THE AUTHORITY OF PRIVY COUNCIL DECISIONS IN AUSTRALIAN COURTS

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During 1978, the High Court of Australia and the New South Wales Court of Appeal handed down decisions which announce a departure from the long-standing rule that decisions of the Privy Council bind all Australian Courts. In this article, Mr Geddes analyses these decisions and considers their future impact on the authority of Privy Council decisions in the various courts which make up the Australian judicial hierarchy.

In recent years, the Commonwealth Parliament has legislated on three occasions to limit appeals to the Judicial Committee of the Privy Council from Australian courts. Whilst it was expected that this legislation would bring about changes in judicial attitudes towards the authority of Privy Council decisions, it was not until recently that the High Court, in *Viro* v. *R.*,[1] and the New South Wales Court of Appeal, in *National Employers' Mutual General Association Ltd* v. *Waind*,[2] formally initiated the process. In this article the changes in the authority of Privy Council decisions announced in *Viro's* and *Waind's* cases are discussed, together with further changes which may develop in the future. But before considering these matters, it will be necessary to examine the rules of precedent which governed the weight of Privy Council decisions in Australian courts before appeals were limited, as well as the legislation which imposed the limitations.

Authority of Privy Council Decisions Before the Limitation of Appeals

> By the established rules of judicial precedent, decisions of the Privy Council, as the ultimate court of appeal in the hierarchy to which our courts belong, have a direct binding authority in our courts which does not attach to the decisions of any other judicial tribunal.

Such was the conclusion of the Full Court of the Supreme Court of Victoria in *Bruce* v. *Waldron*,[3] a case in which the proposition that courts are strictly bound by higher courts in the same judicial hierarchy was put to the test. In that case the Court had to determine whether it must follow the House of Lords' decision in *Duncan* v. *Cammell, Laird & Co.*[4] or the Privy Council decision in *Robinson* v. *State of South*

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[1] (1978) 18 A.L.R. 257.

[2] 19.7.78. Not yet reported.

[3] [1963] V.R. 3, 7.

[4] [1942] A.C. 624.

Australia (No. 2),[5] in relation to the conclusiveness of a Crown claim of privilege for documents. The statement sums up the authority of Privy Council decisions in all Australian courts before the introduction of the legislation which limits Privy Council appeals.

It follows therefore that until the decision in *Viro's* case, the rule that Privy Council decisions were strictly binding applied as fully to the High Court as to any other court. While it is open to argument whether the High Court had always followed the rule faithfully,[6] it represented the formal position. However, there was one decision of the Privy Council by which the High Court explicitly refused to be bound. That was *Webb* v. *Outtrim*,[7] which involved a question as to the limits *inter se* of the constitutional powers of the Commonwealth and a State. Section 74 of the Constitution provides that no appeal to the Privy Council from a decision of the High Court on an *inter se* question shall be permitted except with the leave of the High Court, in the form of a document certifying that the question is one which ought to be determined by the Privy Council. In *Webb* v. *Outtrim*, no such certificate had been obtained, the appeal having been taken to the Privy Council direct from the Supreme Court of Victoria. When, in *Baxter* v. *Commissioners of Taxation (N.S.W.)*,[8] the High Court considered its position in relation to *Webb* v. *Outtrim*, a majority of the justices held that since the purpose of the British legislature in enacting the Commonwealth Constitution had been to permit the High Court, rather than the Privy Council, to have the final say on *inter se* questions, the case was not binding on the High Court.[9] It was affirmed that Privy Council decisions not falling within section 74 of the Constitution were binding.[10]

Shortly after the decision in *Webb* v. *Outtrim*, the Judiciary Acts 1903-1906 were amended by the Judiciary Act 1907, preventing appeals to the Privy Council direct from decisions of the Supreme Courts of the States on *inter se* questions. However, this did not remove all opportunity for the High Court to refuse to be bound by any other decisions

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[5] [1931] A.C. 704.

[6] See Prott, "Refusing to Follow Precedents: Rebellious Lower Courts and the Fading Comity Doctrine" (1977) 51 A.L.J. 288, 290-292. Prott suggested that in *Cooper* v. *Southern Portland Cement Ltd* (1972) 128 C.L.R. 427 the High Court had tacitly refused to follow a binding Privy Council precedent.

[7] (1906) 4 C.L.R. 356.

[8] (1907) 4 C.L.R. 1087.

[9] *Id.* 1117-1118 *per* Griffith C.J., Barton and O'Connor JJ.; 1148-1149 *per* Isaacs J. Higgins J., who dissented, considered *Webb* v. *Outtrim* binding: *Id.* 1176-1177.

[10] *Id.* 1102 *per* Griffith C.J., Barton and O'Connor JJ.; 1147 *per* Isaacs J. It was conceded by the appellant that a Privy Council decision on an *inter se* question in relation to which the High Court had issued its certificate under s. 74 was binding (*Id.* 1101). That was also the opinion of Isaacs J. (*Id.* 1149). The High Court has only issued a certificate on one occasion, and is unlikely to do so again. *Infra* p. 435.

of the Privy Council, for the Privy Council did not always apply the words "*inter se*" consistently. Barwick C.J. recently remarked that "it took sixty years in decisions of the Privy Council to ascertain what precisely the cryptic words '*inter se*' involved . . .".[11] This meant that a decision of the Privy Council which was not perceived to involve an *inter se* question could, on a later occasion, have been treated as an *inter se* decision which was not binding because no certificate had been issued by the High Court under section 74 of the Constitution in relation to it. Although the High Court has never taken this opportunity, Barwick C.J. indicated on one occasion that the Privy Council's decision in the *Boilermakers' Case*[12] might have been a case in point.[13]

Unless it could be distinguished, a Privy Council decision which had been taken on appeal from an Australian court was considered binding throughout Australia, not just in the courts of the State where it originated. For example, *Robinson's* case, the Privy Council decision which was treated as binding by the Victorian Supreme Court in *Bruce* v. *Waldron*, had been appealed from a decision of the Supreme Court of South Australia. When the New South Wales Court of Appeal followed *Robinson's* case in *Ex parte Brown; Re Tunstall* it said: "The House of Lords of course is not bound by the Privy Council . . . but we are—at least on appeals from Australian courts."[14]

What was the authority of Privy Council decisions which had been taken on appeal from outside Australia; could such decisions bind Australian courts? The general question of whether a Privy Council decision can bind the courts of countries apart from that in which the appeal originated has been discussed elsewhere.[15] It is not proposed to cover that ground again. It should be noted, however, that there is authority from the Privy Council itself which suggests that courts from which it is possible to appeal to the Privy Council may be bound by Privy Council decisions from another jurisdiction: see *Fatuma Binti Mohamed Bin Salim Bakhshuwen* v. *Mohamed Bin Salim Bakhshuwen*.[16] The decision of Street J. of the New South Wales Supreme Court in *Mayer* v. *Coe*[17] is usually considered the leading Australian authority on this issue. In that case Street J. considered the question of indefeasibility of title to property registered under Torrens title legislation. Two

[11] Barwick, "The State of the Australian Judicature" (1977) 51 A.L.J. 480, 483.

[12] (1956) 94 C.L.R. 254 (H.C.); (1957) 95 C.L.R. 529 (P.C.).

[13] *R.* v. *Joske; ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 C.L.R. 87, 90.

[14] (1966) 67 S.R. (N.S.W.) 1, 10.

[15] Casenote, (1952) 1 International and Comparative Law Quarterly 392; Marshall, "The Binding Effect of Decisions of the Judicial Committee of the Privy Council" (1968) 17 International and Comparative Law Quarterly 743; Jackson, "The Judicial Commonwealth" (1970) 28 Cambridge Law Journal 257.

[16] [1952] A.C. 1, 14.

[17] [1968] 2 N.S.W.R. 747.

years earlier, in *Frazer* v. *Walker*,[18] which had been taken on appeal from a decision of the New Zealand Court of Appeal, the Privy Council had considered the same issue. Street J. treated himself as bound by that decision, commenting:

> [I]n jurisdictions subject to the ultimate appellate authority of the Privy Council, a decision of the Privy Council laying down principles or lines of reasoning directly applicable within the jurisdiction in question will bind the courts of that jurisdiction even though the proceedings in which the Privy Council decision was given originated from another part of the British Commonwealth. The binding nature of a Privy Council decision is not confined to principles of common law. It is binding also upon matters arising under statutes where the degree of similarity between the local statute and the statute upon which the Privy Council pronounced is considered to be sufficient to render the Privy Council decision applicable.[19]

Bakhshuwen v. *Bakhshuwen* and *Morris* v. *The English, Scottish and Australian Bank Ltd*,[20] a decision in which the High Court had held itself bound by a decision of the Privy Council on appeal from New Zealand, were cited in support.

Whilst the view that Privy Council decisions from other countries may bind Australian courts is therefore supported by authority, it must be said that it can have unfortunate consequences. As Professor Jackson has explained:

> The multiple effect of Privy Council judgments may cause enormous difficulties where legal rules have developed differently in different territories. These difficulties are increased if the Privy Council in arriving at its conclusions does not either take into account or deal specifically with authorities of the territories which its advice will affect. If this occurs, as a result of the "multiple effect" theory there is likely to be fundamental changes of doctrine without due consideration of the authorities which form the basis of the doctrine.[21]

One example of a decision of the Privy Council handed down without full consideration of the Australian authorities which it might affect was *Frazer* v. *Walker* in which, Professor Jackson pointed out, the only decisions referred to by the Privy Council, apart from one of its own previous decisions, were ones dealing specifically with New Zealand law. Another example given by Professor Jackson was the decision of *Isaac* v. *Hotel de Paris Ltd*,[22] in which, in an appeal from the West Indies, the Privy Council omitted any reference to the relevant High Court

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[18] [1967] 1 A.C. 569.
[19] *Supra* n. 17, 752.
[20] (1957) 97 C.L.R. 624.
[21] *Supra* n. 15, 273.
[22] [1960] 1 W.L.R. 239.

case of *Radaich* v. *Smith*.[23] This omission is perhaps understandable since the argument in the former case was heard only ten weeks after the latter decision had been handed down. The considerable confusion caused to the New South Wales courts as to how the High Court decision had been affected by the Privy Council decision is catalogued by Isaacs J. in *Commonwealth* v. *K.N. Harris Pty Ltd*.[24] More recently, several courts have faced the prospect of following *Annamunthodo* v. *Oilfields Workers' Trade Union*,[25] another Privy Council decision from the West Indies, rather than *Australian Workers' Union* v. *Bowen (No. 2)*,[26] an earlier inconsistent High Court decision which was not referred to by the Judicial Committee.[27]

In *Baker* v. *R.*,[28] the Privy Council mentioned two exceptions to the binding authority of its decisions, both of which had applied in that case. It also took the opportunity to deny a third possible exception. The Board, in an appeal from the Jamaican Court of Appeal, considered two of its own previous decisions, both Jamaican appeals. It pronounced them irreconcilable, noting that in the later decision neither the earlier decision nor a relevant provision in the Constitution of Jamaica had been considered. It seems to have been a singularly appropriate occasion for the Board to make some pronouncements on the binding effect of its decisions. First, it repeated what it had previously said many times, that the Judicial Committee of the Privy Council was not strictly bound to follow the rationes decidendi of its previous decisions.[29] It continued:

> [I]n its opinions delivered on an appeal the Board may have assumed, without itself deciding, that a proposition of law which was not disputed by the parties in the court from which the appeal is brought is correct. The proposition of law so assumed to be correct may be incorporated, whether expressly or by implication, in the ratio decidendi of the particular appeal; but because it does not bear the authority of an opinion reached by the Board itself it does not create a precedent for use in the decision of other cases.[30]

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[23] (1959) 101 C.L.R. 209.

[24] [1965] N.S.W.R. 63, 69-70.

[25] [1961] A.C. 945.

[26] (1948) 77 C.L.R. 601.

[27] In *Ethell* v. *Whalan* [1971] 1 N.S.W.L.R. 416, 432-433, Hope J. concluded that in the event that he was wrong to hold the High Court decision distinguishable, he was bound to treat it as overruled by the Privy Council decision; in *Hall* v. *New South Wales Trotting Club Ltd* [1976] 1 N.S.W.L.R. 323, 341, Holland J. followed the Privy Council, rather than the High Court decision; and in *Calvin* v. *Carr* [1977] 2 N.S.W.L.R. 308, 342, Rath J. distinguished the Privy Council decision.

[28] [1975] A.C. 774. Although this case was decided after the enactment of the 1968 legislation limiting Privy Council appeals from decisions of Australian courts, the issues of precedent dealt with are not affected by that legislation.

[29] *Id.* 787-788.

[30] *Id.* 788. This exception is discussed in Morgan, "Precedent in the Privy Council" [1977] Public Law 209.

Such was the case, the Judicial Committee decided, having examined the written arguments of counsel, with the more recent Jamaican appeal. Another way of expressing this exception is to say that a precedent *sub silentio* is not a binding precedent.[31]

The Board explained that another exception to the binding nature of Privy Council decisions occurs:

> [W]here the rationes decidendi of two decisions of the Board conflict with one another and the later decision does not purport to overrule the earlier . . . courts may choose which ratio decidendi they will follow and in doing so they may act on their own opinion as to which is the more convincing.[32]

On the occasion on which the Jamaican Court of Appeal had given full consideration to whether it was bound by the more recent of the two conflicting Privy Council decisions referred to, it had acted on this exception, choosing to follow the earlier decision.[33] It had also held that the per incuriam rule provided another reason for following the earlier and not the later decision,[34] but the Privy Council disagreed:

> Strictly speaking the per incuriam rule as such, while it justifies a court which is bound by precedent in refusing to follow one of its own previous decisions (*Young* v. *Bristol Aeroplane Co. Ltd* [1944] K.B. 718), does not apply to decisions of courts of appellate jurisdiction superior to that of the court in which the rule is sought to be invoked: *Broome* v. *Cassell & Co. Ltd* [1972] A.C. 1027. To permit this use of the per incuriam rule would open the door to disregard of precedent by the court of inferior jurisdiction by the simple device of holding that decisions of superior courts with which it disagreed must have been given per incuriam.[35]

This refusal by the Privy Council to permit courts bound by its decisions to apply the per incuriam rule to its decisions may cause those courts some difficulty. When a court bound by the Privy Council does not have access to a report setting out the arguments of counsel, which was the position in which the Jamaican Court of Appeal found itself, it may be almost impossible to tell whether the case was decided per incuriam, in which event it is binding, or whether it is a *sub silentio* precedent and therefore not binding.

If the per incuriam rule cannot be applied to decisions of higher courts, it has a very limited operation indeed. Strictly speaking, it means that it can only be applied by courts which are bound by their own

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[31] The extent to which this represents an exception to the binding authority of decisions of other courts is discussed in Morgan, *id.* 214-215; Paton, "Decisions Per Incuriam" (1948) 4 Res Judicatae 7, 10-13.

[32] *Supra* n. 28, 788.

[33] *R.* v. *Wright* (1972) 18 W.I.R. 302, 307-308, by which the Jamaican Court of Appeal considered itself bound in *R.* v. *Baker* (1972) 19 W.I.R. 278, 305-306.

[34] *Id.* 307.

[35] *Supra* n. 28, 788.

decisions, unless of course the authority which was overlooked was not judge-made, but statutory. As Cross has said: "No doubt any court would decline to follow a case decided by itself or any other court (even one of superior jurisdiction) if the judgment erroneously assumed the existence or non-existence of a statute, and that assumption formed the basis of the decision".[36] However, if a decision was given per incuriam that will mean that a court which is not bound by decisions of the court which handed it down will have few qualms about refusing to follow it.

Rejfek v. *McElroy*[37] is the first of two cases in which the High Court chastised State courts for passing over an earlier High Court decision in favour of the Privy Council. The background to that case was as follows. In *Helton* v. *Allen*,[38] the High Court had decided that in a civil proceeding, facts which amount to the commission of a crime may nevertheless be established according to the civil, rather than the criminal, standard of proof. However, in *King* v. *Crowe*[39] the Full Court of the Supreme Court of Queensland, in an appeal against a judgment in a civil action for assault, assumed that the assault had to be proved according to the criminal standard of proof, following *Narayanan* v. *Official Assignee, Rangoon*,[40] a decision of the Privy Council on appeal from Burma. *Helton* v. *Allen* was not mentioned in the judgments of the Full Court or the Privy Council. Several years later, Mr and Mrs Rejfek sued Mr and Mrs McElroy in the Supreme Court of Queensland for the rescission of a contract and damages for fraudulent misrepresentation inducing the contract. The trial judge held that the decision of the Full Court of the Queensland Supreme Court required the plaintiffs to prove the fraud of which they complained according to the criminal standard of proof. When he gave judgment for the defendants, the plaintiffs appealed direct to the High Court.

The High Court allowed the appeal, holding that the trial judge had misdirected himself as to the standard of proof which the appellants were required to attain in relation to the fraud they alleged. The Court held that its previous decision in *Helton* v. *Allen* required the trial judge to direct himself that the appropriate standard of proof of the fraud alleged was the civil standard. The Court also took the view that the Full Court of the Supreme Court of Queensland had erred, in *King* v. *Crowe*, when it followed the Privy Council rather than *Helton* v. *Allen*. It regarded the passage from the Privy Council judgment upon which the Full Court had relied as an obiter dictum and therefore not binding. Of *Helton* v. *Allen*, the Court commented: "That decision is

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[36] Cross, *Precedent in English Law* (2nd ed. 1968) 127.
[37] (1965) 112 C.L.R. 517.
[38] (1940) 63 C.L.R. 691.
[39] [1942] St. R. Qd. 288.
[40] [1941] All India Reporter 93.

binding on all courts in Australia unless and until there is a precise decision to the contrary by the [High] Court or by the Privy Council".[41] This means that *Rejfek* v. *McElroy* stands for the unexceptional proposition that a High Court decision cannot be overruled by a mere dictum in a Privy Council judgment. It should hardly have been necessary for the Court to spell that out for State courts. Such unwillingness to permit a Privy Council decision to have a wider operation vis à vis the High Court's own decisions than a strict approach to precedent allowed, can now be seen as a sign of things to come.

The following year, *Jacob* v. *Utah Construction and Engineering Pty Ltd*[42] was decided. In the New South Wales Court of Appeal it had been held, by a majority, that paragraphs (1), (2) and (3) of regulation 73 of the Scaffolding and Lifts Regulations (N.S.W.) were invalid, as inconsistent with the reasoning in the Privy Council decision in *Utah Construction and Engineering Pty Ltd* v. *Pataky*,[43] in which another regulation in the same set of regulations had been held invalid. Some years before this decision, in *Australian Iron and Steel Ltd* v. *Ryan*,[44] the High Court had pronounced regulation 73(2) valid. The Board expressed doubts whether *Ryan's* case could stand with the case it was considering, but had not expressly overruled it.

The High Court held all three paragraphs of regulation 73 valid.[45] In the course of his judgment, Barwick C.J. commented:

> Unless [*Ryan's*] case was overruled by the Privy Council, it was binding upon the Court of Appeal of the Supreme Court of New South Wales and that Court ought not to have held that reg. 73(2) was invalid. It is not, in my opinion, 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. If the decision of this Court is to be overruled, it must be by the Judicial Committee, or by this Court itself. It cannot be treated by a Supreme Court as if it were overruled. The matter is, of course, different where this Court's decision is not precisely in point and comparison has to be made merely between two lines of reasoning. . . .[46]

This does not mean that High Court decisions are binding unless expressly overruled.[47] What *does* it mean? The Chief Justice appears to have been concerned with the concept of ratio decidendi. A decision of

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[41] *Supra* n. 37, 520.
[42] (1966) 116 C.L.R. 200.
[43] [1966] A.C. 629.
[44] (1957) 97 C.L.R. 89.
[45] Unanimously as to regs. 73(1), (2), Barwick C.J. dissenting as to reg. 73(3).
[46] *Supra* n. 42, 207.
[47] *Ratcliffe* v. *Watters* (1969) 89 W.N. (Pt 1) (N.S.W.) 497, 503-505 and the comments of Barwick C.J. in *Breskvar* v. *Wall* (1971) 126 C.L.R. 376, 386-387.

the High Court on a particular point could not be treated as if it were overruled by a line of reasoning employed in a later case to support a decision on a different point. In other words, a *decision*, meaning, in this context, a proposition constructed from the facts of the case and the order of the court, is binding, but not the reasoning which led to the decision. This view has been repeated in other cases decided by the High Court. For example, in *Banks* v. *Transport Regulation Board (Vic.)*[48] Barwick C.J. commented that although the decision in the Privy Council case of *Nakkuda Ali* v. *Jayaratne*[49] was binding, the Court was not bound by the process of reasoning followed by their Lordships in reaching it. More recently, in *H.C. Sleigh Ltd* v. *South Australia*,[50] Jacobs J. echoed this general approach to precedent, drawing attention to its similarity to the opinion of Lord Halsbury that "a case is only an authority for what it actually decides".[51] This approach is attended by the same uncertainties as ratio decidendi; all depends upon the level of generality at which the facts upon which it is based are stated.[52] However, when enunciated by Barwick C.J. in *Jacob's* case, it did indicate unwillingness to permit lower courts in the Australian hierarchy to pass over decisions of the High Court in favour of Privy Council decisions except where the rules of precedent necessarily required it.

Limitation of Privy Council Appeals

Appeals to the Privy Council from the High Court, with the exception of appeals on questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the States and the limits *inter se* of the constitutional powers of the States, have been abolished. Privy Council appeals on these questions are expressly preserved by section 74 of the Commonwealth Constitution, but a certificate of the High Court is required. The High Court has issued a certificate only once, in 1912.[53] It seems unlikely to do so again.[54] The abolition of appeals from the High Court has occurred in two stages, through the Privy Council (Limitation of Appeals) Act 1968 (Cth) and the Privy Council (Appeals from the High Court) Act 1975 (Cth). Privy Council appeals from decisions of federal courts and the Supreme Courts of the Territories have also been abolished, by the Privy Council (Limitation of Appeals) Act 1968, and the Judiciary Act 1968 has ensured that it

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[48] (1968) 119 C.L.R. 222, 233-234.

[49] [1951] A.C. 66.

[50] (1977) 136 C.L.R. 475, 513.

[51] *Quinn* v. *Leathem* [1901] A.C. 495, 506. Discussed in Cross, *Precedent in English Law* (3rd ed. 1977) 59-66.

[52] Note, (1966) 40 A.L.J. 253.

[53] *Colonial Sugar Refining Co. Ltd* v. *Attorney-General for the Commonwealth* 15 C.L.R. 182 (H.C.); (1913) 17 C.L.R. 644 (P.C.).

[54] *Nelungaloo Pty Ltd* v. *Commonwealth* (1952) 85 C.L.R. 545; *Whitehouse* v. *Queensland* (1961) 104 C.L.R. 635; *Western Australia* v. *Hamersley Iron Pty Ltd (No. 2)* (1969) 120 C.L.R. 74.

is not possible to appeal to the Privy Council from decisions of State courts in the exercise of federal jurisdiction.

The background to the limitation of Privy Council appeals and the effects of the Privy Council (Limitation of Appeals) Act 1968 have been discussed in detail in a previous volume of this Review.[55] It is sufficient for present purposes to say that section 3 of that Act[56] bans appeals from the High Court in matters:

> (i) in which the High Court decision was not given on appeal from a decision of a State Supreme Court;
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> (ii) in which the High Court decision was given on appeal from a decision of a State Supreme Court in the exercise of federal jurisdiction;
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> (iii) in which the High Court decision involved the application or interpretation of the Commonwealth Constitution, a Commonwealth Act, or an instrument (including an ordinance, rule, regulation or by-law) made under a Commonwealth Act.

Section 3 therefore bars appeals to the Privy Council from the High Court on "federal" matters, but not on "State" matters. Section 4 of the Act abolishes appeals to the Privy Council direct from decisions of federal courts and the Supreme Courts of the Territories. The chances of an appeal to the Judicial Committee direct from an inferior court of a Territory were considered to be so remote as to make it unnecessary to deal with it.[57]

The Judiciary Act 1968, which amended the Judiciary Act 1903-1966, removed any doubts about whether it was possible to appeal directly to the Privy Council from State courts exercising federal jurisdiction. Previously there had been some doubt as to whether an appeal lay by special leave from these courts, although it was clear that there was no appeal as of right.[58]

The final stage in the abolition of appeals to the Privy Council from decisions of the High Court occurred with the passing of the Privy Council (Appeals from the High Court) Act 1975.[59] Section 3 of the

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[55] Mason, "The Limitation of Appeals to the Privy Council from the High Court of Australia, from Federal Courts other than the High Court, from the Supreme Courts of the Territories and from Courts exercising Federal Jurisdiction" (1968) 3 F.L. Rev. 1. The Act is also explained, and the parliamentary debates on the Bill commented on in St. John, "The High Court and the Privy Council; The New Epoch" (1976) 50 A.L.J. 389, 391-394.

[56] The validity of which was upheld by the Privy Council in *Kitano* v. *Commonwealth* (1975) 132 C.L.R. 231.

[57] H.R. Deb. 1968, Vol. 58, 867-868.

[58] The question of appeals to the Privy Council from State courts exercising federal jurisdiction before the 1968 amendment is discussed by Mason, *op. cit.*, 5-14.

[59] The validity of which was upheld in *Attorney-General of the Commonwealth* v. *T. & G. Mutual Life Society Ltd* (1978) 19 A.L.R. 385. The Act and the parliamentary debates on the bill are discussed by St. John, *op. cit.*, 394-397.

Act abolishes any appeals from decisions of the High Court which remained, after the 1968 Act. When the Prime Minister, Mr Whitlam, introduced the Privy Council (Appeals from the High Court) Bill, he also introduced the Privy Council Appeals Abolition Bill.[60] This was a Bill to terminate any remaining appeals from Australian courts (apart from the High Court) to the Privy Council. It would have abolished appeals on "State" matters from State Supreme Courts and from State and Territorial inferior courts. The Bill was rejected by the Senate.[61] After it was reintroduced later in 1975 and rejected a second time,[62] it became one of the 21 Bills which were relied on by the Governor-General for the 1975 double dissolution.

Effects of Limitation of Appeals on the Authority of Privy Council Decisions

In *Viro* v. *R.*,[63] the High Court made some important pronouncements upon the weight to be accorded decisions of the Privy Council, not just in the High Court itself, but in State courts as well. The case may also throw light upon the question of the authority of Privy Council decisions in other Australian courts in the future. It came before the High Court in the following way. Viro was convicted of murder in the Supreme Court of New South Wales. Following an unsuccessful appeal to the New South Wales Court of Criminal Appeal, he applied for special leave to appeal to the High Court. His application, fully argued as though it were an appeal, was heard by a bench of five justices, before whom it was submitted that the summing up of the trial judge had been defective, on several grounds. One of the grounds was that the jury should have been directed that if the accused's plea of self-defence failed only because the degree of force used was excessive, the homicide was reduced from murder to manslaughter. It is generally accepted that such a direction would have involved following the High Court decision in *R.* v. *Howe*,[64] and refusing to follow *Palmer* v. *R.*,[65] a Privy Council decision on appeal from the West Indies. The justices who heard the application referred two questions to the whole Court of seven justices. They were: (1) whether *Palmer's* case was binding on the High Court, and if it was not, (2) whether it or *Howe's* case should be followed, on the matter of excessive self-defence.

The Court granted special leave to appeal, allowed the appeal, set aside the conviction and ordered a new trial. The appeal was allowed on two grounds, one of which is not relevant here. The other was that the trial judge had erred in failing to direct the jury in accordance with the

[60] H.R. Deb. 1975, Vol. 93, 54.
[61] S. Deb. 1975, Vol. 63, 431.
[62] S. Deb. 1975, Vol. 65, 187.
[63] (1978) 18 A.L.R. 257.
[64] (1958) 100 C.L.R. 448.
[65] [1971] A.C. 814.

High Court decision in *Howe's* case. In the course of his judgment each justice discussed whether *Palmer's* case, and Privy Council decisions generally, bound the High Court.

It was held by all seven justices that the High Court was not bound by decisions of the Privy Council and, by a majority, that *Howe's* case ought to be followed, rather than *Palmer's* case. The Chief Justice said:

> I am of opinion that this court is no longer bound by decisions of the Privy Council whether or not they were given before or after the date when the Privy Council (Appeals from the High Court) Act 1975 became effective.[66]

Nor would it be different if the Privy Council decision was an appeal from an Australian court; *all* Privy Council decisions had ceased to be binding upon the High Court. On this matter the other six justices agreed.[67] Barwick C.J. explained the reason for his conclusion:

> The essential basis for the observance of a decision of a tribunal by way of binding precedent is that that tribunal can correct the decisions of the court which is said so to be bound. This condition can no longer be satisfied in the case of this court in relation to the Privy Council. Leaving aside the theoretical possibility of a question *inter se* within the meaning of s 74 being certified by this court as appropriate for decision by the Privy Council, there is no circumstance in which a decision of this court can now be the subject of appeal to the Privy Council.[68]

The Chief Justice took the view, which appears to have been shared by the other justices,[69] that the High Court, when stating that it was not bound by the decisions of the Privy Council, was announcing a state of affairs which was a necessary consequence of the abolition of remaining Privy Council appeals in 1975. Another possible view would have been that the abolition of appeals gave the High Court the opportunity to choose whether it should continue to be bound by the Privy Council.[70] So far as the High Court is concerned, it makes no difference that the latter approach was not preferred. However, as we shall see, it may have implications for the binding authority of Privy

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[66] *Supra* n. 63, 260.

[67] *Id.* 282 *per* Gibbs J.; 289 *per* Stephen J.; 294 *per* Mason J.; 306 *per* Jacobs J.; 318 *per* Murphy J.; 325 *per* Aickin J.

[68] *Id.* 260.

[69] *Id.* 282 *per* Gibbs J.; 289 *per* Stephen J.; 294 *per* Mason J.; 306 *per* Jacobs J.; 317-318 *per* Murphy J.; 325 *per* Aickin J.

[70] After abolition of Privy Council appeals from Canadian courts in 1949, pre-1949 Privy Council decisions taken on appeal from Canada continued to be binding on the Supreme Court for many years. The difference between this approach and that of the High Court may be explained to some extent by the Canadian Court's more strict approach towards its own previous decisions. See Joanes, "Stare Decisis in the Supreme Court of Canada" (1958) 36 Canadian Bar Review 175; MacGuigan, "Precedent and Policy in the Supreme Court (1967) 45 Canadian Bar Review 627; Laskin, Chief Justice of Canada, (1977) 51 A.L.J. 345.

Council decisions in other courts. While none of the justices said that the High Court had not been bound by Privy Council decisions on "federal" matters since the coming into operation of the Privy Council (Limitation of Appeals) Act 1968, a possibility which Barwick C.J. had apparently contemplated,[71] the role of that Act in freeing the Court from the binding effect of Privy Council decisions was implicitly acknowledged.

What weight will be accorded a persuasive Privy Council decision by the High Court? Whilst he did not address himself to this question in *Viro's* case, on a previous occasion, in *Favelle Mort Ltd* v. *Murray*,[72] Barwick C.J. had said that if the High Court was not bound by the Privy Council it would treat its decisions with at least as much respect as it gave to decisions of the House of Lords. Generally, the other justices in *Viro's* case agreed that a Privy Council decision which would previously have been binding should be treated as of high persuasive value. Gibbs J., commenting that although the High Court no longer regarded itself as bound by decisions of the House of Lords it nevertheless continued to recognise " 'their peculiarly high persuasive value' ",[73] suggested:

> We ought now to regard a decision of the Privy Council as even more highly persuasive [than those of the House of Lords], if that is possible, by reason of the very fact that its decisions remain binding on the States.[74]

It follows that any Privy Council decisions which do not involve issues which could arise before courts exercising jurisdiction in "State" matters, in particular, constitutional decisions and decisions involving some Commonwealth statutes, will be less highly persuasive.[75] Mason J. mentioned the new possibilities for diversity in the common law. Having said that the High Court should accord Privy Council decisions "the highest respect", he continued:

> I would emphasize that it is well recognized that the common law may develop differently in Australia from the common law as it develops in England and other countries from which an appeal lay or now lies to the Privy Council. It is the responsibility of this court to determine ultimately what is the law for Australia.[76]

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[71] *R.* v. *Joske; ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 C.L.R. 87, 90.

[72] (1976) 8 A.L.R. 649, 658.

[73] *Supra* n. 63, 282.

[74] *Id.* 282-283.

[75] Most of the more recent Privy Council appeals from this country on "federal" matters are mentioned in Snelling, "Australian Appeals to the Privy Council: A Twelve Year Survey (1946-1957)" (1958) 2 Sydney Law Review 460; "Memoranda Respecting Appeals, and Applications for Special Leave to Appeal, from the High Court of Australia to the Privy Council" (1971) 123 C.L.R. XX.

[76] *Supra* n. 63, 294.

Jacobs J., on the other hand, chose to emphasise the desire for uniformity in the common law in Commonwealth countries. He suggested that the Court would only differ from a decision of the Privy Council or even strong dicta with the "greatest reluctance".[77] Murphy J. was the only justice who suggested that the weight to be given to a Privy Council decision should depend on whether it had been taken on appeal from a decision of the High Court. In his view a decision on appeal from the High Court "should be treated for the present as equivalent to a High Court decision".[78] Murphy J. did not state what weight ought to be given to other decisions of the Privy Council. It is apparent, however, that he would accord them less weight than decisions given on appeal from the High Court.

Federal courts, Supreme Courts of the Territories and State courts exercising federal jurisdiction, as well as the High Court, are affected by the legislation which limits appeals to the Privy Council.[79] How will the announcement in *Viro's* case affect the authority of Privy Council decisions in these courts?

In the event of conflict between Privy Council and High Court decisions, one of which was decided after the date of the coming into operation of the Privy Council (Appeals from the High Court) Act 1975, the courts will obviously consider themselves bound by the High Court decision, rather than that of the Privy Council. The obligation to follow decisions of the High Court continues as before, whilst the combined effect of the abolition of Privy Council appeals from these courts and the High Court and the announcement in *Viro's* case must be that Privy Council decisions cannot be given precedence over decisions of the High Court.

Are courts from which there is no appeal to the Privy Council bound by its decisions where there are no conflicting High Court decisions? None of the justices in *Viro's* case gave any direction as to how these courts should act in such a situation, although it is possible that one will be given. In the past, members of the High Court have given guidance to subordinate courts on the weight of decisions of other courts, when High Court decisions are also involved,[80] and when there is no relevant High Court authority.[81] Assuming that no guidance

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[77] *Id.* 306.

[78] *Id.* 318. The circumstances in which the High Court will overrule itself are discussed in Springall, "Stare Decisis as Applied by the High Court to its Previous Decisions" p. 483.

[79] *Supra* pp. 435-436.

[80] *E.g. Piro* v. *W. Foster & Co. Ltd* (1943) 68 C.L.R. 313, *infra* nn. 6-8 and the text thereto.

[81] *E.g. Public Transport Commission of New South Wales* v. *J. Murray-More (N.S.W.) Pty. Ltd* (1975) 132 C.L.R. 336, 341 in which Barwick C.J. suggested that in the absence of a High Court decision, a Supreme Court should, as a general rule, follow relevant decisions of the English Court of Appeal.

is forthcoming from the High Court, several possibilities appear open to the courts themselves.

First of all, they could adopt the approach of the Chief Justice in *Viro's* case, and decide that they are not bound by any decisions of the Privy Council, because an appeal to the Judicial Committee is no longer available to reverse a decision in which a court has failed to follow one of its decisions. On this approach, Privy Council decisions would not have been binding in these courts since the abolition of appeals to the Privy Council from them in 1968. Would this mean that courts which treated Privy Council decisions as binding after 1968[82] need not have done so? In the author's opinion a better view would be that it was not open to these courts to assert their independence from Privy Council decisions so long as the High Court, as the final appellate court, had not done so. It is also the author's opinion that the view that no Privy Council decisions bind these courts has much to commend it, as a flexible approach to precedent. It need hardly be said that if this view was taken, the courts concerned would treat Privy Council decisions as having at least as much persuasive authority as the High Court has indicated it will give to them. Those who see this as too much of a break with the past could point out that the position of the High Court is different from that of the other courts from which there is no appeal to the Privy Council; if the High Court had not decided it was not bound by the decisions of the Privy Council, some of those decisions could only have been overruled by statute, or even by constitutional amendment, whilst if one of these courts applies a Privy Council decision, it will be possible to appeal to the High Court, which can consider whether the decision ought to be followed.

A second possibility is that these courts will determine that all Privy Council decisions should continue to be regarded as binding, unless overruled. If universally accepted by the courts (or imposed upon them by a direction of the High Court), this would ensure consistency so far as individual decisions were concerned. It would also mean that Privy Council decisions given after the termination of appeals could overrule decisions of these courts. This would be as unsatisfactory a state of affairs as that which results from the capacity of the Privy Council to overrule Australian decisions in appeals taken from outside Australia.[83]

Such a state of affairs could be avoided, if a third possibility was adopted. The High Court could be treated as standing in the place of the Judicial Committee as the final court of appeal and Privy Council decisions accorded the same status as decisions of the High Court. On this basis, a Privy Council decision given before the 1968 legislation

[82] *E.gs Milirrpum* v. *Nabalco Pty Ltd* (1971) 17 F.L.R. 141, 242 (Northern Territory Supreme Court); *Nicholson* v. *Nicholson* (1971) 17 F.L.R. 47, 52 (State court exercising federal jurisdiction).

[83] *Supra* pp. 430-431.

abolishing appeals would continue to be binding, while decisions given after that legislation would, as decisions of a court outside the judicial hierarchy, be highly persuasive only.

Bearing in mind that at the time of writing it is still possible to appeal to the Privy Council from State courts on "State" matters,[84] what is the authority of Privy Council decisions in those courts?[85] On various occasions members of parliament, legal practitioners and academic writers[86] have warned that while Privy Council appeals continue, the existence of two final courts of appeal could give rise to a conflict of binding authority in State courts. What should a State court do, if faced with conflicting High Court and Privy Council decisions, one of which was handed down after the Privy Council (Appeals from the High Court) Act 1975 came into operation?[87] In *Viro's* case, opinion was divided on this matter. Barwick C.J. said that in the event of conflict, the High Court decision must always be followed by State courts:

> I do not agree that the State courts can choose between a decision of this court and that of the Privy Council. . . . I do not think it can ever be left to a State court to decide whether or not it will

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[84] Murphy J. does not share this view: *Commonwealth* v. *Queensland* (the *Queen of Queensland Case*) (1975) 134 C.L.R. 298, 336; *Viro* v. *R.* (1978) 18 A.L.R. 257, 317. See Blackshield, "The Abolition of Privy Council Appeals: Judicial Responsibility and the Law for Australia" (1978) Adelaide Law Review—Research Paper No. 1, Ch. V.

[85] It will be recalled that the inferior courts of the Territories are unaffected by the legislation limiting appeals to the Privy Council: *supra* p. 436. A theoretical right of appeal by special leave continues. It is doubtful whether any of these courts would contemplate refusing to follow a decision of the Privy Council, but subject to that, the unlikelihood of special leave being granted suggests these courts should approach the question of the authority of Privy Council decisions as though an appeal to the Privy Council is not available.

[86] *E.g.* Senator Greenwood, S. Deb. (1968) Vol. 37, 777; Mr Jacobi, H.R. Deb. (1975) Vol. 93, 390-391; St. John, "The High Court and the Privy Council; The New Epoch" (1976) 50 A.L.J. 389, 394-401, Blackshield, "Judges and the Court System" in Evans (ed.), *Labor and the Constitution 1972-1975* (1977) 105, 108-109; Prott, "Refusing to Follow Precedents: Rebellious Lower Courts and the Fading Comity Doctrine" (1977) 51 A.L.J. 288, 293-294.

[87] Despite the general nature of the language used by several of the justices when dealing with this problem of conflicting decisions (*supra* n. 63, 260-261 *per* Barwick C.J.; 283 *per* Gibbs J.; 295 *per* Mason J.; 306 *per* Jacobs J.; 318-319 *per* Murphy J.) it is submitted that in the absence of a clear statement that their comments are intended to apply to decisions both of which were given before the Act, it should be assumed that they do not so apply. It would be surprising if the effect of the Act was to revive as authorities decisions which had been overruled or reversed by the Judicial Committee. The assumption which has been made here also appears consistent with the general comments made as to the weight to be given to past Privy Council decisions by the High Court. *Supra* p. 439. However the New South Wales Court of Appeal, in *Waind's* case, appears to have taken a different view of the matter. *Infra* p. 453. If the assumption made by the writer is correct, any apparent conflict between decisions both of which were given before the Act should be resolved by reference to the principles in *Jacob* v. *Utah Construction and Engineering Pty Ltd.* *Supra* n. 42 and the text thereto.

> follow a decision of this court in a matter upon which this court has pronounced whether recently or at some more remote point of time. It is for this court alone to decide whether its decision is correct.[88]

The Chief Justice gave no reason in support of his view. However Jacobs J., who took the same view, did. He relied on section 73(ii) of the Commonwealth Constitution, which gives the High Court jurisdiction to hear appeals from State Supreme Courts, and suggested that since the abolition of Privy Council appeals from the High Court, this express provision prevailed over the more general royal prerogative and Judicial Committee Act 1833 (Imp.), which conferred and regulated the right of appeal to the Privy Council from State courts, to bestow pre-eminent authority on High Court decisions.[89] Jacobs J. was the only justice who took this view. It would be interesting to hear the response to it of the Judicial Committee, in an appeal in which it had to decide whether to follow itself or an inconsistent High Court decision.

While Barwick C.J. and Jacobs J. were prepared to lay down a rule for State courts to follow, Gibbs J. pointed out that it was not necessary to do so for the purposes of deciding the case before the Court. Nevertheless, he did offer some thoughts on the matter. He suggested that if the High Court has deliberately decided not to follow a Privy Council decision, State courts will be bound to follow the High Court decision, unless directed by the Privy Council not to do so. As will be discussed, the latter possibility appears unlikely. Gibbs J. also suggested that there could be situations in which the Privy Council decision should be followed although the Judicial Committee had not directed courts not to follow the High Court decision. He instanced the case where the High Court decision was "an old one and obviously out of line with principles more recently established".[90] Mason J. took a different view. Having said that in case of conflict State courts should, as a general rule, follow the High Court, he continued:

> Of course every general rule has its exceptions or qualifications. Here an exception must be allowed for the case where the Privy Council, after taking into consideration a decision of this court, has decided not to follow it. In such a case a State court should follow the Privy Council unless its decision appears to be based on considerations that are not relevant to Australian circumstances or conditions.[91]

Murphy J. appeared to fall short of the view that State courts must always follow the High Court in case of conflict between the High Court and the Privy Council. This is perhaps surprising, in view of his

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[88] *Supra* n. 63, 260-261.
[89] *Id.* 306-307.
[90] *Id.* 283.
[91] *Id.* 295.

trenchant criticism of previous decisions of the Privy Council, in particular *Oteri and Oteri* v. *R.*,[92] a decision on appeal from the Supreme Court of Western Australia. Murphy J. said that: "[t]he lesson of cases such as *Oteri* is that Australian courts should not be encouraged to look to the Privy Council for guidance on Australian law".[93] Notwithstanding this view, Murphy J. said:

> Any other court in Australia faced with a Privy Council decision and a later conflicting decision of the High Court should follow the High Court; if it is faced with a Privy Council decision on appeal from outside Australia and a conflicting High Court decision (earlier or later), it should follow the High Court (even if, in the case of an earlier High Court decision, the Privy Council had taken account of it).[94]

What is surprising here is that Murphy J. limited himself to saying that where the Privy Council decision was the later, the High Court decision should be preferred, if the Privy Council decision was *from outside Australia.* He did not explain why he limited himself in this way. Professor Blackshield has offered the likely explanation that this apparent omission results from the view of Murphy J. that there is now no appeal to the Privy Council from *any* Australian courts.[94a] A decision given on an appeal from within Australia would have no authority at all.

The two remaining justices declined to direct State courts as to how they should resolve a conflict between High Court and Privy Council decisions. Stephen J. suggested that a direction to follow the High Court, whether observed or not, could not resolve the situation so long as the appellant retained the ability to appeal from the State court's decision to the High Court or the Privy Council. Nor did he believe that a direction to State courts to follow the more recent decision offered any better solution. Such a direction, if followed, would secure for the High Court a share of appeals from State courts, instead of driving all appellants to the Privy Council. The only way of ensuring that all appeals came to the High Court would be for State courts to be directed by the High Court to follow the Privy Council decision in the event of conflict. As to this suggestion, Stephen J. commented: "[s]uch a sacrifice of principle for expediency cannot, of course, be countenanced and serves only to illustrate the undesirable aspects of the second course suggested".[95] Aickin J. also took the view that no pronouncement or direction given by the High Court could solve the problem of conflict between High Court and Privy Council decisions for State courts. There

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[92] (1976) 11 A.L.R. 142.
[93] *Supra* n. 63, 319.
[94] *Id.* 318-319.
[94a] *Supra* n. 84 and the text thereto. Blackshield, *supra* n. 84, 71.
[95] *Id.* 291.

could be no doubt, however, that it was the duty of the New South Wales Supreme Court to apply *Viro's* case in the new trial which had been ordered by the High Court:

> [W]here this court is seised of an appeal from a State Court, and allows that appeal, then upon a new trial being ordered the State Courts are, as I see it, bound upon such new trial to follow the direction of this court and to decide otherwise is to deny this court's status as a court of ultimate appeal.[96]

Before any comment is made on the merits of the respective views, perhaps an attempt at summing up is appropriate. When the High Court decision is the later decision, Barwick C.J., Gibbs, Mason, Jacobs and Murphy JJ. have all indicated that it must be followed,[97] whilst Stephen and Aickin JJ. would leave the resolution of the conflict to the court which has to deal with it. On the other hand, when the Privy Council decision is the later, Stephen and Aickin JJ. would once again leave it to the court itself to determine whether it must be followed, whilst Barwick C.J. and Jacobs J. have said that the High Court decision must be followed. Of the remaining justices, Murphy J. believes that the High Court decision must be followed if the Privy Council decision is from outside Australia (or, perhaps, whatever its origins), Mason J. suggests that the High Court decision must be followed, except in circumstances which he describes, in which the Privy Council decision must be followed, and Gibbs J. suggests that the Privy Council decision must be followed in limited circumstances which he specifies. Thus, when the Privy Council decision is the later, in some cases a majority of the High Court directs that its decisions should be followed, whilst in other cases it cannot be said that the majority gives any direction at all.

Should State courts be directed always to follow the High Court rather than the Privy Council when conflict arises? Strictly speaking, such a possibility should not be contemplated, within our system of precedent. This is because the observance of that direction cannot in itself achieve its object, assuming it to be that High Court decisions will be preferred to Privy Council decisions where conflict arises. It is true that if the direction is not followed by the State courts it can be enforced by the High Court. A State court which fails to follow the direction and follows a Privy Council decision may be reversed on appeal to the High Court. However, this alone will not have the effect that High Court decisions will always be preferred to Privy Council decisions, because if the direction is obeyed that will give the appellant the opportunity to appeal to the Privy Council, which may follow its own decision.

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[96] *Id.* 327.

[97] Although in the opinion of Gibbs J. the High Court must have made a deliberate decision not to follow the Privy Council and there must not be a later decision of the Privy Council directing the taking of a different course.

Of course, the members of the High Court foresaw this possibility. Barwick C.J. dealt with it by suggesting to the Judicial Committee "that in the ascertainment of Australian law, the decisions of [the High Court] might well be regarded by their Lordships as compelling".[98] In the address which the Chief Justice delivered at the 19th Australian Legal Convention in 1977, he had expressed the same view, adding:

> [I]t could be decided that where the High Court has pronounced upon the point, the Privy Council either will not intervene by the grant of special leave in order to review that decision or, if a matter comes before it as a matter of right, will not differ from the views expressed by the High Court.[99]

Barwick C.J. was not the only justice in *Viro's* case who was prepared to suggest that the Privy Council might in future treat High Court decisions as binding; Murphy J. suggested that "[i]t would be mischievous for the Privy Council to state Australian law otherwise than in accordance with this court's pronouncement".[1] Gibbs and Mason JJ. expressed not altogether different views. Gibbs J. suggested that in deciding appeals from Australia the Privy Council would no doubt give High Court decisions the same careful consideration as the High Court would give to Privy Council decisions, citing the Privy Council's decision in *Geelong Harbor Trust Commissioners* v. *Gibbs Bright & Co.*[2] in support,[3] and Mason J. quoted from the same case, commenting: "By these observations the Privy Council has acknowledged that this court is pre-eminently equipped to decide what is the law for Australia".[4]

Both Stephen J. and Aickin J. expressed opinions which were incompatible with the role Barwick C.J. and Murphy J. envisaged for the Privy Council. Stephen J. said the position of a final court of appeal was such that:

> [I]t may neither surrender, nor be relieved of, its responsibility to find what is the law by any involuntary adoption of the decisions of any other court. It may impose upon itself a rule that it will accept as absolute the binding force of its own past decisions, [but] [s]ubject only to that possibility, it must otherwise wholly accept the responsibility of itself declaring what it regards to be the law, even if the views of other tribunals, however respected, are to a contrary effect.[5]

Aickin J. said that the task of the High Court "now must be to make up its own mind in the performance of its own duty to declare what is the law".[6] He continued:

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[98] *Supra* n. 63, 261.
[99] Barwick, "The State of the Australian Judicature" (1977) 51 A.L.J. 480, 488.
[1] *Supra* n. 63, 318.
[2] [1974] A.C. 810, 820-821. *Infra* p. 448.
[3] *Supra* n. 63, 283.
[4] *Id.* 295.
[5] *Id.* 289-290.
[6] *Id.* 325.

> [O]n an appeal from the Supreme Court of a State, the Privy Council, in the performance of its judicial function, must perform the same task, ie it must determine what in its view is the correct law for the relevant State and thus of all other States, as well as other jurisdictions from which an appeal lies to the Privy Council.[7]

Another possibility is that one of the features of the Privy Council, as a final court of appeal, is not that it is bound by decisions of no other court, but that it is free to decide whether it should be bound by the decisions of any other court. A more general version of this view is that the rules of precedent applied by a court are those laid down by the court itself, subject to any overriding constraints imposed by a higher court, or by statute. In *Piro* v. *W. Foster & Co. Ltd*,[8] decided at a time when it was assumed that decisions of the Privy Council would be consistent with those of its alter ego, the House of Lords, Latham C.J. suggested that in cases of clear conflict between a decision of the House of Lords and of the High Court, Australian courts, including the High Court, should as a general rule follow the House of Lords decision on matters of general legal principle.[9] Similar views were expressed by other justices.[10] Without conceding that such an approach was desirable at that time, it does illustrate the spirit of self-restraint, admittedly not from a final court of appeal, of which it is to be hoped the Privy Council will give some evidence in the near future.

Is it realistic to expect that the Privy Council will defer to High Court decisions in appeals from State courts? There can be little doubt that one factor which will weigh heavily when it considers whether it should do so, is that two justices of the High Court, including the Chief Justice, have suggested such a course. It is regrettable that this was not a matter upon which the Court could speak with one voice.

There are signs in decisions of the Privy Council itself that it might be prepared to defer to High Court decisions. In *Australian Consolidated Press Ltd* v. *Uren*,[11] the Privy Council, recognising that Australian common law need not follow the same pattern as English common law, dismissed an appeal and affirmed a decision of the High Court, instead of following the House of Lords' decision in *Rookes* v. *Barnard*.[12] The Judicial Committee commented:

> There are doubtless advantages if within those parts of the Commonwealth (or indeed of the English-speaking world) where the law is built upon a common foundation development proceeds along similar lines. But development may gain its impetus from any one

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[7] *Id.* 326.
[8] (1943) 68 C.L.R. 313.
[9] *Id.* 320.
[10] *Id.* 326 *per* Rich J.; 336 *per* McTiernan J.; 342 *per* Williams J.
[11] [1969] 1 A.C. 590.
[12] [1964] A.C. 1129.

> and not from one only of those parts. The law may be influenced from any one direction.[13]

More recently, in *Geelong Harbor Trust Commissioners* v. *Gibbs Bright & Co.*[14] the Judicial Committee explained why it was reluctant to reverse a decision of the High Court and to overrule an earlier High Court decision:

> If the legal process is to retain the confidence of the nation, the extent to which the High Court exercises its undoubted power not to adhere to a previous decision of its own must be consonant with the consensus of opinion of the public, of the elected legislature and of the judiciary as to the proper balance between the respective roles of the legislature and of the judiciary as lawmakers. . . . [This consensus] may be influenced by the federal or unitary nature of the constitution and whether it is written or unwritten, by the legislative procedure in Parliament, by the ease with which parliamentary time can be found to effect amendments in the law which concern only a small minority of citizens, by the extent to which Parliament has been in the habit of intervening to reverse judicial decisions by legislation; but most of all by the underlying political philosophy of the particular nation as to the appropriate limits of the lawmaking function of a non-elected judiciary. The High Court of Australia can best assess the national attitude on matters such as these.[15]

The point here is that their Lordships considered the High Court better placed than themselves to determine whether a decision of the High Court should be followed. It is an indication of reluctance, on the part of the Privy Council, to overrule High Court decisions where the High Court itself has chosen not to do so.

What can be learned, from their Lordships' comments in *Geelong Harbor Trust*, as to the likelihood that in the future the Privy Council will defer to High Court decisions? If the Privy Council is confronted with an appeal in relation to which there is a decision of the High Court directly in point it will be dealing with a situation which is different from that with which it dealt in *Geelong Harbor Trust*, in two respects. First, it will not have the opportunity to overrule the High Court decision, but instead it may create a conflict between binding decisions for State courts. The second difference will be that the High Court decision in point will not have been affirmed in the High Court in the decision appealed from. However, it is submitted that what was important in *Geelong Harbor Trust* was not that the earlier High Court decision had been affirmed by the High Court, so much as that the

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[13] *Supra* n. 11, p. 447, 641.

[14] [1974] A.C. 810.

[15] *Id.* 820-821. However there have been occasions in recent years when a High Court decision has been reversed by the Privy Council. *E.g. Commissioner of Stamp Duties (N.S.W.)* v. *Bone* (1976) 135 C.L.R. 223.

Privy Council should not overrule it because the High Court was in a better position to determine whether it should be overruled. Even if this is wrong, if the High Court decision is not an isolated authority, but one which has been followed in a subsequent High Court decision, particularly if it has been followed recently, should not the Privy Council be as reluctant to overrule it as it was to overrule the earlier High Court decision in *Geelong Harbor Trust*?

In the event that the Privy Council has to decide an appeal without a High Court authority in point, one hopes that, as Barwick C.J. suggested in his address to the 19th Australian Legal Convention,[16] it will attempt to predict, on the authorities available, what the High Court is likely to decide in the future, and to base its decision on that prediction. It is in this area, as the Chief Justice has admitted, that even with the greatest goodwill, conflict could arise. It might occur if the Privy Council was wrong in its prediction on the authorities, or if there were no authorities on which to base a prediction.

What are the present responsibilities of State courts towards a relevant Privy Council decision in the absence of any High Court authority? Putting to one side for the moment the issue of the authority of Privy Council decisions taken on appeal from outside Australia, notwithstanding the comment of Barwick C.J. in *Viro's* case that such courts "*may regard themselves* as bound by an apt decision of the Privy Council",[17] such decisions must continue to strictly bind State courts.

In the first part of this article, attention was drawn to difficulties experienced by Australian courts when the Privy Council, in appeals from outside Australia, had handed down decisions which were inconsistent with Australian authority, without a proper consideration of that authority.[18] The reader is reminded that subject to the propositions laid down in *Rejfek* v. *McElroy* and *Jacob* v. *Utah Construction and Engineering Pty Ltd*,[19] such decisions bound Australian courts. A few months before the High Court gave its decision in *Viro's* case, Rath J. of the Equity Division of the Supreme Court of New South Wales, in *Calvin* v. *Carr*,[20] considered a new argument on this issue. It was submitted that he should not follow a common law decision of the Privy Council on appeal from outside Australia, in preference to an earlier High Court decision based on common law, because the decision of the Privy Council in *Australian Consolidated Press Ltd* v. *Uren*[21] had established that there was a common law for Australia. The response of Rath J. was cautious:

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[16] *Supra* n. 99.
[17] *Supra.* n. 63, 260. Italics added.
[18] *Supra* pp. 430-431.
[19] *Supra* pp. 433-435.
[20] *Supra* n. 27.
[21] *Supra* n. 11 pp. 447-448 and the text thereto.

> Because I consider that [the Privy Council decision] does not apply to the facts of the present case, I have not to decide this matter, and I propose to express no opinion upon it, beyond the observation that the common law is the heritage of many Commonwealth countries, and the burden of showing territorial divergency . . . may lie upon him who asserts it.[22]

So far as the specific question of the authority of Privy Council decisions on appeal from outside Australia is concerned, *Viro's* case is of little assistance. The reader is reminded that in that case Mason J. expressed the view that a later decision of the Privy Council must be followed in preference to a High Court decision when that decision had been considered by the Judicial Committee, unless the Privy Council decision appeared to be based on considerations that were not relevant to Australian circumstances or conditions. The basis of this exception was "the recognition of the potential for different development of the common law in various countries".[23] Although Mason J. was speaking in the context of the responsibilities of a State court faced with conflicting High Court and Privy Council decisions, the point he was making was a general one; "there will be some cases in which Australian conditions and circumstances are such as to require a Supreme Court to decline to follow the Privy Council decision".[24] It is possible that Barwick C.J. shared the view of Mason J., since he suggested that State courts "may regard themselves as bound by an *apt* decision of the Privy Council".[25] On the other hand, he may have been referring to the fact that there are many decisions of the Privy Council which do not bind Australian courts, since they are based on different legal systems. It is possible that Murphy J. would go further than either Mason J. or Barwick C.J. on this matter. Having said that in the event of conflict between decisions of the Privy Council on appeal from outside Australia and the High Court, Australian courts should follow the High Court, he continued:

> Australian courts will inevitably pay less regard to past Privy Council decisions on appeals from elsewhere and more regard to decisions of the supreme tribunals which are now the final arbiters of their national legal systems.[26]

Obviously, however, this passage is in the nature of a prediction, rather than a statement for the guidance of the courts concerned.

Of the other justices, Stephen J. expressed no view on the matter and Jacobs J. stated that he could not "accept as significant that the appeal was from Jamaica and not from an Australian court".[27] Although

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[22] *Supra* n. 27, 342.
[23] *Supra* n. 63, 295.
[24] *Ibid.*
[25] *Supra* n. 63, 260. Italics added.
[26] *Id.* 319.
[27] *Id.* 306.

Gibbs J. mentioned the possibilities for divergence in the common law, it is not clear whether he believed that a State court could now refuse to follow a Privy Council decision as a consequence. He may have been of the view that the possibilities for divergence in the common law give the Privy Council itself the right to diverge, as in *Australian Consolidated Press Ltd* v. *Uren*, but do not give State courts the right to refuse to follow Privy Council decisions which are based on common law principles. That was the view of Aickin J., who said that "decisions of the Privy Council in hearing appeals from other jurisdictions will, in so far as they depend upon the principles of common law, be binding on the Supreme Courts of the States".[28] This approach implies a consistency in Privy Council decisions based on common law which the possibilities for divergence deny. Following the decision of the Privy Council in *Uren's* case Professor Jackson wrote:

> The acceptance of divergency . . . emphasises the necessity that the Privy Council specifically indicate whether it holds to the view [that decisions on appeal from one country may bind the courts of another country]. If it does the Board must specify in each of its decisions exactly which courts are to be bound thereby; and it is *essential* that relevant decisions of any judicial hierarchy so bound are taken into account.[29]

This need is no less pressing today than when Professor Jackson mentioned it.

How have State courts responded to the possibility of conflict between High Court and Privy Council decisions? At the time of writing, only the New South Wales Court of Appeal, in *National Employers' Mutual General Association Ltd* v. *Waind*,[30] has indicated its attitude. In that case the applicant sought leave to appeal to the Judicial Committee of the Privy Council from a Court of Appeal decision. The Imperial Order in Council which governs appeals from New South Wales courts[31] provides, in Rule 2, that an appeal shall lie—

> (b) at the discretion of the Court, from any other judgment[32] of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

The principal ground of the appeal in respect of which leave was sought was that a recent decision of the High Court, *Grant* v. *Downs*,[33] should be reviewed. It was argued that this raised an issue of "great general or

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[28] *Id.* 326.
[29] N. 15, 279 *supra* p. 429.
[30] 19.7.78. Not yet reported.
[31] 1909 No. 1521.
[32] *I.e.* not covered by Rule 2(a) *infra* p. 455.
[33] (1976) 135 C.L.R. 674.

public importance" so that it ought to be submitted to the Judicial Committee for decision.

The Court refused leave to appeal. Moffitt P. delivered a judgment giving reasons for his conclusions, and Reynolds, Hutley, Glass and Samuels JJ.A. concurred with that judgment. In the opinion of Moffitt P., the application raised the question whether the Court should permit the applicant to attempt to produce a conflict with the High Court decision. Assuming a conflict was created by the decision of the Privy Council, a question would arise as to whether State courts should follow it or the High Court decision. This was a relevant question to consider in determining whether the application for leave to appeal should be granted, for if State courts must follow the High Court rather than the Privy Council decision, the question involved in the appeal would hardly be of "great general or public importance".

This approach led Moffitt P. to consider *Viro's* case. His Honour noted that Barwick C.J. and Jacobs J. had said in that case that if conflict arose between the High Court and the Privy Council, State courts must follow the High Court. He concluded that Murphy J. had also taken that view.[34] Moffitt P. had greater difficulty summing up the views of the other justices. He said that "the most expressed view" was that "the High Court should at least generally not direct State courts what to do but should leave State courts to make their own decisions".[35] With respect, this is true of a conflict in which the Privy Council decision is the later,[36] but it is a less accurate description of what was said of a conflict in which the High Court decision is the more recent.[37] As was mentioned previously, a majority of the justices in *Viro's* case took the view that if the High Court decision was later than the conflicting Privy Council decision it bound State courts.[38] Moffitt P. continued: "Insofar as an individual judge has stated that a State court should or might prefer a Privy Council decision to that of the High Court, such case has rather been treated as an exceptional case."[39]

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[34] *Cf. supra* pp. 443-444.

[35] Transcript of judgment, 10.

[36] Stephen and Aickin JJ. refused to give a direction (*supra* p. 444), whilst the direction of Gibbs J. applied only where the Privy Council had directed State courts not to follow the High Court decision (*supra* p. 443). Mason J. directed that the High Court decision should be followed unless, after considering that decision, the Privy Council had declined to follow it, in which event the Privy Council decision must be followed. However the High Court decision must be followed if the Privy Council decision was based on considerations not relevant to Australian circumstances or conditions (*supra* p. 443).

[37] Once again, Stephen and Aickin JJ. refused to give a direction, whilst Gibbs J. suggested the High Court's decision should be binding if it has deliberately decided not to follow the Privy Council decision. Mason J. suggested that the decision of the High Court should be binding.

[38] *Supra* n. 97 and the text thereto.

[39] Transcript of judgment, 10-11.

None of those exceptions applied to the hypothetical situation which was under consideration.

As a consequence of the difficulties experienced in finding common ground in the judgments of the last four justices, Moffitt P. drew alternative conclusions from *Viro's* case. He said:

> [E]ither the State courts are bound to follow High Court decisions in preference to those of the Privy Council where decisions of those Courts are in conflict or, it being a matter for the State courts, it is open to them to so decide.[40]

With respect, it is suggested that a different general conclusion can be drawn from *Viro's* case. It is that in relation to some cases of conflict a majority of the High Court has directed that the High Court decision should be followed, whilst in relation to others there is no majority direction, so that a State court is free to determine its own response. However, Moffitt P. doubted whether a direction could bind the Court of Appeal:

> So long as an appeal lies from this Court to [the High Court and the Privy Council] it is difficult to see how the decision of one of them that this Court should not follow the other can bind this Court. What if each of those Courts directs this Court to disregard the other? It seems to me that the State courts must make their own decision on this matter.[41]

This is, of course, a difficulty which Stephen and Aickin JJ. foresaw when they refused to give a direction to State courts. It would not exist if the Privy Council determined that it should do nothing to create a conflict between its decisions and those of the High Court.

Having suggested that State courts should resolve for themselves how to deal with any conflict between High Court and Privy Council decisions, Moffitt P. suggested that in the interests of certainty, a rule should be laid down by the Court of Appeal for all New South Wales courts. The rule which he chose was that decisions of the High Court should be preferred, except when the High Court decision was of some antiquity and the Privy Council decision was more recent. Cases falling within the exception are to be dealt with individually as they arise, although when the High Court decision has stood without being departed from by the High Court, whilst the Privy Council decision was given since 1975, the High Court decision should be followed. This means that where one of the decisions was given since 1975 the High Court decision should be followed, but that where both decisions were given before 1975 in some circumstances the High Court decision should be followed, whilst in other circumstances the State courts should determine for themselves which decision to follow. In other words, a High Court

[40] Transcript of judgment, 11.
[41] Transcript of judgment, 12.

decision may be followed rather than the Privy Council decision which overruled it. It will be interesting to see whether any of the other State courts are prepared to countenance that possibility.

Two reasons were given, for directing that as a general rule, in case of conflict, High Court rather than Privy Council decisions must be followed by New South Wales courts. The first reason was substantially the same as that given by Jacobs J. in *Viro's* case for preferring High Court decisions.[42] Moffitt P. suggested that the combined effect of section 73(ii) of the Commonwealth Constitution, which makes the High Court the appellate court from State courts, and the legislation abolishing Privy Council appeals from the High Court made the High Court "the ultimate court of appeal from State courts in the appellate channel provided by the Constitution".[43] The second reason was that the High Court was better placed than the Privy Council to decide what was the appropriate law for Australia. It was also noted that a good deal of support could be found, in the judgments in *Viro's* case, for the general rule which had been adopted. This led Moffitt P. to suggest that:

> The same conclusion thus is reached whether the correct view is that we ought to extract if possible the overall view of the High Court in *Viro* and are then bound to follow it, or we decide the matter for ourselves.[44]

Returning to the application before the Court, Moffitt P. concluded that if the Privy Council gave a decision inconsistent with the High Court decision in *Grant* v. *Downs*, it would not be a precedent in New South Wales. That being so, leave to appeal to the Privy Council was refused. Two other reasons were given for the refusal of leave to appeal. The first was that if it was inappropriate for the Court to predict the fate of a hypothetical decision of the Privy Council which was inconsistent with *Grant* v. *Downs*, it should refuse leave to appeal on the basis that such a decision would produce confusion and uncertainty, that is to say, leave to appeal "ought" not to be given. The final reason for refusing leave to appeal also turned on the word "ought" in Rule 2(b) of the Order in Council. Previously, for one of the reasons set out in the Rule, a question "ought" to be submitted directly to the Privy Council, as the court by which all other Australian courts were bound, by-passing the intermediate appellate court. Since the Privy Council was no longer the ultimate court of appeal, but one of two ultimate courts of appeal, neither of which was bound by the other, it could no longer be said that a question "ought" to be submitted to the Privy Council. Moffitt P. recognised that this was likely to mean the end of Privy Council appeals by leave of the New South Wales Supreme Court under Rule 2(b).

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[42] *Supra* p. 443.
[43] Transcript of judgment, 14.
[44] Transcript of judgment, 15.

For the time being, however, two other forms of appeal to the Privy Council still remain, from New South Wales courts. Rule 2 provides that an appeal shall lie—

> (a) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards.

In addition to this appeal as of right, it is also possible to appeal to the Privy Council from New South Wales courts and other State courts by the special leave of the Judicial Committee itself.[45]

Future Limitation of Privy Council Appeals

It is not proposed to canvass the various ways in which State Governments could secure the abolition of appeals to the Judicial Committee of the Privy Council from State courts. That question has been discussed elsewhere.[46] Up to the time of writing, there have been several reports that some States are considering abolishing Privy Council appeals. Following publication of the reasons for the decision of the High Court in *Viro's* case, Mr Walker, the Attorney-General for New South Wales, announced the preparation of legislation to secure the abolition of Privy Council appeals from New South Wales courts.[47] It was later reported that if the States failed to agree upon a common approach to the abolition of Privy Council appeals at the Standing Committee of Attorneys-General in July, New South Wales would seek to abolish such appeals in its own right.[48] It was also reported that the legislation would take the form of three bills, each aimed at terminating Privy Council appeals. The first would simply seek to abolish the appeals, whilst the second would enable the New South Wales Parliament to petition the Queen in Council to rescind all Orders in Council relating to New South Wales appeals, and the third would seek the exercise, by the Commonwealth Parliament, of its power under section 51(xxxviii) of the Constitution, so as to confer power on the New South Wales Parliament to abolish appeals. At the same time, it was

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[45] The conditions and rules relating to appeals as of right and by special leave are dealt with in Bentwich, *The Practice of the Privy Council in Judicial Matters* (2nd ed. 1926) 137-151, 152-180.

[46] Nettheim, "The Power to Abolish Appeals to the Privy Council from Australian Courts" (1965) 39 A.L.J. 39; Lumb, *The Constitutions of the Australian States* (4th ed. 1977) 93-97; Barwick, "The State of the Australian Judicature" (1977) 51 A.L.J. 480, 487; Graycar and McCulloch, "Gilbertson v. South Australia —The Case For S. 51(xxxviii)?" (1977) 6 Adelaide Law Review 136; Crawford, "The New Structure of Australian Courts" (1978) 6 Adelaide Law Review 201, 222-224; Blackshield, *supra* n. 84, Ch. IV.

[47] Canberra Times 13.4.78.

[48] Sydney Morning Herald 26.6.78.

reported that the States most interested in abolishing Privy Council appeals were New South Wales and South Australia, while Queensland and Western Australia did not wish to do so. In the meantime, the Victorian Attorney-General, Mr Storey, announced that his department had prepared legislation which, together with Federal legislation, would permit the Victorian Parliament to repeal Imperial legislation, including legislation governing Privy Council appeals, in its application to that State.[49] He said, however, that the Victorian Government was not planning to sever links with the Privy Council.

To sum up, it appears that whilst the problem of conflict between High Court and Privy Council decisions in State courts may be conclusively resolved by the termination of appeals to the Judicial Committee in some States, procedures will have to be devised for dealing with it in others, unless the Privy Council decides that it is appropriate to treat itself as bound by High Court decisions. If it does so, that would not necessarily spell an end to Privy Council appeals from Australian courts, because there may be cases in which an appeal to the Privy Council is possible, whilst a High Court appeal is not.[50] Courts in States from which appeals are abolished will be confronted with the same possibilities as federal and territorial courts, from which appeals have already been abolished, as to the weight to be attributed to Privy Council decisions.[51]

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[49] Age 15.4.78.

[50] If the amount in dispute is $1000 or more, an appeal as of right to the Privy Council is available, under the Imperial Orders in Council, whilst under the Judiciary Act 1903 (Cth) as amended, s. 35(3), the amount involved for an appeal to the High Court as of right must be not less than $20,000. The Orders in Council governing Privy Council appeals from the States, apart from that applying in New South Wales which has been previously mentioned, are: South Australia: 1909 No. 202; Western Australia: 1909 No. 760; Queensland: 1909 No. 1229; Tasmania: 1910 No. 1186; Victoria: 1911 No. 98. In Victoria and Queensland, Privy Council appeals are governed by State legislation as well: Supreme Court Act 1958 (Vic.), s. 218; Appeals and Special Reference Act 1973 (Qld), s. 2.

[51] *Supra* pp. 440-442.