Commissioner of Taxation (NSW)*[24] the High Court took the view that this was an *inter se* question and that the High Court could ignore the decision of the Privy Council.

Only one certificate was granted by the High Court in an *inter se* case; that was in 1914 in *Attorney-General v. Colonial Sugar Refinery Co Ltd*.[25] But it was not until 1985, in *Kirmani v.*

Captain Cook Cruises Pty Ltd[26] that the High Court formally announced that it would never again grant a certificate under s.74. The combined effect of the legislation earlier mentioned, and that announcement, has been that s.74 has become a dead letter, and what remains of s.74 after the legislation limiting appeals to the Privy Council will have no further effect.

An interesting feature of the 1907 decision in *Baxter* is this. The majority judgment, of Griffith CJ, Barton and O'Connor JJ, was read by Sir Samuel Griffith. These three men were among the principal framers of the Constitution. The judgment deals at length with the history and purpose of s.74, including the negotiations in London for its amendment. In explaining the compromise that was finally reached, the judgment asserts that there had been considerable dissatisfaction with the manner in which the Privy Council had interpreted the Canadian Constitution. It also asserts that the framers of the Australian Constitution had greater familiarity with the constitutional work of the Supreme Court of the United States than had the English Law Lords. The judgment may well have been regarded in England as a somewhat aggressive assertion of colonial independence. And it provides a fascinating glimpse of part of the history of Federation. I strongly commend a reading of *Baxter* to anyone interested in the history of s.74, or in the personality of Sir Samuel Griffith.

During the first 60 years of federation the Privy Council became involved in some important constitutional issues. For example, a number of cases went to the Privy Council concerning s.92 of the Constitution.

Writing in 1968, Sir Douglas Menzies, who himself, as counsel, had been involved in some major s.92 cases, said:

> "[T]he Privy Council has on five occasions decided appeals relating to s.92. It has reversed the High Court three times and affirmed the High Court twice. On each occasion upon which it reversed the High Court its actual decision has been substantially in accord with prevailing professional opinion in Australia. The High Court, when reversed, and so freed from the burden of its own error, has proceeded without eager interference from the Privy Council, to develop the law in its traditional style, that is to consider each case and decide it upon its own facts.
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> "It is, I think it, a fair statement that the essential difficulty about s.92 arises from the section itself, not from the lawyers, and that the Privy Council has been of assistance in clearing away bold but unjustified generalisations made by the High Court from time to time to avoid the inescapable difficulty of the section itself, and, that in doing what it has, the Privy Council has left it to the High Court to work out a doctrine that recognises both the great importance of the section and its necessary limitations". [27]

It was only after appeals to the Privy Council came to an end that the High Court was able, by a unanimous decision, to set aside much of the previous case law, and to lay down a new approach to s.92.[28] It may be doubted that this would have been possible if appeals to the Privy Council had still been open. When Sir Garfield Barwick, in retirement, was asked by an interviewer from the New South Wales Bar Association to comment on the decision in *Cole v. Whitfield*, he said that he would have had great fun arguing an appeal from that decision before the Privy Council. No doubt he would. A lot of barristers had great fun arguing appeals about s.92 over the first 88 years of Federation. But it is worth remarking that, since *Cole v. Whitfield*, there has been very little s.92 litigation. The only s.92 case to come before the High Court in my four years there concerned, not trade and commerce, but freedom of movement of citizens between parts of Australia.

In an interesting turn of the wheel, years after it ceased to play any part in the interpretation of the Australian Constitution, the Privy Council has now found itself dealing with consequences arising from Scottish devolution, and the introduction into the United Kingdom of something not unlike federalism.

In Deakin's speech on the *Judiciary Bill*, in 1902, he pointed out that the constitutional place and role of the High Court of Australia was intended to be more like that of the Supreme Court of the United States than that of the Supreme Court of Canada. This is a theme to which Sir Samuel Griffith returned in *Baxter*. The scheme of the Australian Federation was more like that of the United States, especially in the constitution of the Parliament, and the relationship between Parliament and the judiciary. Deakin observed that under the *British North America Act*, the central government in Canada had a power of veto over provincial legislation; senior provincial officials, including judges, were appointed by the central government; and the Upper House of the legislature was quite differently constituted. Unlike the Supreme Court of Canada, but like the Supreme Court of the United States, the High Court of Australia has never given advisory opinions to the other branches of government. The Canadian arrangements no doubt reflected the history of the Canadian Federation and, in particular, the position of Quebec. It was not until the end of appeals to the Privy Council in constitutional cases that the High Court found itself completely in the position envisaged by Deakin.

From time to time, as it became obvious that the ties between Australia, and other former parts of the British Empire, and the Privy Council, were being loosened or broken, suggestions were made for the creation of some new supra-national tribunal that could act as a court of last resort at least among some parts of the British Commonwealth. Nothing has ever come of these proposals, and it is difficult to imagine that they could be revived. The developments and changes in relations between Australia and the United Kingdom, and in relations between the United Kingdom and Europe, which recently led the High Court to decide that, within the meaning of our Constitution, the United Kingdom is now a foreign power, [29] seem impossible to reconcile with such a proposal. In particular, it is hard to imagine that the Australian people would now accept any tribunal other than a completely Australian court as the final interpreter of their Constitution.

The same may be said of judicial review of administrative action. This is an area in which, in recent years, United Kingdom law has been revolutionised. The consequence of human rights legislation and jurisprudence has been to alter the focus of English judicial review from the responsibilities of administrators to the rights of citizens. Questions as to the relationship between the courts, the executive, and Parliament are at least as sensitive in the United Kingdom as they are in Australia. Some Australian legislators and administrators may not be enamoured of judicial review, but it may be doubted that they would be enthusiastic about judicial review by a tribunal outside Australia. Even in the area of ordinary civil and criminal law, there is now a much greater involvement of State and federal Parliaments in changing the law than there was a century ago. Tort law reform, sentencing, consumer protection, product liability, and many other areas of the law as it affects the daily lives of citizens involve an inter-action between the courts and the legislature.

The history of s.74 mirrors the history of the Australian Federation over the course of the 20th Century. Appeals to the Privy Council were never merely a symbol of our ties to the United Kingdom. While they lasted, they were a practical manifestation of the existence of a form of Australian governmental power external to Australia. It was not until 1986 that the judicial power by which Australian citizens are governed was vested completely in Australian institutions.

Endnotes:

* I am grateful for the assistance of my Associate, Anthea Roberts, in the preparation of material for this paper.

1. An account of Australian experience and opinion as to Privy Council appeals is contained in Howell, *Joseph Chamberlain and the amendment of the Australian Constitution Bill*, (2001) 7 *The New Federalist* at 16.

2. Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 18 March, 1902.

3. *Official Record of the Debates of the Australian Federal Convention* (Adelaide), 23 March, 1897 at 25.

4. See La Nauze, *The Making of the Australian Constitution*, 1972, at 303.

5. *Ibid.*, at 248. See also Joyce, *Samuel Walker Griffith*, 1984, at 208-209.

6. Joyce, *op. cit.*, at 208-209.

7. *Ibid.*, at 208-209.

8. La Nauze, *op. cit.*, at 262.

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

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

11. (1976) 136 CLR 529.

12. *Candlewood Navigation Corp v. Mitsui OSK Lines* [1986] AC 1.

13. (1980) 54 ALJR 552.

14. [1975] AC 154.

15. *Australian Consolidated Press Ltd v. Uren* [1969] 1 AC 590.

16. *Viro v. The Queen* (1978) 141 CLR 88.

17. (1970) 120 CLR 487.

18. See, for example, Nicol, *E C Membership and the Judicialisation of British Politics*, Oxford University Press, 2002.

19. Steyn, *The Case for a Supreme Court*, the Neill Lecture, delivered at All Souls College, Oxford, 1 March, 2002 at 6-7.

20. *Magill v. Weeks* [2001] UKHL 67.

21. For example, *Webb v. The Queen* (1994) 181 CLR 41.

22. [1907] AC 81.

23. (1904) 1 CLR 585.

24. *Commissioner of Taxation* (*NSW) v. Baxter* (1907) 4 CLR 1087.

25. [1914] AC 237.

26. (1985) 159 CLR 351.

27. (1968) 42 ALJ 79 at 83.

28. *Cole v. Whitfield* (1988) 165 CLR 360.

29. *Sue v. Hill* (1999) 199 CLR 462.