XVITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW

"THE ROLE OF THE SUPREME COURT OF QUEENSLAND IN THE CONVERGENCE OF LEGAL SYSTEMS"

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University of Queensland

The Hon P de Jersey AC, Chief Justice of Queensland[1]

When sworn in as Chief Justice of the High Court of Australia in 1952, Sir Owen Dixon expressed the view that "the authority of the courts of law administering justice according to law is a product of British tradition and it is for us to maintain it."[2] While the Chief Justice acknowledged then that the Australian legal system was indelibly marked with the imprint of its colonial mother-country[3], the system had obviously developed in its own distinct way since the arrival of British common law with the new entrants to Sydney Cove in 1788, and over the last five decades, that development has involved a canter if not a gallop. The contemporary Australian focus is sharply fixed on the maintenance, and further refinement, of a distinctively Australian jurisprudence.

I am honoured to present this paper today in my home jurisdiction, to this distinguished gathering of national and international jurists. The paper is entitled "The Role of the Supreme Court of Queensland in the Convergence of Legal Systems." I will seek to deal with the impact of international jurisprudence on the development of the statute law, and the common law, of this jurisdiction; and to an extent, vice versa. Queensland being part of the federation, it is important to note first our context, within the gestation of national, Australian law.

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[1] I am considerably indebted to my Associate, Ms Ilona Turnbull, for her valuable and extensive assistance in the preparation of this paper.

[2] The Rt Hon Sir Owen Dixon, "Address Upon Taking the Oath of Office as Chief Justice of the High Court of Australia" (1952) 26 ALJ 3 at 5.

[3] Parkinson, *Tradition and Change in Australian Law*, (LBC, Sydney, 1995), Ch 1, p 3.

The reception of British common law into Australia

When the British deemed Australia *terra nullius* – a land uninhabited, and therefore capable under international law of being "settled"[4] rather than ceded or conquered[5], "all the English laws then in being, which are the birthright of every English subject, (were) immediately there in force."[6] But when the First Fleet landed, they brought with them "only so much of the English law as (was) applicable to their new situation and the condition of an infant colony".[7] To avoid confusion as to which English law applied in New South Wales, the Imperial Parliament in 1828 passed the *Australian Courts Act* (9 Geo 1V, c 83). It provided that all laws in force in England on 28 July 1828 which were applicable to New South Wales and Van Dieman's Land,[8] were deemed to be in force there. That was not to say the applicable common law was frozen in time after 1828 – the common law rules as "expounded from time to time (were) to be applied".[9]

The independent development of Australian law was nevertheless curbed by limitations placed on legislative councils during the early 19th century, stipulating their enactments must not be "repugnant" to the laws of England. Given the term "repugnant" was undefined, there were problems determining the extent of divergence necessary to give rise to "repugnance". Apparently in response to the efforts of one particularly zealous Anglophilic Judge, who invalidated very many pieces of South Australian legislation on the basis of "repugnancy", an independent investigatory committee was established and thence the Imperial Government's enactment of the *Colonial Laws Validity Act* 1865 (28 & 29 Vict, c 63). While reflecting the pre-eminence of English law,

[4] In 1889, the Judicial Committee of the Privy Council confirmed that Australia had indeed been "settled" in *Cooper v Stuart* 14 App Cas 286 at 291.
[5] Morris et al, *Laying Down the Law* (4th ed, Butterworths, Sydney, 1996), Ch 3, p 27.
[6] Blackstone, *Commentaries on the Laws of England* (11th ed, Cadell, London, 1791), vol 1, p 108.
[7] Ibid.
[8] As Queensland and Victoria were originally part of New South Wales, the 28 July 1828 commencement date also applied in those areas/colonies. South Australia adopted the date of reception as the date of the colony's settlement on 28 December 1836, while Western Australia adopted 1 June 1829. Further, see Parkinson, op cit n 3, pp 142-143.
[9] Gibbs J in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 625-626.

that Act provided no colonial law was to be invalidated on the ground of repugnancy *unless* inconsistent with British legislation specifically directed at the colony.[10] The Westminster Parliament thereby did its then best to encourage newly developing colonies. The Act ensured the fledgling Australian legislatures should not replicate English laws premised on English society in Australia, but instead, utilise British notions of justice with a view to developing innovative bodies of law responsive to the unique needs of Australian society.[11]

Australian adoption of English laws continued through the later 19th century. As an example, the *Judicature Acts of* 1873 and 1875 of the United Kingdom, militating the concurrent administration of common law and equity, provoked parallel reforms in the Australian jurisdictions – Queensland leading the way with the *Judicature Act* 1876.[12]

Diminution of English hegemony in judicial decision-making was accelerated by Sir Owen Dixon in 1963 in *Parker v R,*[13] His Honour refusing, with the concurrence of his colleagues, to follow a decision of the House of Lords in a criminal matter - considering it erroneous. Yet as late as 1966, *Skelton v Collins*[14] evidenced considerable reluctance in the Justices to depart from House of Lords authority, even if considered wrongly decided.

After some reforms during the late 1960's and 1970's[15], Australia's path to legal autonomy was legislatively enshrined with the passing of the Australian and British *Australia Acts* 1986, providing that

[10] Section 3 *Colonial Laws Validity Act* 1865 (28 & 29 Vict, c 63).
[11] Morris, op cit n.5, p 33. See also Parkinson, op cit n.3, p 144.
[12] South Australia followed with the *Judicature Act* 1878 (SA), then Western Australia in 1880 (*Supreme Court Act* 1880), Victoria in 1883 (*Judicature Act* 1883) and Tasmania in 1903 (*Legal Procedure Act* 1903). New South Wales took longer – implementing fusion in 1970 (*Supreme Court Act* 1970).
[13] (1963) 111 CLR 610 at 632.
[14] (1966) 115 CLR 94. Further see Kercher, *An Unruly Child: A History of Law in Australia*, (Allen & Unwin, Sydney, 1995), p177.
[15] Ibid. As Kercher points out, the Commonwealth Parliament abolished appeals from the High Court to the Privy Council on constitutional and federal law matters in 1968. This was followed by a more far-reaching Act in 1975, which abolished nearly all other appeals from the

> "no Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or Territory as part of the law of the Commonwealth, of the State or of the Territory."[16]

The *Australia Acts* also abolished appeals from Australian jurisdictions to the Judicial Committee of the Privy Council in London. At last, Australia had secured its own true legal independence.

How much of the system which has developed has nevertheless been influenced by international jurisprudence? In particular, to what extent is the *Queensland* legal system predicated on international notions and guided by international precedent, and for how long has "borrowing" of international legal concepts been occurring? And to what extent has Queensland been influential elsewhere?

Much of our system depends on the work of the State's brilliant and perspicacious early jurist, Sir Samuel Griffith, and his most memorable mark rests on the national constitution.

Sir Samuel Griffith and the Constitution

He was foremost an interesting personality. Born in Wales in 1845 and migrating to Australia in 1853, Griffith became Premier of Queensland in 1883, third State Chief Justice in 1893, and in 1903, first Chief Justice of the High Court of Australia – where he remained for 16 years until 1919.[17] Griffith was erudite and versatile, his capacities extending to translating Dante's *La Divinia Commedia* from Italian to English[18] - a true Italophile – and that had some interesting international consequences to which I will return. He was a distinguished and forward-thinking jurist, and a statesman who saw federation

High Court except under s 74 of the Constitution on *inter se* matters. Appeals from State Supreme Courts to the Privy Council were accepted until the passing of the *Australia Acts* in 1986.

[16] Section 1 *Australia Act* 1986 (Cth).

[17] See also Joyce, *Samuel Walker Griffith*, (University of Queensland Press, Queensland, 1984).

as the way to democratic independence for a united Australia. To paraphrase Sir Edmund Barton, for the first time in human history there would be a nation for a continent and a continent for a nation[19].

Along with other influential statesmen, Andrew Clark, Alfred Deakin, Sir Edmund Barton and Charles Kingston, Griffith organised multiple Constitutional Conventions[20] to explore the prospect of federating. At Easter time in 1891, drifting on Refuge Bay in the Hawkesbury aboard the Queensland Government Steam Yacht, *Lucinda*[21], Griffith, together with Kingston, Barton and Clark, produced a draft constitution bill. (There is a replica of the *Lucinda's* "upper deck gentlemen's smoking room", where the drafting occurred, on level 2 (public corridor) of the Supreme Courthouse in Brisbane.) While others assisted Griffith in the drafting of the Bill, as Alfred Deakin later wrote, "as a whole and in every clause (it) bore the stamp of Sir Samuel Griffith's patient and untiring handiwork, his terse, clear style and force of expression."[22] That draft was revived at the 1897-1898 Conferences, ratified by the colonies' Premiers in early 1899,[23] coming into force on 1 January 1901.[24]

[18] Pannam, "Dante and the Chief Justice" (1959) 33 ALJ 290.
[19] Sir Harry Gibbs GCMG, AC, KBE "Dinner Address: The Constitution: 100 Years On" at the Proceedings of the Thirteenth Conference of the Samuel Griffith Society, Melbourne, 31 August – 2 September 2001. See <http://www.samuelgriffith.org.au/papers/html/volume13/v13dinner.htm> (accessed 12 June 2002), p 1.
[20] The first being the National Australasian Convention held from March to April 1891 with further conferences at Corowa (31 July – 1 August 1893), Hobart (29 January 1895) and Bathurst (17-21 November 1896). Another National Australasian Convention was held across 1897-1898 (Adelaide 22 March-23 April 1897; Sydney 2-24 September 1897 and Melbourne 20 January –17 March 1898). See also <http://www.foundingdocs.gov.au/places/cth/cth1.htm> (accessed 13 June 2002).
[21] Quick & Garran, *The Annotated Constitution of the Australian Constitution* (Legal Books, Sydney, 1976) p 130.
[22] Deakin, *The Federal Story: The Inner History of the Federal Cause 1980-1900* (Melbourne University Press, Melbourne, 1944), p 32.
[23] Quick & Garran, op cit n.21, p 218-220.
[24] Ibid, pp 228-252.

In drafting our Australian Constitution, Griffith and his colleagues resorted for inspiration to North American[25] experience.

With Griffith's appointment to the High Court, the draftsman and proponent became the interpreter. One of his basal views of its essence was expressed in the doctrine of intergovernmental immunities, precluding States from interfering with the exercise of the legislative or executive power of the Commonwealth and vice versa.[26] Griffith, and his colleagues Barton and O'Connor, preferred US doctrine, rejecting the Canadian constitutional theory which had developed according to British law.[27] Griffith explained the Court's then approach to US precedent - he expressed reliance on eight United States authorities[28] - to placate detractors who asserted a preference for the Canadian approach:

> "We are not, of course, bound by the decisions of the Supreme Court of the United States. But we all think that it would need some courage for any Judge at the present day to decline to accept the interpretation placed upon the United States Constitution by so great a Judge so long ago as 1819, and followed up to the present by the succession of great jurists who have since adorned the Bench of the Supreme Court at Washington. So far, therefore, as the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance."[29]

(The US Judge of 1819 to whom Griffith referred was Chief Justice John Marshall.)

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[25] Parkinson, "The Early High Court and the Doctrine of the Immunity of Instrumentalities", (2002) 13 Public Law Review 26.
[26] *D'Emden v Pedder* (1904) 1 CLR 91; *Federated Amalgamated Government Railway and Tramway Service Association v NSW Traffic Employees Association* (1906) 4 CLR 488 (the Railway Servants case). See also Deakin op cit n.22, p.31-34.
[27] Deakin, op cit n.22, p 27.
[28] *Powell v Apollo Candle Co.* (1885) 10 App Cas 282; *McCulloch v Maryland* 4 Wheaton 316 (1819); *Bank of Toronto v Lambe* 12 AC 575; *Bank v Mayor* 7 Wallis 16 25; *Osborn v Bank of the United States* 9 Wheaton 738; *Leprohon v Ottawa* 3 Ont AR 522; *Bank v Mayor* 7 Wallis 16 (1868); *Crandall v Nevada* 6 Wallis 35.
[29] *D'Emden v Pedder* (1904) 1 CLR 91.

In those early days of the federation, United States influence on the interpretation of our instrument was strong: as the Australian Constitution was "undistinguishable in substance"[30] from the American one, it should receive "like interpretation"[31], and furthermore, the Court should follow American precedent if "unable otherwise (to) come to a clear conclusion."[32] Later High Courts pulled away somewhat from this approach to constitutional interpretation.[33] Griffith did not feel constrained by the weight of atavistic English law: he preferred instead to select what he, for his part, identified as "premium" sources of jurisprudence from across the common law world, and asserted the authority of the High Court to do that.

In 1904, Griffith censured the Full Court of the Supreme Court of Victoria for following Judicial Committee decisions on the Canadian Constitution rather than a relevant High Court decision on the Australian Constitution[34]. Then, in 1908, in *Bayne v Blake*[35], he implicitly rebuked the Victorian Chief Justice for avowing the High Court could not direct a Supreme Court officer to conduct an inquiry, in the course of a case more broadly significant for progressing of High Court proceedings in the context of an unresolved appeal to the Privy Council. Griffith confronted the Judicial Committee of the Privy Council in 1907, in *Baxter v Commissioner of Taxation,*[36] refusing to follow its decision in *Webb v Outrim*[37]: the High Court alone had jurisdiction over an *inter se* question where no certificate pursuant to s 74 of the Constitution had been granted. In fact in that case, five of the States had asked that a certificate be granted, perhaps a reflection of early State reluctance to accept their relatively new High Court as utterly reliable.

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[30] Ibid at 113.
[31] Ibid.
[32] Ibid.
[33] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (Engineers' Case) (1920) 28 CLR 129.
[34] McHugh J's address "The High Court and the Oxford Companion to the High Court" at the 2002 Constitutional Law and Conference Dinner, New South Wales, 15 February 2002 at <http://www.hcourt.gov.au/speeches/mchughj/mchughj_oxford.htm> (accessed 11 June 2002) p 4.
[35] (1908) 5 CLR 497.
[36] (1907) 4 CLR 1087.
[37] (1907) AC 81; (1907) 4 CLR 356.

It would be wrong to think it was only North-American precedent which influenced Griffith. He was not entirely antithetical to the use of English precedent, and let us not overlook his Welsh origins! Griffith, the Australian, commendably traversed the common law world generally, in his quest for guidance via what he assessed as the "best" sources of international law.

Sir Samuel Griffith and the Queensland Criminal Code

I now mention Griffith's magnificent work on the Criminal Code of Queensland. This provides a very good illustration of our early understandable dependence on the wisdom of others. When he was Chief Justice of Queensland, Griffith accepted a commission from the then Premier, Sir Thomas Mcllwriath, to draft a model criminal code for the State. He completed the mammoth task but five years later in 1898, and the Code came into force on 1 January 1901.[38] Embarking on his task, Griffith noted that:

> "…the written Criminal Law of Queensland…is scattered through nearly two hundred and fifty Statutes, while the unwritten portion of the Criminal Law, which forms a very large part of it, is only to be found in the books of writers on the subject of the Criminal Law of England, or in decisions of courts of criminal jurisdiction."[39]

Hence his mild admonition:

> "it must seem strange to the ordinary mind that in the present stage of civilisation a great branch of the law, by which everyone is bound, and which is understood to be definitely known and settled, should not be reduced to writing in such a form that any intelligent person able to read can ascertain what it is."[40]

And so Griffith was emboldened to codify the criminal law of Queensland – an initiative which would have worldwide impact. While extolling the virtues of codification Bentham style, he did note inherent problems, and

[38] O'Regan QC, "Sir Samuel Griffith's Criminal Code" (1992) 7 Australian Bar Review 141.
[39] In a letter to the Attorney-General dated 29 October 1897 where he forwarded his draft code – *Queensland Parliamentary Papers* CA 89-1897 at IV.
[40] Ibid.

> "remarked that codification is a very different thing from consolidation. The latter is a comparatively easy though laborious work, consisting merely in the collection and orderly arrangement of existing statutory provisions. Codification includes all this, but includes a complete statement of all the principles and rules of law applicable to the subject-matter."[41]

Griffith began by compiling a digest of all statutory offences known to be in force in Queensland,[42] numbering about 1000. As mentioned, he was an Italophile, sharing this with his friend, Sir William Macgregor, who by chance was in possession of the Italian Penal Code, also known as the "Zanardelli Code" of 1888.[43] In 1894, Macgregor, then Administrator of British New Guinea, and later Governor of Queensland, gave Griffith a copy of the Zanardelli Code, together with an Italian dictionary. Griffith made use of that code, in conjunction with the English Draft Bill of 1880 and the code of the State of New York of 1881.[44] The influence of the Zanardelli Code was considerable, if not primary. As put by Griffith:

> "I have derived very great assistance from this Code which is, I believe, considered to be in many respects, the most complete and perfect Penal Code in existence."[45]

The Zanardelli Code was extraordinarily influential: not only for Griffith's Code, but also for the codes of Venezuela, Chile, Argentina and Cuba.[46] It was a "true code," comprising a general part, a series of principles defining criminal responsibility, and the delineation of specific offences and defences.[47] Griffith's first complete draft of 1897 demonstrated with clarity the derivation of

[41] In a paper entitled "Criminal Responsibility: A Chapter from a Criminal Code" which Griffith presented to a meeting of the Australasian Association for the Advancement of Science on 12 January 1898 p 896.
[42] Called *The Digest of the Statutory Criminal Law in Force in Queensland on the First day of January 1896*.
[43] The Hon Justice K A Cullinane's (the Northern Judge) translation of Professor Cadoppi's article "The Zanardelli Code and Codification in the Countries of the Common Law", (2000) 7 James Cook University Law 118 at 134.
[44] O'Regan, op cit n.38 at p 142.
[45] In a letter to the Attorney-General dated 29 October 1897 by which he forwarded his draft code – *Queensland Parliamentary Papers* CA 89-1897 at VII.
[46] The Hon Justice K A Cullinane in his translation of Schulze "The Italian Contribution to European Penal Law in the late 19th Century" - paper presented at the 55th Congress of the History of the Italian Risorgimento at Sorrento in December 1990 p 112.

each of its components. The right hand side of the page presents a column containing the proposed provision, and the left, a column specifying the source of the clause.[48]

For example, Griffith acknowledged his s 23: "…a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident", was based on Art 45 of Zanardelli, which, in Griffith's view, succinctly stated a criminal law proposition "not particular to any locality or any special system of jurisprudence".[49] On this aspect, Griffith adopted Zanardelli word for word. He considered the provisions of many codes in relation to the definition of insanity for determining criminal responsibility:[50] the Dutch, German and Hungarian, the Code of Zurich, the Austrian Draft of 1881, the Russian Draft of 1881, the Code Napoleon, the New York Code and the Zanardelli Code. Once again, he preferred the Zanardellian expression.

In December 1898, the Queensland Government convened a Royal Commission to examine Griffith's draft Code. There was division of opinion on only two matters.[51] The Bill encountered a few problems in its passage through Parliament, but fittingly, at a time when Griffith was acting Governor, the Bill finally passed and received Royal Assent, by Griffith's own hand, on 28 November 1899.[52]

The Griffith Code, perhaps better styled the "Griffith-Zanardelli" Code, became a model adopted, if with adaptation, by many other regimes, some of this migration fostered by the British Colonial Office: Papua, then British New

[47] Cadoppi, op cit n.43 at 137.
[48] See *Draft of a Code of Criminal Law prepared for the Government of Queensland*, Government Printer, Brisbane, 1897.
[49] Griffith, op cit n.41 at 897.
[50] Ibid at 900-901.
[51] The Minutes of Proceedings of the Commission and its Report and Draft Bill were published in 49 *Journals of the Legislative Council* CA 38-1899 at X and XI.
[52] O'Regan, op cit n. 38 at 146-147.

Guinea in 1902, New Guinea in 1921[53], the Solomon Islands, Fiji[54], the Seychelles, Nigeria (apart from Northern Nigeria)[55], Kenya, Uganda, Tanganyika, Nyasaland, Northern Rhodesia, Zanzibar, Gambia and Botswana.[56] Cyprus, Israel and Palestine adopted parts of the Code, with the Italian Professor Cadoppi describing the Penal Code of Palestine as a "nephew of the Griffith Code".[57]

The Griffith Code has served Queensland remarkably well: the satisfaction of the people of Queensland and their governments has been enduring. Following enactment in 1899, it was not comprehensively reviewed for as many as 95 years.[58] Some more years passed before updating to include offences like stalking and torture, thrown up by the vicissitudes of 21st century life.

Some retreat from reliance on English precedent

While Griffith resorted to a deal of broadly international precedent, both in legislation and the common law, he tended in that respect to sit in the minority. Generally, the formulation of most legislative provisions, and the development of the common law, fairly closely followed the English path over the fifty or so years following Griffith's death. There has been discernible divergence over the last two or three decades – hardly surprising, with the crystallisation of Australian identity and the greater alliance between the system of our cousin 24 hours away, and European law. Indirectly flagging a broader international view, the High Court noted in *Cook v Cook*[59] in 1986:

> "The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts

[53] *Criminal Code Ordinance* 1902; *Laws Repeal and Adopting Ordinance* 1921. See also Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (4th ed, Butterworths, Sydney, 1997), p 5.
[54] O'Regan, op cit n.38 at 150.
[55] Cadoppi, op cit n.43 at 180.
[56] Ibid at 182-183.
[57] Ibid at 184.
[58] See O'Regan, Herlihy and P Quinn, *Final Report of the Criminal Code Review Committee to the Attorney-General*, Queensland, (June 1992), p 3.

> just as Australian courts benefit from the learning and reasoning of other great common law courts."

Australian courts will look, have looked, increasingly to common law jurisdictions other than England for comparative law precedent. I will shortly mention a couple of the more recent legislative initiatives reliant on international jurisprudence, but refer first to some words of Sir Anthony Mason a year later than *Cook v Cook*, in 1987:

> "One element of reality is that for the past twenty years at least, our statute law…has been largely original and not derivative. Our Parliaments, instead of following English legislative models, have pursued indigenous solutions adapted to Australian conditions and circumstances, sometimes after taking careful account of American experience."[60]

(a) in the criminal jurisdiction

In the criminal arena, there is increasing resort to United States and Canadian legislation in the formulation of Queensland statutes. On 23 November 1993, Queensland became the first Australian state[61] to create an offence of stalking.[62] The motivation came from community and women's interest groups with the support of the Queensland Police Service.[63] The development of anti-stalking legislation had long been hindered by the difficulty of defining precisely what behaviour should be proscribed.[64]

The earliest noted case of stalking occurred as long ago as 1704 in England: a physician relentlessly pursued a young heiress.[65] Dr Lane was convicted of

[59] (1986) 162 CLR 376 at 390.
[60] "Future Directions in Australian Law", 13 (1987) Monash University Law Review 149 at 149.
[61] Queensland introduced anti-stalking legislation in 1993; New South Wales, the Northern Territory and South Australia in 1994; Tasmania, Victoria and Western Australia in 1995; and the Australian Capital Territory in 1996.
[62] Section 359A *Criminal Code (Queensland).*
[63] Currie "Stalking and Domestic Violence: Views of Queensland Magistrates" paper presented at the *Stalking: Criminal Justice Responses Conference* convened by the Australian Institute of Criminology, Sydney 7-8 December 2000, p 1. See also *Criminal Law Amendment Bill* 1993, Explanatory Notes, p 2.
[64] Ogilvie, "Australian Institute of Criminology Research and Public Policy Series No. 34: Stalking: Legislative, Policing and Prosecution Patterns in Australia", Canberra, 2000 at <http://www.aic.gov.au/publications/rpp/34/ch5.pdf> (accessed 10 June 2002) p 53.
[65] *Dennis v Lane* (1704) 6 Mod 131; 87 ER 887.

assaults committed during his "ardour[66]," and appears– with others – to have forfeited security for recognisances to the tune of £400, then a very considerable sum.[67] The drafters of the Queensland provisions had recourse to North American legislation, being the only available guide at that time. California was, in 1990, the first US state officially to define stalking as a crime,[68] in response to "celebrity stalking" cases. Here in Queensland, the impetus was rather domestic violence.[69] Reciprocal legislation sprang up in other Australian jurisdictions, following the Queensland lead, although the comparable provisions differ in their delineation of the elements of the offence.[70]

The *Police Powers and Responsibilities Act* 2000 (Queensland) followed years of consultation, including the production of a five volume report by the then Criminal Justice Commission, a review by the Parliamentary Criminal Justice Commission, a public discussion paper and a 1997 version of the Act.[71] The 1997 Act was concerned with effecting an extension of police powers: the 2000 Act focused on consolidation of police powers.[72]

Significantly for present purposes, the detailed report leading up to the Commission's review and the 1997 Act, examined the nature and extent of police powers following English, Welsh and Canadian, as well as Australian authorities.[73] The Canadian and English were the predominant international

[66] Including an assault on a barrister who had previously escorted the heiress to London. The physician, Dr Lane, upon seeing the barrister "in his gown, assaulted him, and beat him severely with a cane" : *Dennis v Lane* (1704) 6 Mod 131; 87 ER 887 at 888.
[67] Mullen, Pathé and Purcell, *Stalkers and Their Victims* (Cambridge University Press, Cambridge, 2000), p 251.
[68] Section 649.9 of the Californian Penal Code.
[69] Keenahan and Barlow, "Stalking: A Paradoxical Crime of the Nineties", (1997) 2(4) International Journal of Risk, Security and Crime Prevention 291. See also Queensland Hansard 1993 (9 November) 5373; Queensland Hansard 1993 (9 November) 6070; Queensland Hansard 1993 (9 November) 6074.
[70] Ogilvie op cit n.64 at 71-80.
[71] *Police Powers and Responsibilities Bill* 2000 (Queensland) – Explanatory Notes p.3.
[72] Ibid.
[73] *Report on a Review of Police Powers in Queensland Volume 1: An Overview,* Queensland Criminal Justice Commission Publications, May 1993 pp. 24-38; 49; 65-88.

influences on the drafting of the bill, along with existing Queensland provisions contained in some 90 or so separate statutory instruments.

(b) in civil law

The statutory instrument most frequently consulted in Queensland is probably the *Uniform Civil Procedure Rules* 1999, a comprehensive codification of procedural rules largely applicable uniformly to all three State courts, unique to the State of Queensland. While its genesis was substantially some years' work of a standing committee led by the Hon Justice Williams of the Supreme Court of Queensland, Lord Woolf's civil justice reforms in the United Kingdom were carefully taken into account: although it must be recorded that many of those English developments appear very much to have had a lot to do with anterior Queensland approaches.[74]

For almost a century, civil procedure in our Supreme Court had been governed by the *Rules of the Supreme Court* 1900. Again, Sir Samuel Griffith had been largely responsible for drafting those Rules, based on the post-*Judicature Act* Rules in England.[75]

The Uniform Civil Procedure Rules are, I believe, among the most progressive, readily comprehensible, and comprehensive, sets of procedural rules, applicable to any courts across the entire common law world. And I assert that is not just the self-supportive utterance of a local head of jurisdiction. But I should revert to aspects of the civil law more influenced by others!

The company legislation applicable in Queensland is the Commonwealth *Corporations Act* 2001. While Australia's original companies legislation was based on the English *Companies Act* 1862, the past 15-20 years have witnessed fairly independent Australian development, though with a degree of

[74] A paper delivered by the Hon Justice Williams of the Supreme Court of Queensland at the Fifth Biennial AIJA Conference, Auckland, 26 - 28 April 2000 p1.
[75] Ibid.

United States influence. One commentator suggests "novelties" borrowed from the United States include the *forum non conveniens* rule; clear articulation that appeals from one State court to another are excluded; the provision for uniform procedural rules in the handling of corporations matters; the statutory derivative action; a statutory "business judgment rule";[76] and relaxation of prospectus requirements for small and medium-sized enterprises, incorporating disclosure relief in the case of private offerings and small issue exceptions already available in the United States.[77]

In the corporate arena, one particular example of potential American influence rests in the realm of good faith and unconscionable dealings, particularly with respect to s 51AC of the *Trade Practices Act* 1974 (Cth), which sees "bad faith conduct as a subset of unconscionable conduct."[78] Courts are yet to pass upon any difference between an implied duty of good faith under the general law and the concept of good faith under s 51AC.[79] Should a duty of good faith be implied into contracts to ensure standards of fair dealing? By contrast with United Kingdom law,[80] United States law has recognised a duty of good faith implied into contracts for the sale of goods under the *Uniform Commercial Code*,[81] and the contract law of that jurisdiction resembles Australia's. [82]

The High Court, in February this year[83], noted debate among various Australian jurisdictions[84] as to the existence and content of any implied obligation or duty, though it emerged in argument that both sides accepted its

[76] Von Nessen, "The Americanisation of Australian Corporate Law" (1999) 26 Syracuse Journal of International Law and Commerce 239 at 261, 263.
[77] Ibid at 245.
[78] Heffey, Paterson and Robertson, *Principles of Contract Law* (LBC, New South Wales, 2002), p 262.
[79] See, for example, *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] ATPR 41-703.
[80] Cf. *Renard Constructions Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 265.
[81] Section 1-203.
[82] Heffey et al op cit n. 78 at 261.
[83] *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 (14 February 2002).
[84] The authorities are discussed by Finn J in *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 188-198.

existence (in the exercise by a lessor of a rental determination power). Accordingly, "whilst the issues respecting the existence and scope of a "good faith" doctrine are important"[85], it was inappropriate to deal with them.[86] Whether the law of Australia implies such a duty therefore remains to be determined.

The constraint of consistency with European Conventions has meant Australian reliance on recent United Kingdom case authority has necessarily diminished. *R v Swaffield; Pavic v R*[87], concerned with the admission of covertly recorded admissions in the criminal court, illustrates a High Court apparently deriving optimal assistance from United States and Canadian authority. The United Kingdom now follows a somewhat different path, as illustrated in that area by *R v P.*[88] On the other hand, we have not always recently, in Queensland, found high North American authority necessarily of persuasive assistance: an example is *Bowditch v McEwan & Ors,*[89] where the Court of Appeal declined, with some considerable conviction, to follow a decision of the Supreme Court of Canada. That concerned whether a mother could be liable in negligence to her child, injured during her pregnancy through an accident as she drove her vehicle.

Statistical analysis of the extent of a court's expressed reference in judgments to overseas authority provides a reflection of international influence which is not necessarily a completely reliable indicator, but it is nevertheless of some interest. In the last half-year, an analysis of 20 of 176 judgments in the Queensland Court of Appeal, shows this extent of international reference[90]:

[85] *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 (14 February 2002) at [40].
[86] In similar vein, though with more support for an implied duty of good faith, *Alcatel Australia Limited v Scarcella & Ors* (1998) 44 NSWLR 349.
[87] (1997) 192 CLR 159.
[88] [2001] 2 WLR 463.
[89] [2002] QCA 158.
[90] Current to 19 June 2002.

Case Name	Citation	UK Authorities	US Authorities	Other Authorities
R v Essenberg	[2002] QCA 004	1		
Heavey Lex No 64 Pty Ltd & Anor v Chief Executive, Dept of Transport	[2002] QCA 13	1	1	
Hennessey Glass & Aluminium P/L v Watpac Australia P/L	[2002] QCA 24	1		
Beardmore v. Franklins Management Services P/L	[2002] QCA 060	1 UK Act 3 UK cases	1	
Woolcock Street Investments Pty Ltd v. CDG P/L & Johnson	[2002] QCA 088	1	2	1 Canadian
Mazelow Pty Ltd v. Herberton Shire Council	[2002] QCA 119	2		
Bone v. Mothershaw	[2002] QCA 120	5		1 Hong Kong
Rhyse Holdings Pty Ltd & Ors v. McLaughlins (A Firm) & Anor	[2002] QCA 122	1		
Walz Construction Co P/L v. ASP Ship Management (A Firm) & Ors	[2002] QCA 136	1		
R v. C	[2002] QCA 156	3		
Briant v. Allan & Anor	[2002] QCA 157	1		
Port of Brisbane Corp v. ANZ Securities	[2002] QCA 158	9		
Bowditch v. McEwan & Ors	[2002] QCA 172	2		1 Canadian
Kim & Anor v. Cole & Ors	[2002] QCA 176	4		
Buderim Ginger Ltd v. Booth	[2002] QCA 177	1		
CMC Cairns P/L v. Isicob P/L	[2002] QCA 181	3		
Alford & Ors v. Ebbage & Ors	[2002] QCA 194	6		
Dickson & Anor v. Creevey	[2002] QCA 195	2		
National Australia Bank Ltd v. Troiani & Anor	[2002] QCA 196	1		
R v. Georgiou, Edwards & Heferen	[2002] QCA 206	1		

That equates to overseas reference in approximately 11% of the judgments. In some particular cases, reference can be extensive. *Hancock v Nominal Defendant*[91], decided last year, provides a good example. It was a complex,

[91] [2002] 1 Qd R 578.

psychiatric injury case, where the Court of Appeal upheld the liability of a negligent driver to the parent of the deceased victim of his driving, the parent learning of the death the day following the accident. McMurdo P[92] referred to 4 UK, 3 Canadian, 1 South African and 6 Australian decisions; Davies JA[93] 4 UK, 2 US, 2 Irish, 1 New Zealand, 1 Canadian, 1 South African, 1 Scottish and 17 Australian; Byrne J[94] 60 US, 2 New Zealand, 2 UK, 1 Irish, 1 Canadian and 6 Australian.

As will be apparent from the table, most cases involving resort to international authority are civil or corporate; in the corporate arena, still mainly the United Kingdom[95], but increasingly, the United States of America.

The Supreme Court Library some time ago surveyed the citation of authority in Supreme Court judgments . Of the reported judgments of the Court of Appeal over the calendar years 1997 and 1998, approximately 40% of the authorities cited were from overseas jurisdictions, half from the United Kingdom.

Interestingly, there is substantial reference to persuasive Queensland authority in some recent English cases. In *Cobra Golf Inc v Rata*[96], Rimer J, dealing with an Anton Piller order in the context of contempt proceedings, drew substantially on the analysis of Ambrose J of the Supreme Court of Queensland in *Exagym Pty Ltd v Professional Gymnasium Equipment Co Pty Ltd*[97], and analysis of Byrne J in a further instalment of the same litigation.[98] Then in *Stimpson v Smith*,[99] a guarantee case, the English Court of Appeal

[92] Ibid at [1] – [20].
[93] Ibid at [21] – [99].
[94] Ibid at [100] – [105].
[95] See, for example, Mr Justice Helman's decision in *Re Carrington Cotton Corporation Ltd* BC9902880 No. 11984 of 1998; 2 June 1999 at [15]. That case concerned an application for an injunction to prevent company funds being used to defray legal expenses incurred in an oppression action.
[96] [1998] Ch 109.
[97] [1994] 2 Qd R 6.
[98] [1994] 2 Qd R 129.
[99] [1999] Ch 340.

relied on the reasoning of E S Williams J of the Supreme Court of Queensland in *Moulton v Roberts*.[100]

Sometimes the Queensland influence elsewhere has regrettably not been acknowledged. As McPherson JA of the Queensland Court of Appeal pointed out in the preface to the second edition of his seminal work "The Law of Company Liquidation"[101], that occurred in relation to House of Lords' reliance, in re *Westbourne Galleries Ltd*,[102] on views expressed in the first edition of that work.

(c) treaty based law

It would be incomplete not to record the extent to which some Queensland legislation, unsurprisingly, is enacted in the cradle of international treaties. As examples -

1. The *Criminal Offence Victims Act* 1995 (Queensland), which enshrines the rights of victims of crime, and sets out "fundamental principles" consistent with those adopted by the United Nations General Assembly in November 1985.

2. The *International Transfer of Prisoners Act* 1997 (Queensland) intended to give effect to the scheme for the international transfer of prisoners set out in the *International Transfer of Prisoners Act 1997* (Cth). It does so by

- facilitating the transfer of prisoners between Queensland and various overseas countries, to serve their imprisonment in their home countries, or countries with which they have community ties; and
- facilitating the transfer of prisoners, convicted by international war crimes tribunals, back to Queensland to serve their sentences.

The Commonwealth Act[103] provides a procedural framework for Australian participation in international prisoner transfer agreements. Complementary

[100] [1977] Qd R 135.
[101] (Law Book Company, Sydney, 1979).
[102] ([973] AC 360
[103] The first treaty was signed with Thailand in July 2001.

State and Territory legislation was necessary to render the scheme workable in the respective jurisdictions.[104]

3. *Electronic Transactions (Queensland)Act* 2001

In October 1998 a meeting of the Standing Committee of Attorneys-General agreed in principle to the Commonwealth's proposal for a national uniform legislative regime, and to enact model electronic commerce legislation, based on recommendations in the Report of the Electronic Commerce Expert Group and relevant articles of a United Nations Commission.

The *Electronic Transactions (Queensland) Act* 2001 aims to ensure a transaction is not invalid simply because it took place by means of an electronic form of communication.

Current issues

Two in particular bear mention.

Responses to terrorism

On 5 April 2002, the Commonwealth and the States reached an agreement on terrorism and multi-jurisdictional crime.[105] Clause 3 requires the parties to

> "take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll back provisions to ensure that the new Commonwealth law does not override State law where that is not intended and to come into effect by 31 October 2002."

States are presently working on legislation to refer the relevant power over specific offences to the Commonwealth, and the Commonwealth's package of Bills is being debated in the Senate.

[104] Administrative arrangements are currently being finalised between the Commonwealth and the States to allow for implementation of the international transfer scheme.
[105] See <http://www.dpmc.gov.au/docs/terrorism.cfm> (accessed 12 June 2002).

International Criminal Court

After substantial debate, the Commonwealth recently announced its intention to ratify the 1998 Rome Statute, providing for the establishment of an International Criminal Court.[106] The Court is "intended to be a permanent international criminal tribunal to prosecute those individuals who commit the most serious crimes of concern to the international community of nations,"[107] including genocide, crimes against humanity, war crimes and a proposed "crime of aggression".[108] Australia signed the International Criminal Court Statute on 9 December 1998, one of the first signatories and prime drafters of the text.[109]

Conclusion

In 1987 Sir Anthony Mason suggested that

> "because our legal separation from the United Kingdom was so harmonious and so recent we have no reason to distance ourselves from the continuing evolution of the law in that country. It would be a denial of our legal heritage if we were to do so." [110]

Having said that, however, and acknowledging that the United States, Canadian and New Zealand experiences are instructive, he rested at the point that it is for us to fashion a "common law for Australia…best suited to our conditions and circumstances". That is incontrovertible, and the following decade and a half have witnessed our attempt in that regard.

To what extent is the Queensland legal system predicated on international notions and guided by international precedent, and for how long has this "borrowing" of international legal concepts been occurring? The influence has

[106] Background information on this treaty and other treaties under negotiation may be found at the Commonwealth Parliament web site of the Joint Standing Committee on Treaties: <http://www.aph.gov.au/house/committee/jsct/index.htm>.
[107] Joint Standing Committee on Treaties, "Inquiry into the 1998 Statute of the International Criminal Court", Parliament of the Commonwealth of Australia, May 2002, found at <http://www.aph.gov.au/house/committee/jsct/ICC/ICC.htm> (accessed 10 June 2002) p 1.
[108] Ibid.
[109] Ibid.
[110] Mason, op cit n.60 at 154.

been long-standing, substantial and diverse, originating with the iconic Griffith, a master in drawing usefully upon international jurisprudence, and we remain open to continuing beneficial influence; and led by Griffith's example, I hope jurisdictions elsewhere may, conversely, continue to benefit from the Queensland experience. As interestingly put recently by Mr David Pannick QC, "legal concepts do not stop at passport control".