Foreword

AUSTRALIA AND THE UNITED KINGDOM: A BIT LIKE FAMILY, MUCH IN COMMON BUT A LOT OF DIFFERENCE

The Hon Chief Justice Robert French AC*

It is a pleasure to be able to offer some remarks by way of Foreword to the UK Supreme Court Yearbook for the 2015–16 legal year. There are deep historical and cultural connections between the Australian judiciary and legal profession and the judiciary and legal profession of the UK. The connection is well illustrated by the appointment in September 2016 of Jonathan Smithers, the Immediate Past President of the Law Society of England and Wales, as the new Chief Executive Officer of the Law Council of Australia. The Law Council of Australia is the peak national representative body of the Australian legal profession and is composed of the Law Societies and Bar Associations of the Australian States and Territories and a group representing large law firms.

A particular and significant historical connection is found in Merthyr Tydfil, the birthplace of Sir Samuel Griffith, a principal architect of the Australian Constitution and, in 1903, appointed as the first Chief Justice of Australia. In September 2016, at the Merthyr Tydfil Crown Court in the presence of Lord Chief Justice Thomas and his Honour Judge Richard Twomlow, I presented the Court with a photographic montage of Samuel Griffith’s swearing in as Chief Justice in 1903, his handwritten commission from the Governor-General of the day, Lord Tennyson and his oaths of office and allegiance. In the course of that visit to the UK, I addressed the thriving Anglo-Australasian Lawyers Society in London and joined with Lord Reed in delivering opening addresses at the Cambridge Public Law Conference on Unity in Public Law. While in Cambridge, I stayed at the residence of the new Master of Christ’s College, Australian academic Professor Jane Stapleton, who had only just taken up residence with her husband, Professor Peter Cane. While in London, I stayed at Gray’s Inn of which I am an Honorary Bencher along with a number of other Australians. I also have the honour, with other Australians, of being an Honorary Bencher of Lincoln’s Inn. There are many dimensions in the

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relationship between the UK and Australia and in the connection between our legal systems and their judicial development through the decisions of our highest courts. The dimensions include lines of divergence as well as parallel and convergent thinking in the various areas of the common law. The changing constitutional relationship of our countries is part of the Australian evolution to independent nationhood.

In 1999, the High Court of Australia held that an Australian citizen who had been elected to the Australian Senate had not been validly elected because she had not renounced her British citizenship and was therefore under ‘acknowledgment of allegiance […] to a foreign power’ within the meaning of s 44(i) of the Constitution. In the course of their judgment, three Justices of the High Court, 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.

That statement reflected the historical movement of Australia’s constitutional relationship with the UK from a self-governing colony in 1901, closely linked legally and constitutionally with the UK, to an independent nation for which the UK is a friendly foreign power, albeit one with which Australia shares deep historical and cultural connections.

Australia’s Constitution came into effect as s 9 of a statute of the UK Parliament, namely the Commonwealth of Australia Constitution Act 1901 (UK). Australia did not thereby spring into existence fully formed as an independent nation. In the words of a former Chief Justice of the High Court of Australia, Sir Owen Dixon, its Constitution was ‘not a supreme law purporting to obtain its force from the direct expression of a people’s inherent authority to constitute a government.’ It was ‘a statute of the

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2 ibid 503.
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British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King’s Dominions.\textsuperscript{5}

For nearly three decades after the Commonwealth of Australia came into existence, its executive power was not exercised as that of an independent nation in connection with its external relations. They remained, as a matter of convention rather than law, largely in the hands of the British government. Australia did not regard itself as having the power to declare war.\textsuperscript{6} 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.\textsuperscript{7} The Declaration stated that Great Britain and its Dominions were:

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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.\textsuperscript{8}
\end{quote}

Then, at an Imperial Conference early in November 1930, a resolution was passed that advice to the King about the appointment of Dominion Governors-General would be tendered only by the Dominion Ministers.\textsuperscript{9} This meant that from then on the Australian Government would decide who would be the Governor-General of Australia and so advise the King. Although that resolution did not involve any constitutional change, it changed the identity of the King’s advisors. Britain, Australia, Canada and New Zealand from then on enjoyed what the late Professor George Winterton called a ‘personal union of Crowns’ rather than a shared monarchy.\textsuperscript{10} In a relevant sense, it could be said that Australia became an independent kingdom from 1931.\textsuperscript{11}

In 1930, the Australian Prime Minister Scullin 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

\begin{itemize}
\item \textsuperscript{5} ibid.
\item \textsuperscript{6} \textit{Farey v Burvett} [1916] HCA 45, (1916) 21 CLR 433, 452 (Isaacs J); \textit{Welsbach Light Co of Australasia Ltd v Commonwealth} (1916) 22 CLR 268, 278.
\item \textsuperscript{7} Inter-Imperial Relations Committee, \textit{Imperial Conference, 1926: Report, Proceedings and Memoranda} (1926) (emphasis in original).
\item \textsuperscript{8} ibid 2.
\item \textsuperscript{9} George Winterton, ‘The Evolution of a Separate Australian Crown’ (1993) 19 Monash UL Rev 1, 8–12.
\item \textsuperscript{10} ibid 2-3, 5–21.
\item \textsuperscript{11} ibid 16; WJ Hudson and MP Sharp, \textit{Australian Independence: Colony to Reluctant Kingdom} (Melbourne UP 1988) 138.
\end{itemize}
not happy. Isaacs was a ‘local man’ not known to the King and there had been no prior consultation. Scullin held his ground in a personal audience with the King. The announcement of Isaacs’ appointment was made ‘with a clear implication of the King’s displeasure.’

The next movement was from executive to legislative independence. The Statute of Westminster, enacted on 11 December 1931, provided for the Dominions which adopted it to no longer be subject to the possibility of British laws having paramount force over Commonwealth laws by operation of the Colonial Laws Validity Act 1865 (Imp). The Dominion Parliaments were free to repeal or amend British legislation applicable to them and could legislate extra-territorially. No future British Act was to extend to a Dominion as part of its law unless expressly declared in that Act that the Dominion had requested and consented to its enactment. For local political reasons to do with the attitude of State governments, the Statute was not adopted in Australia until 1942, albeit the adoption was made retrospective to 3 September 1939. Nevertheless, the 1865 Act continued to apply to the States and the possibility of appeals to the Privy Council from decisions of State Supreme Courts remained in place as an alternative to appeals to the High Court of Australia save for appeals involving questions arising under the Commonwealth Constitution.

The enactment of the Australia Act 1986 (UK) and corresponding legislation in the Commonwealth and State Parliaments marked the end of the legal sovereignty of the British Parliament over Australia and lent support to the proposition that ultimate sovereignty resided in the Australian people. The British version of the 1986 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. Section 1 of the 1986 Act provided:

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.

Until the enactment of the Nationality and Citizenship Act 1948 (Cth), there was no legal concept of Australian citizenship. It was not mentioned in the Constitution. The 1948 Act had the effect that a person born in

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Australia after its commencement was an Australian citizen by birth. A person who was a British subject immediately before the Act would become an Australian citizen if he or she was born in Australia and would have been an Australian citizen if the Act had been in force at the time of his or her birth. The Act was amended in 1984 so that Australian citizens were no longer automatically British subjects. It was possible, however, to be both an Australian citizen and a British subject which had the interesting sequel I have already mentioned in the case of Sue v Hill.\(^{13}\)

The historical and constitutional movement in the relationship between the UK and Australia from that of coloniser and colony to that of friendly foreign states has its parallels in the relationship between our judiciaries. At one time it was the practice of the High Court of Australia to follow decisions of the UK House of Lords. That changed following the decision of the House of Lords in *Director of Public Prosecutions v Smith* in which it was held that a person who had been charged with an offence of murder requiring a proof of an intention to kill could be presumed to have intended the natural and probable consequences of his acts.\(^ {14}\) In *Parker v The Queen*,\(^ {15}\) decided two years later, Chief Justice Sir Owen Dixon said, with the agreement of the other Justices of the High Court of Australia:

> 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 wrong. They are fundamental and they are propositions which I could never bring myself to accept.\(^ {16}\)

Subsequently, different approaches to the development of the common law have emerged from time to time between the High Court of Australia and the UK House of Lords and, latterly, the UK Supreme Court. Recent examples include the decision of the High Court of Australia in *Commonwealth Bank of Australia v Barker* which held that Australian courts should not imply into employment contracts a term of mutual trust and confidence between employer and employee.\(^ {17}\) In so doing, the Court did not follow the approach taken by the House of Lords in *Malik v Bank of Credit and Com-

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13 Sue (n 1).
16 ibid 632, referring to Smith (n 14).
merce International SA (in liq). This was in part attributable to the differences between the regulatory history of the employment relationship and of industrial relations in Australia and the regulatory history in the UK.

This year, in *Miller v The Queen*, the High Court of Australia declined to follow the course adopted by the UK Supreme Court and the Judicial Committee of the Privy Council in the conjoined appeals of *R v Jogee; Ruddock v The Queen* in which the Court and the Privy Council held that the common law had taken a ‘wrong turn’ in the decision of the Privy Council over 30 years earlier in *Chan Wing-Siu v The Queen* and that there was no place for extended joint criminal enterprise liability in the law. While the decision in *Jogee* made it appropriate for the High Court of Australia to reconsider its decision adopting the doctrine of extended joint criminal enterprise in *McAuliffe v The Queen*, it declined to overrule that case. The decision in *McAuliffe* had been reaffirmed in 2006. In doing so in *Miller*, five Justices of the High Court of Australia in their joint judgment noted that the Victorian Parliament had abolished the common law of complicity and in its place imposed liability on persons ‘involved in the commission of an offence’. The New South Wales Law Reform Commission had undertaken a review of the law of complicity and proposed retention of extended joint criminal enterprise liability along the lines adopted in the Criminal Code (Cth) with a modification in the case of liability for homicide. The New South Wales Parliament did not choose to act on the Commission’s recommendations. Nor has the Parliament of South Australia chosen to reform the law as stated in *McAuliffe*. Criminal responsibility in Western Australia, Queensland and Tasmania is governed by their respective Criminal Codes. The majority held that in light of that history it was not appropriate for the High Court of Australia to decide to abandon extended joint criminal enterprise liability and require proof of intention in line with *Jogee*. The joint judgment also disagreed with the proposition in *Jogee* that the expression ‘joint enterprise liability’

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22 *Jogee; Ruddock* (n 19) [87] (Lord Hughes and Lord Toulson (with whom Lord Neuberger, Lady Hale and Lord Thomas agreed)).
24 *Miller* (n 19) [2], [43] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), [131]-[148] (Keane J), but see [129]-[130] (Gageler J (dissenting)).
26 *Miller* (n 19) [42] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); Crimes Act 1958 (Vic), ss 323–324.
28 *Miller* (n 19) [43] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).
could occasion public misunderstanding and allow for a form of ‘guilt by
association’ or ‘guilt by simple presence without more.’

In a decision published in October 2016, the High Court of Australia
gave consideration to an employer’s vicarious liability for the intentional
criminal act of an employee involving child sexual abuse at a boys’ school.
That consideration arose in the particular context of a contested refusal to
extend time within which to bring an action based on vicarious liability.
Five of the Justices, in a joint judgment, acknowledged the importance of
the decision of the UK House of Lords in Lloyd v Grace, Smith & Co in
the development of the law relating to vicarious liability for an employee’s
wrongful act. That decision had been referred to with approval by the
High Court of Australia in Deatons Pty Ltd v Flew. Also of importance
was Lister v Hesley Hall Ltd and in particular the judgment of Lord Steyn.
However, its recent application in Mohamud v Wm Morrison Supermarkets plc
was not seen as providing an answer to the question why it was fair
and just to impose liability on the employer for assaults committed by the
employee in that case. The law relating to vicarious liability in relation
to criminal acts of an employee will be the subject of further development
over time in Australia. In that development, decisions of the courts of the
UK will undoubtedly be given close attention for two reasons: the part they
have played in the development of Australian law and the extent to which
they may be relevant to its further development.

The preceding examples are of cases in which the High Court of Australia
has made decisions differing from those of the UK Supreme Court. The
boot was on the other foot in Cavendish Square Holding BV v Makdessi
in which the UK Supreme Court held that the rule against penalties
in England and Scotland was confined to cases of breach of contract.
Lord Neuberger and Lord Sumption, with whom Lord Carnwath agreed,
disagreed emphatically with the decision of the High Court of Australia
in Andrews v Australia and New Zealand Banking Group Ltd which they
described as ‘a radical departure from the previous understanding of the

29 ibid [45] (French CJ, Kiefel, Bell, Nettle and Gordon JJ). cf Jogee; Ruddock (19) [77] (Lord
Hughes and Lord Toulson (with whom Lord Neuberger, Lady Hale and Lord Thomas
agreed)).
30 Prince Alfred College Inc v ADC [2016] HCA 37.
32 Prince Alfred College (n 30) [48] (French CJ, Kiefel, Bell, Keane and Nettle JJ).
36 Prince Alfred College (n 30) [72] (French CJ, Kiefel, Bell, Keane and Nettle JJ).
law’. At the risk of plagiarising myself, I will repeat here what I said about our differences generally in *Paciocco v Australia and New Zealand Banking Group Ltd*, which was a sequel to the *Andrews* decision:

Differences have emerged from time to time between the common law of Australia and that of the United Kingdom in a number of areas. Those differences have not heralded the coming of winters of mutual exceptionalism. All of the common law jurisdictions are rich sources of comparative law whose traditions are worthy of the highest respect, particularly those of the United Kingdom as the first source.

While the benefits of convergence in commercial law are evident, the common law process will not always achieve that outcome. Lord Neuberger and Lord Sumption described the penalty rule in *Cavendish* as ‘an ancient, haphazardly constructed edifice which has not weathered well’. Indeed, as long ago as 1975 and 1999 the English Law Commission and the Scottish Law Commission respectively recommended that the scope of the rule against penalties be expanded by legislative intervention to include circumstances beyond breach of contract. There has been activity in this area in national jurisdictions and the development of internationally applicable model rules and principles. They were discussed in *Cavendish* in the judgments of Lord Mance and Lord Hodge. As I suggested in *Paciocco*, it may be that in Australia statutory law reform offers more promise than debates about the true reading of English legal history.

In the field of public law, Australia’s written federal Constitution and the absence of such a document in the UK underpin some important divergences between our countries. 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.

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39 *Cavendish* (n 37) 1396 [41].
41 ibid 842 [10].
42 *Cavendish* (n 37) 1380 [3].
44 *Cavendish* (n 37) 1439–41 [162]–[67].
45 ibid 1468 [264]–[265].
46 *Paciocco* (n 40) [10].
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Because Australia has a written Constitution its 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 State law is inconsistent with a valid Commonwealth law. The Commonwealth Constitution also entrenches the High Court of Australia’s jurisdiction to judicially review the decisions of Commonwealth officials, including Ministers, under s 75(v) of the Constitution. The High Court of Australia has also developed doctrines under which State Parliaments cannot abolish the Supreme Courts of the States and, importantly, cannot deprive the Supreme Courts of the States of their traditional supervisory jurisdiction over official decisions for jurisdictional error. An interesting question would arise for the UK in the event of legislation purporting to abolish or abrogate judicial review of administrative action. It may be that the focus of the courts in the UK would then be directed to ‘common law constitutionalism’ and the question whether, even in the absence of a written constitution, there are limits on what parliament can do to the fundamentals of the relationship between the executive, the parliament and the courts.

There are many common legal problems in private and public law where the approaches and solutions adopted by each of the UK Supreme Court and of the High Court of Australia are similar. We share an important 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. All that being said, we have evolved as two countries. Our histories have been different. Australia has a history which antedates that of British settlement, reflected in 40,000 to 60,000 years of Indigenous occupation. The common law decision of the High Court of Australia in Mabo v Queensland (No 2) introduced an element into Australia’s legal and constitutional arrangements that is not reflected in those of the UK. 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 the Privy Council in 1889. Mabo was properly described as a ‘shift’ in


52 Cooper v Stuart [1889] UKPC 16, (1889) 14 App Cas 286.
Australia's common law constitutional foundation.\textsuperscript{53}

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