

**ADDRESS TO THE AUSTRALASIAN-ANGLO LAWYERS' ASSOCIATION**  
**On Tuesday 11 October 2005**  
**At the Union Club, Sydney**

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When I was asked to address the Sydney branch of this society, it was suggested that I should simply update a talk I gave to the London branch in May 2004. That seemed a great idea – until on Saturday when I re-read it. It seems from another world.

In May 2004, the judiciary in New Zealand seemed to be on a roller coaster ride. We had been through two years of controversy associated with the government's proposals to abolish appeals to the Privy Council. The step had been opposed by the principal opposition party, whose justice spokesman had said that, if his party was successful in the next election, the Supreme Court would be disestablished and appeals to the Privy Council reinstated. The legislation had been passed in October 2003, 100 years after the establishment of the High Court of Australia. At the celebrations in Canberra, it was impossible not to be envious when reminded that the High Court, on its creation, had been hailed as the "keystone" in the arch of the constitution. Our Supreme Court has had a much more doubtful start.

When I spoke to the London branch of the Anglo-Australasian Society, the Supreme Court had been established but was not to begin sitting until July 2004. I was filling in the time sitting in the Privy Council. I was occupying the office at the top of the building in Downing St which is still referred to as the "Colonial Judge's room". It was hard not to feel a pang of regret for the loss of what one of our Chief Justices at the turn of the century before last referred to as the "great and noble ideal" of a single judicial tribunal for the countries linked by the ties of Empire and the common law. The Colonial Judge's room has a clock that an elderly retainer climbed the stairs every day to wind up and bookshelves full of the statutes and law reports of South Australia, West Australia, Tasmania, Victoria and Queensland. (I never did discover where New South Wales was). All collections stop at the dates appeals to the Privy Council stopped. I wonder whether the clock will be left to stop when the last appeal ends - and what will happen to the beautiful hearing chamber, purpose built in 1837, through which much of our histories have been played out.

Chief Justice Stout's reference to the "great and noble ideal" of a single Empire judicial tribunal was, it has to be said, deeply ironic. It was made during the course of a public mutiny by the New Zealand courts against a decision of the Privy Council dealing with native title in New Zealand. Stout and his colleagues assembled the profession together in a sitting later reported in the New Zealand Law Reports as "The Protest of Bench and Bar". It delivered the rebuke that the Privy Council, as New Zealand's final appellate body, "knows not our statutes, or

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The Rt Hon Dame Sian Elias, Chief Justice of New Zealand

our conveyancing terms, or our history". The Chief Justice ended, grimly, "What the remedy may be, or can be, for such a state of things, it is not at present within my province to suggest". Now, Chief Justice Stout, a former Premier of New Zealand, was incapable of forbearing to promote a solution. His preferred outcome was for the High Court to become a regional final appeal court. That was an outcome he reluctantly accepted to have been precluded for the time being by the first instance jurisdiction of the High Court and the appointing of only three judges. For that reason, he thought New Zealand must "stand alone", "for the present". He therefore proposed the ending of appeals to the Privy Council and the setting up of a New Zealand court to hear final appeals.

It has taken us exactly 100 years to get to that point and many of the objections to that course (including the nervousness of foreign investors) which Stout rejected in 1905 were rehearsed again. One of the concerns was that the Court would not have enough to do. It was some consolation to read that the same fear was expressed at the setting up of the High Court and to recall that the Supreme Court of the United States languished for its first 10 years, hearing no cases for two years and delivering its first substantive decision after three years. Dark fears were expressed about the smallness of New Zealand society and the benefits of the detachment achieved by putting half the world between the court and the society it serves. I must say that I did think that anyone who thinks New Zealand is a village has never spent time at Westminster. That gulfs in cultural and social context are not easily overcome: I was once asked as counsel in a Privy Council appeal whether Maori "still" live on reservations. I was of course able to answer the immediate question and explode the troubling rolled up misconception that Maori had ever lived on reservations - but it is not easy to explain a whole world.

As if the rather bruising debate about the capacity of our senior judiciary to step into the shoes of the Judicial Committee were not bad enough, in May 2004 the Privy Council issue arose at a time when the New Zealand judiciary was facing an avalanche of law reform proposals, which inevitably meant that a wider spotlight was on us. New statutory procedures for dealing with complaints about judges and providing processes for their removal by Parliament were being enacted. That inevitably led to discussion about judicial misdemeanours, some being fairly ancient examples, but all contributing to a sense of public unease. The Law Commission had suggested substantial changes to the courts system, most concerned with better processes but some with implications for the structure of the courts and apparently prompted by a belief that symmetry and simplicity in structure would assist in better access to justice. Their work was light on detail, leaving further uncertainties about future directions and in particular the place in the legal system of the High Court, the superior court of general jurisdiction. A discussion paper had been put out about a new process of appointment to judicial office, suggesting that it was necessary to move to a system more transparent.

Now, none of these reform suggestions were unique to New Zealand or its conditions. Most have either been acted on or are being proposed in other jurisdictions. The fact that they came together all at one time because we had, for the first time in many years, a government with an interest in constitutional and governmental reform, perhaps created an impression that there was something wrong with the New Zealand system. It did not help that, as my predecessor Sir Thomas Eichelbaum and I have both had reason to remark upon, the place of the judiciary in our legal system under our unwritten constitution has been so little understood in the wider community. It did not help that the reform proposals were being put forward against a background of publicly expressed judicial anxiety about institutional dependence upon the Ministry of Justice, concerns raised but not addressed for 15 years and indeed exacerbated both by a 2003 restructuring of government departments and by some serious security breaches affecting the judiciary. Or that we were facing difficulties in recruiting to the High Court bench for reasons which seemed to be connected with judicial terms and conditions, particularly the absence of a defined benefit system for superannuation and the early age of retirement (at 68). It did not help that there was a vein of anger in political circles arising out of a controversial decision of the New Zealand Court of Appeal refusing to strike out proceedings seeking investigation in the Maori Land Court of title according to native custom in foreshore lands and lands below high water mark. The political debate about establishment of the Supreme Court had already raised allegations of judicial activism and the relationship between Parliament and the judiciary. During the Select Committee processes the Supreme Court Bill was amended to provide assurances that no change in the constitutional balances were effected by the legislation. The purpose provision of the Act now provides:

Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.

I hope we never have to decide what this means. It invokes the duality described by Dicey and it is a departure from our traditional reticence to spell out the features of our unwritten constitution in statutes. By contrast, the New Zealand Constitution Act provides simply that the New Zealand Parliament continues to have "full powers to make law for New Zealand" and the scope of judicial functions are not described.

So things were a little unsettled when I spoke in London. In some ways there was worse to come. The rather academic question of Parliamentary sovereignty suddenly became a current political one. (If I had foreseen that, in March 2003 -long before the reference to Parliamentary sovereignty rather oddly popped up in the Supreme Court Act - I might not have agreed to the blandishments of Cheryl Saunders at Melbourne University to add my two cents in revisiting that hoary chestnut – as Owen Dixon said, a variant on the old theological riddle - after writing about it more than thirty years previously). In addition, the Press obtained under the Official Information Act, judicial comments to officials pointing

out that the plans for accommodation of the Supreme Court in a converted jury courthouse, which had been submitted for government approval without reference to the judges (who had not yet been appointed), failed to make provision for an adequate library, was not functional for a collegiate court, did not make sensible provision for some of our support staff to be located near judges and made no provision at all for the Chief Justice's administrative support staff. Public comment we had made to the same effect earlier seemed to have been missed and the story - predictably - was inaccurate and not corrected by Ministry officials who knew it to be wrong. The way in which the information was obtained raised further issues for us about institutional independence.

Australia seemed to us at that time an oasis of stability. About the only consolation to be had was that things were not so great in the United Kingdom either. It was going through its own upheavals arising out of the proposals to turn the Law Lords into a Supreme Court and to disestablish the office of Lord Chancellor. Not to mention the abolition of Queen's Counsel and the setting up of a judicial appointments mechanism.

That was the position we were in from May to October last year. It was an anxious time - and a challenging background for the establishment of the new final court of appeal. It is much too early to assess, now that the Supreme Court has got underway, the extent to which it provides an answer to its critics. It would seem unlikely that it will accomplish that except by doing and doing over time at that. Even then, it would be unrealistic to think that any such Court can satisfy everyone. We take comfort from Chief Justice Gleeson's comments at the centenary of the High Court that there never has been a golden age when the High Court has basked in universal approval. As he said:

From the very beginning, decisions of the court that have frustrated political objectives, have resulted in noisy criticism, resentment of the court's power and independence, and threats to limit that independence.

So, our expectations are not high. I think nevertheless that things have moved on significantly from the time when we were in the phoney war stage of having been established but not yet underway and having to imagine what benefit our establishment might bring to the administration of justice in New Zealand. We have recently had an extremely closely-fought election campaign. I do not think the Supreme Court was raised as an issue at all, even though its establishment was a major achievement of the incumbent government and had been attacked at the time by the major opposition party. When a new member was appointed to our Court, to replace a retiring judge, there seems to have been no comment at all, even though the appointment of the first judges of the new court was a matter of intense public and political interest.

What happened? Well, the phoney war period came to an end. We heard our first substantive appeal in November last year. For the year to the end of November since our first substantive hearing, we are likely to have completed hearing only 15 appeals where leave has been granted. We have delivered reasoned judgments, as we are obliged by statute to do, in 60 other cases and we have on hand a further 16 cases in which leave either has been given or seems likely to be given. There are indications that the availability of second appeal where points are of general or public significance, is being increasingly resorted to by practitioners in areas where no effective appeal was formerly available to the Privy Council. A shift in legal culture seems to be happening. On those trends, I expect that our workload over the next year will amount to approximately 30 substantive appeals. It is not a heavy workload but I think it can be expected that such a volume will enable the Court to have real impact on the administration of justice in New Zealand.

Before the establishment of the Court, I suggested that we could expect three main benefits:

- Greater accessibility to second-tier appeal for those cases where such appeal is warranted, to the benefit of the coherence of the legal system as a whole
- Better understanding of local context
- Better understanding in the wider community of the place of the courts and better understanding of our unwritten constitution and its balances.

With the advantage of a year sitting in the Supreme Court, I would add a few other possible advantages of a local final appeal court:

- An incentive for appellate advocates to understand the principles of the legal system as a whole, contributing to its consistency and coherence
- Greater efficiencies in case disposition for those cases where appeals were formerly available as of right (where the amount in dispute is more than \$5,000).

I should address these last two points before attempting an assessment of whether the advent of the Supreme Court has had the benefits of accessibility, understanding of local content and has contributed to better understanding of the place of the court under our unwritten constitution.

First, changes to appellate advocacy. At the first sitting of the Supreme Court, our then Attorney-General voiced her expectations that the establishment of the Supreme Court would raise the standard of appellate advocacy. I am not sure whether it is methods of advocacy that may be affected by the establishment of the Supreme Court, but I think we can see signs that the greater accessibility of a court of final appeal may have an impact on litigation practice more generally. Effectively, save in a very small proportion of cases, the Court of Appeal was formerly the final appellate court for New Zealand. It is a busy intermediate appeal court, hearing about 90 cases a year with its permanent judges sitting together and another 400 in divisional courts comprising two High Court judges and one permanent judge of the Court of Appeal. I have wondered whether (and this is a matter I raise tentatively) whether the accessibility of a further appeal may have implications for the approach of counsel in the Court of Appeal. Of course, the Supreme Court is not principally a court of error correction, but the court must be alert for any serious miscarriage of justice. An undeserved win in the Court of Appeal because one counsel has been particularly persuasive, or another has been insufficiently prepared, or the case is a dog's breakfast, may be a much less satisfactory outcome for the successful party than in the days when further appeal was less realistic. If so, competent counsel in the Court of Appeal, may want to make sure they meet the real merits of the case against them, even if it is insufficiently argued by their opponent. Such cases are no doubt rare but they stand out at second appeal level and we have already had a few where plausible arguments insufficiently tested has led to serious error which had to be corrected. More directly, the necessary method of a final court of appeal must impact upon the way in which arguments in that forum are developed. A final court of appeal must be cautious. The judges of such a court have to be anxious about getting things wrong - and you can get things wrong in so many ways. The judges of final courts of appeal have to keep the wider picture constantly in mind. They cannot deal with the case before them without thinking of the implications in quite different contexts, contexts with which counsel in the particular case may be quite unfamiliar. We have to be interested in analogies, comparisons and consequences. That is very difficult for practitioners to get their heads around unless they know a good deal of law. That is not how legal practice in New Zealand is currently organised. It is highly specialised. That is a problem for the Court. It means that counsel may not be familiar with general principles and how they are being applied in disparate areas of law. They may not be able to think in terms of the principles that cross-refer and intersect and we have already had some examples of that. I have been struck by the difference in your jurisdiction. My impression is that the significant decisions of the High Court are followed with interest by the profession as a whole and not just those with specialist interest in the subject of the case. That is aided by the extent to which the Court identifies and reasons from principle and by analogy. It is indeed a court with a sense of the reach and scope of the law as a whole. There are lessons here for any final court. I hope we learn them well.

Secondly, it seems that the accessibility of the Supreme Court, able to give a hearing date to an appeal well in advance of the hearing available in the Privy Council and requiring leave in all cases, is having an effect upon the conduct of the commercial cases that formerly went to London by right. Filing an appeal to buy time, as was not uncommon in the past, is not realistic unless there is a good point deserving of leave. Where leave is given, we are finding that the accelerated hearing dates have resulted in many commercial disputes being settled promptly.

As for the expectations of better accessibility voiced before the Supreme Court was established, I think it is clear that the range of work the Court has already been called upon to consider is much wider than the scope of the appeals considered by the Privy Council. Very few criminal cases in our history were granted special leave to appeal to the Privy Council. Very few family cases were eligible to go to London. These and others, are areas of law of great importance to New Zealanders which have not had the benefit of second tier appeal. I have elsewhere suggested that that has been the real cost to us of retention of appeals to the Privy Council. The theoretical availability of special leave was almost never invoked by the Privy Council, perhaps because it was obliged to accept any case in which the amount in issue was \$5,000. In this jurisdiction, both Justices Kirby and Heydon have noted that since leave has been required for all appeals to the High Court, the proportion of criminal and immigration cases has increased dramatically. I expected that pattern to be followed in New Zealand. Many of the cases that were formerly taken to the Privy Council as of right were quite straightforward. Some indication of that is given by the relatively low number of cases on appeal from New Zealand which are significant legal authority. In addition, I think it is a fair comment to say that in some cases where significant legal principle was in issue, sometimes in highly controversial cases, the Privy Council was reluctant to grant leave and was able to avoid doing the more readily because it had no obligation to give reasons. That has been to the detriment of the development of New Zealand law. Effectively, we have lacked a court of final appeal with the responsibility to maintain overall coherence in the principles which underlie all non-statute law. As Ahraon Barak, Chief Justice of Israel says:

The development of a specific common law doctrine radiates into the entire legal system. The interpretation of a single statute affects the interpretation of all statutes, A legal system is not a confederation of laws. Legal rules and principles together constitute a system of laws whose different parts are tightly linked.

Certainly, the appeals granted leave in the Supreme Court have wider scope than those traditionally heard by the Privy Council. In addition, we have heard a number of appeals where an appeal to the Privy Council was not realistic because of urgency.

It is difficult to know on the basis of our limited experience to date whether the expected benefit of understanding of local context has been obtained. It would however be very surprising if it were not, in cases where such context is relevant. A local final appeal court is free to respond in all cases to local conditions and indeed to intellectual preferences, as the Privy Council has approved by deferring in some cases to local courts. That is the freedom conferred on the New Zealand courts by the Privy Council in such cases as *Invercargill City Council v Hamlin* and more reluctantly, *Lange v Atkinson*. It is the freedom taken in a few cases by the local courts even before appeals to the Privy Council were abolished in your jurisdiction and in mine where the type of case did not go to the Privy Council as of right (as in *Parker v R* in Australia and *Corbett v Social Security Commissioner* in New Zealand), but it is a freedom now available in New Zealand, as it has been for more than 20 years in Australia. The extent to which New Zealand courts would feel able to throw over existing law free of the restraint of appeals to the Privy Council, was much debated at the time of the reform. The legislation clearly expects a New Zealand response where it is called for. The overall purpose of the Supreme Court Act is:

- (i) to recognise that New Zealand is an independent nation with its own history and traditions; and
- (ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and
- (iii) to improve access to justice.

The extent to which the establishment of the Supreme Court in New Zealand will accelerate divergence between our legal systems and those of the United Kingdom is one of the big questions which hangs over the reforms. The same question, the diminished Englishness of the law we inherited from England, is a live one in Australia, Canada and the other countries who inherited the common law as overseas possessions of England. It is worth remembering that the common law has never been entirely the same in all jurisdictions to which it attached with colonisation. Colonial legislation in most of our countries provided that English law applied only "so far as applicable to the circumstances" of the colony. The common law was modified by the pre-existing custom of local populations. The extent to which it was applied is a significant difference in our legal systems and their history. Our legal system was set up following the Reform Acts, whereas yours predated them. I have wondered whether that may explain our laxity with equity, a matter upon which we have often been severely taken to task by your judges and academics. On the other hand, the common law is a system which pulls us together. Although the experience in Canada and here suggests that some conformity will be lost over time, such divergence will

be for good reason, responsive to local conditions. The expression of such differences is itself critical to the continued vitality of the common law. I do not think it was simply politeness that led Lord Bingham to say that the differences and dialogue between final courts enriches the common law. Differences make us more rigorous in method and encourage us to speak truth plainly in our judgments. Indeed, the principal reasons for divergence between our legal systems will remain, as they always have been, differing legislative and constitutional arrangements and different history. There are undoubted disadvantages in a constitution as elusive as ours in New Zealand. I have already indicated that I think at times of strain it leaves judicial function seriously undervalued and misunderstood, but there are some benefits. Original intent is not a concept that greatly troubles us. We are comfortable with Sir Rupert Cross's view that a statute has a legal existence independently of the historical contingencies of its promulgation, and accordingly should be interpreted in the light of its place within the system of legal norms currently in force". I have wondered whether we have more room for relativity, dialogue and change. I think that is demonstrated by the significant constitutional shifts in our times in both the United Kingdom and New Zealand, with remarkably little fuss and strain. A significant current reason for divergence is the fact that for the past 15 years we have been operating under a statutory Bill of Rights. We lack the obligation to defend the text of a written constitution. It may be in the short term those circumstances push us closer to English law but it is not clear that will continue with the greater pull exerted by Europe.

The final benefit I hoped might be achieved with the setting up of the Supreme Court is greater understanding of the courts and the constitution. The position of the High Court in Australia can be contrasted with the position in New Zealand before the reforms. I doubt whether many New Zealanders, if asked before the government policy to change the arrangements was announced, would have been able to name our final appeal court. My experience has been that most lay-people were incredulous to be told that New Zealand's highest court was located at Downing Street in London and comprised Lords of Appeal in Ordinary with the odd ring-in retired Lord Justice or Commonwealth Judge. Why did this inaccessibility and invisibility matter? Because courts called upon to make decisions which may be unpopular with the Executive or powerful groups or even with the community more generally are vulnerable. If courts are vulnerable, so is the rule of law. Chief Justice Gleeson believes that, however unpopular particular decisions of the High Court may be from time to time, the public understands the role of the Court and knows that it provides a guarantee of impartiality in the application of law to individuals. Similar pride in the institutions, if not in particular outcomes, can be seen in Canada and the United States. I am not confident that the same can be said in New Zealand. The obscurity of our final appeal has not helped in the understanding of the judicial system.

Whether through the work of the Court to date or (as is more likely) through some of the controversy its establishment generated, I think there is considerably

more awareness of the role of the courts. I do not suggest that we have yet seen the development of pride in the institution. That will need to be earned. Unlike the solutions being adopted in England, there is as yet no progress to report on institutional independence but I think there is more awareness now of what is at stake - and that is an important start.

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