Chapter 15

The Privy Council – An Australian Perspective*

For a generation devoted to moving on, rather than looking back, what happened 20 years ago is ancient history; what happened 100 years ago is primeval. Many young Australian lawyers would be only dimly aware that, for most of the 20th century, the apex of Australia's court system was in London, not Canberra. Many English lawyers would be unfamiliar with the continuing role of the Privy Council, and some may be surprised at the demands it still makes upon the time of the Law Lords. Yet, for Australian lawyers of my age, the Privy Council was a real and powerful presence. During most of my time at the New South Wales Bar, which was from 1963 until 1988, appeals could be taken to the Privy Council from the High Court, from State Supreme Courts, and even from single judges of State Supreme Courts. Australian appeals were abolished by a gradual, and messy, legislative process that began in 1968 and ended with the *Australia Acts 1986* (Cth and UK).

Until the 1986 legislation took effect, litigants, by appealing from State Supreme Courts to the Privy Council, could bypass the High Court in many cases, and it was not uncommon for appellants to do so where an existing decision of the High Court appeared to be adverse precedent.

An appellant thus had a tactical advantage in the form of a choice of forum. Of course, for most litigants, considerations of cost weighed against going to London, but increased availability of air travel meant that the Privy Council was probably hearing more Australian appeals in the 1970s than in the 1930s.

Looked at functionally, the Privy Council was (and is) a supra-national tribunal resolving disputes most of which were (and are) local. Relatively few of the cases before it were trans-national. Today, they come from the smaller members of the Commonwealth of Nations.

Some of the tensions that existed in relation to appeals from countries such as Australia or Canada are likely to affect any supra-national tribunal with jurisdiction to resolve local disputes within several nations.

The final abolition of Australian appeals was not controversial.

When it happened, it seemed to have been inevitable. The same cannot be said of the arrangements made when Australia became a federal union in 1901. The question of appeals to the Privy Council was the last significant obstacle in Australia's path to Federation. Unlike the *British North America Act* of 1867, the Australian Constitution was written locally. It emerged in draft form from two Conventions, one in 1891, and one in 1897-1898. The draft agreed by the second Convention was approved by

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