VIRESNE EX VIRONE VIRENT AN VIRUS? SOME THOUGHTS ON VIRO v. R.

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Viresne ex Virone virent an virus? *That is, is* Viro *v.* R. *a source of power or poison? Briefly the implicit answer must be that both are present, and in potent amounts. The immediate effect of* Viro *was to free the High Court from being bound by Privy Council decisions. However, the case has a deeper significance for Australian nationhood on the one hand, and the doctrine of binding precedent on the other. The Court's acknowledgment of its own "responsibility . . . to determine ultimately what is the law for Australia" is welcome not only as a clear manifesto of Australian nationalism, but also as a manifesto of the Court's present willingness to assume an explicit lawmaking role not concealed by Blackstonian doctrines of precedent. But this access of national and judicial virility may also be virulent: not only for those who lament the fading symbols of Australian dependence on Britain and judicial subservience to supposedly pre-existing "law", but also because of the continuing problems which* Viro *fails to resolve, and to which it may even contribute. One such problem is that of the insoluble logical dilemma left for State courts, now subordinate to two coordinate and potentially competing appellate systems; another is the degree to which the creative responsibility now acknowledged by the High Court for itself is to be accorded (as the author argues that it must be) to State courts as well. The* Waind *case, responding with diligence and sympathy to the High Court's lead in* Viro, *is seen as offering the way to sound solutions of both these problems.*

I THE HIGH COURT AND PRECEDENT: FROM *PIRO* TO *VIRO*

The announcement by the High Court of Australia in *Viro* v. *R.*,[1] that that Court no longer regards itself as bound by any past or future decision of the Judicial Committee of the Privy Council, is part of a rapidly changing fabric of laws and understandings concerning Privy Council appeals. Any commentary responsive to *Viro* must begin by stressing that further developments appear to be imminent.

Viro was decided on 11 April 1978. By the time this comment went to press a little over three months later, additional pieces of the puzzle were already falling into place. First, an indispensable part of the constitutional foundation for *Viro* had been supplied retrospectively by the High Court's further holding, on 15 June 1978, that the Privy

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[1] (1977) 18 A.L.R. 257. See Note (1978) 52 *A.L.J.* 345; Crawford, "The New Structure of Australian Courts" (1978) 6 *Adelaide L. Rev.* 201, 224-230.

Council (Appeals from the High Court) Act 1975 was valid.[2] Secondly, on 21 July 1978, a specially constituted five-judge bench of the New South Wales Court of Appeal had announced,[3] for all judges in New South Wales,[4] four new rules of judicial policy—(1) that as between conflicting decisions of High Court and Privy Council, the decision of the High Court would always be preferred; (2) that, for that reason, leave to appeal from Supreme Court to Privy Council *for the purpose of inviting their Lordships to review a High Court decision* would henceforth never be granted, since any such review would be futile;[5] (3) that, alternatively, no such leave would be granted since the object of the application (namely, to *create* a conflict between High Court and Privy Council) was not one of which it could ever be said that leave "ought" to be granted; and (4) that, in any event, no leave to appeal to the Privy Council would henceforth be granted in *any* case, since (now that the Privy Council no longer ranks *higher than* the High Court) it can never be said of *any* issue that it is one which affirmatively "ought" to be determined by the Privy Council rather than the High Court.[6]

Meanwhile, thirdly, there had been a revival of earlier[7] press reports that Commonwealth and State Attorneys-General were exploring proposals for the legislative abolition of Privy Council appeals direct from the State Supreme Courts in matters of purely State law.[8] And

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[2] *A.-G. (Commonwealth)* v. *T. & G. Mutual Life Society Ltd* (1978) 19 A.L.R. 385.

[3] In *National Employers' Mutual General Association Ltd* v. *Waind* (as yet unreported).

[4] Insofar as the Court's conclusions are laid down as propositions of law, they are obviously binding on all judges in New South Wales. Insofar as they should rather be regarded as rulings of judicial "practice" or "policy" (see discussion at notes 158-164 *infra*), it is clear that pronouncement by the Court of Appeal is an appropriate mechanism by which to achieve such rulings for all judges *of the Supreme Court*. Theoretically, New South Wales courts *other than the Supreme Court* might claim an inherent power to formulate their own rules of precedent. In fact, however, it seems clear either that they have no such inherent power, or that their exercise of it (if any) is subject to specific directives from the Supreme Court.

[5] A Privy Council *affirmation* of the High Court decision would add nothing to what we already knew; a *rejection* of it would be disregarded by virtue of (1) above. Thus, either way, a Privy Council pronouncement could serve no useful purpose.

[6] Some of these rulings are considered further at notes 102-110 and 169-173 *infra*.

[7] *Sydney Morning Herald*, 16 December 1977, 2, 7; 21 December 1977 (editorial), 6.

[8] For present purposes I assume (1) that the above appeals survive; and (2) that all other possibilities of appeal have now been abolished by the conjoint effect of the Privy Council (Limitation of Appeals) Act 1968 (Cth), the Judiciary Act 1968 (Cth), and the Privy Council (Appeals from the High Court) Act 1975 (Cth). Both assumptions are examined more fully in Blackshield, *The Abolition of Privy Council Appeals* (Adelaide Law Review Research Paper No. 1, 1978; forthcoming).

these new reports of possible legislation affecting *all* the States were accompanied by reports that, if necessary, New South Wales was prepared to take its own independent initiatives for abolition of the appeal from its own State Supreme Court.[9] Finally, the pendency of the appeal to the Privy Council in *Calvin* v. *Carr*[10] had presented their Lordships with a possible opportunity of indicating how *they*, in the aftermath of *Viro*, would respond to a conflict between High Court and Privy Council authority.

The affirmative aspects of *Viro* v. *R.* are thus part of a rapidly burgeoning movement towards the disappearance from Australia of *all* Privy Council appeals; its problematic aspects seem likely to fade from practical significance as that movement progresses. For the time being, however, *Viro* remains an absorbing and at times an anguished exposure of problems which reach to the very heart of the doctrine of binding precedent. It is solely with these problems of precedent that the present comment is concerned.

There was a time when the High Court of Australia, in its approach to precedent, appeared to be at least partly in thrall to the then prevailing sentiment of a homogeneity of culture and tradition throughout the British Empire—reinforced (for lawyers) by the mystique of a univocal common law as "a brooding omnipresence in the sky".[11] The result was a working assumption that, normally, even the decisions of English municipal courts should be preferred to indigenous Australian views. The decisive pronouncements of English judges were in *Trimble* v. *Hill*[12] and (at least as to the House of Lords) in *Robins* v. *National Trust Co.*;[13] the high water mark in Australia was the High Court's decision in *Piro* v. *W. Foster & Co. Ltd*,[14] which in 1944 led Zelman Cowen to say that the Court had "formally written the House of Lords into the hierarchy of tribunals whose decisions bind Australian Courts".[15] That, of course, was an exaggeration; even in *Piro* v. *Foster*, the Court

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[9] *Sydney Morning Herald*, 26 June 1978, 2, 21; 28 June 1978, 11; 29 June 1978, 10; 3 July 1978 (editorial), 6; 5 July 1978, 2.

[10] At this time of writing the Privy Council proceedings had been adjourned to 30 October 1978. The appeal is from the decision of Rath J. in *Calvin* v. *Carr* [1977] 2 N.S.W.L.R. 308, and involves a possible conflict between the Privy Council decision in *Annamunthodo* v. *Oilfield Workers' Trade Union* [1961] A.C. 945 and the High Court decision in *Australian Workers' Union* v. *Bowen (No. 2)* (1948) 77 C.L.R. 601.

[11] Holmes J., in *Southern Pacific Co.* v. *Jensen* (1917) 244 U.S. 205, 222, denying such an "omnipresence" for the United States.

[12] (1879) 5 App. Cas. 342, 344-345.

[13] [1927] A.C. 515, 519.

[14] (1943) 68 C.L.R. 313, 320 (Latham C.J.), 325-326 (Rich J.), 326-327 (Starke J.), 335-336 (McTiernan J.), and 340-342 (Williams J.). The only reported instance of a formal *following* of *Piro* v. *Foster* appears to be that in the judgment of Latham C.J. in *Ford* v. *Ford* (1947) 73 C.L.R. 524, 528.

[15] Cowen, "The Binding Effect of English Decisions upon Australian Courts" (1944) 60 *L.Q.R.* 378, 381.

continued to maintain its well settled view[16] that municipal English decisions, including those of the House of Lords, could not strictly be *binding* in Australia. Nevertheless, Sir Owen Dixon's refusal in *Parker* v. *R.*[17] to follow a House of Lords decision which he (and his High Court brethren) thought fundamentally "misconceived and wrong" dramatically ushered in a new era. Since then, the Court has continued to mark out an independent position.[18] Now, in *Viro* v. *R.*, it has taken a giant step towards implementation of W. N. Harrison's plea in 1934 for the development of distinctively Australian rules of precedent "to suit the circumstances existing here".[19] The potential movement was on four main fronts.

II ARE AUSTRALIAN COURTS "BOUND" BY PRIVY COUNCIL DECISIONS GIVEN IN NON-AUSTRALIAN APPEALS?

In *Viro*, the Court was faced with a conflict between its own previous decision in *R.* v. *Howe*,[20] and that of the Privy Council in *Palmer* v. *R.*[21] The initial challenge to the authority of the latter case was on the limited ground that it had come before the Privy Council by way of appeal from Jamaica. The argument was that Privy Council decisions are binding in Australia only when they are rendered on appeal from Australian courts. On this view, Privy Council precedents derive their binding force in Australia from their Lordships' institutional role as constituting *the highest court in the Australian legal system*; so that when they sit as the highest court in some other legal system, their pronouncements (though obviously always persuasive) can have no

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[16] Isaacs J. had rejected the strict "uniformity" ideal as early as *Baxter's* case (1907) 4 C.L.R. 1087, 1152. As to English decisions in Australian courts see *Brown* v. *Holloway* (1909) 10 C.L.R. 89, 102-103; *Webb* v. *Federal Commissioner of Taxation* (1922) 30 C.L.R. 450, 469-470; *Sexton* v. *Horton* (1926) 38 C.L.R. 240, 244, 251; *Waghorn* v. *Waghorn* (1942) 65 C.L.R. 289, 292-293, 297-298; *Wright* v. *Wright* (1948) 77 C.L.R. 191, 202, 210-211, 213-214. And see Brett, "High Court—conflict with decisions of Court of Appeal" (1955) 29 *A.L.J.* 121; St John, "Lords Break from Precedent: An Australian View" (1967) 16 *Int. & Comp. L.Q.* 808, 812-813.

[17] (1963) 111 C.L.R. 610, 632, refusing to follow the House of Lords decision in *D.P.P.* v. *Smith* [1961] A.C. 290.

[18] *E.g.*, in *Skelton* v. *Collins* (1966) 115 C.L.R. 94 (where *Piro* v. *Foster* was extensively reinterpreted); *Uren* v. *John Fairfax & Sons Pty Ltd* (1966) 117 C.L.R. 118; *Mutual Life & Citizens' Assurance Co. Ltd* v. *Evatt* (1968) 122 C.L.R. 556; *Geelong Harbour Trust Commissioners* v. *Gibbs, Bright & Co.* (1970) 122 C.L.R. 504; *Caltex Oil (Aust.) Pty Ltd* v. *The Dredge "Willemstad"* (1976) 11 A.L.R. 227; *Grant* v. *Downs* (1976) 11 A.L.R. 577. In historical perspective it is of course important to see these cases not as a departure from, but rather as a return to, an older High Court tradition: see, *e.g.*, Isaacs J., in *Commonwealth and the Central Wool Committee* v. *Colonial Combing, Spinning & Weaving Co. Ltd* (1922) 31 C.L.R. 421, 438-439.

[19] Harrison, "Precedent in Australia" (1934) 7 *A.L.J.* 405, 406.

[20] (1958) 100 C.L.R. 448.

[21] [1971] A.C. 814.

binding effect. In short, this argument challenged the view of Sir Laurence Street in *Mayer* v. *Coe*[22] and in *Ratcliffe* v. *Watters*[23]

> that, in 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.

Prior to *Mayer* v. *Coe* the precedents had been inconclusive. The clearest decision *contrary* to *Mayer* v. *Coe* was *Negro* v. *Pietro's Bread Co. Ltd*,[24] in which the Ontario Court of Appeal refused to follow the Privy Council's much-criticised decision (on appeal from Australia) in *Victorian Railways Commissioners* v. *Coultas*.[25] It did so on the ground that "the binding effect of the judgment of the Privy Council is limited to the Courts of the Colony from which the appeal is had". But the only formal support there proffered for this "very bold . . . conclusion"[26] was a passage from the judgment of Greer L.J. in *Fanton* v. *Denville*,[27] a decision of the English Court of Appeal; and in context it is clear that that passage did no more than reaffirm the well settled rule that Privy Council decisions are not binding in *English* courts.[28]

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[22] (1968) 88 W.N. (Pt 1) (N.S.W.) 549, 555.

[23] (1969) 89 W.N. (Pt 1) (N.S.W.) 497, 504.

[24] [1933] 1 D.L.R. 490, 495-496. On this and related cases see Joanes, "Stare Decisis in the Supreme Court of Canada" (1958) 36 *Can. Bar Rev.* 175, 186-187. As early as *Toronto Railway Co.* v. *Toms* (1911) 44 S.C.R. 268, 274, there had been a faint hint that the Supreme Court of Canada might "possibly [not] feel itself bound" by the *Coultas* case. In *Will* v. *Bank of Montreal* [1931] 3 D.L.R. 526, Ford J., of the Supreme Court of Alberta, had declined to follow a Privy Council decision in an Australian appeal; but only on the ground that the Privy Council, in *Robins* v. *National Trust Co.* [1927] A.C. 515, 519, had (he thought) directed him to prefer a later inconsistent decision of the House of Lords. *Negro* v. *Pietro's Bread Co.* was followed by similar rejections of the *Coultas* decision in *Purdy* v. *Woznesensky* [1937] 2 W.W.R. 116 (Saskatchewan Court of Appeal), and in *Austin* v. *Mascarin* [1942] 2 D.L.R. 316, 318-319 (Ontario Court of Appeal); but in each of these cases the issue was clouded by apparent adoption of the reasoning in *Will* v. *Bank of Montreal*.

[25] (1888) 13 App. Cas. 222. The *locus classicus* of English criticisms is in *Coyle* v. *J. Watson Ltd* [1915] A.C. 1.

[26] Note 24 *supra*, 496.

[27] [1932] 2 K.B. 309, 332.

[28] See *Leask* v. *Scott* (1877) 2 Q.B.D. 376, 380; *The City of Chester* (1884) 9 P.D. 182, 207; *Dulieu* v. *White* [1901] 2 K.B. 669, 677, 683. Of course, insofar as this rule rests on the fact that the Privy Council is not part of the *English* hierarchy, it might tend to support the broad principle that decisions are binding only in the hierarchy in which they are given. The suggestion that this is in fact the reason for the usual English rule is strengthened by *Combe* v. *Edwards* (1877) 2 P.D. 354, 360, where Privy Council *ecclesiastical* decisions were treated as strictly binding (but see *A.-G. for Ontario* v. *Canada Temperance Federation* [1946] A.C. 193, 206); and also by *The Cayo Bonito* [1903] P. 203, 215-216, 219-220, where Privy Council *admiralty* decisions (given at a time when the Privy Council was the highest appellate court in the English admiralty jurisdiction)

The strongest *support* for *Mayer* v. *Coe* was an inferential analogy from the Privy Council's own holding that when it applies Mohammedan law, its pronouncements are binding in all jurisdictions retaining the Privy Council appeal where Mohammedan law applies.[29] But, doctrinally, that pronouncement was explicitly based on the theological postulate of universality of the Koran; functionally, it reflected the practical exigencies of a situation in which a Committee composed predominantly of English judges is called upon to develop a set of authoritative precedents for an alien jurisprudence. The Privy Council's work in relation to common law jurisdictions is simply not comparable.

Finally, in *Morris* v. *English, Scottish & Australian Bank Ltd*,[30] the High Court of Australia had treated the construction of New South Wales tenancy legislation as governed by the Privy Council's construction[31] of corresponding legislation in New Zealand. The case was a piquant one because it was clear that the Privy Council's view depended on a misapplication of an earlier dictum of Williams J. in the High Court.[32] Nevertheless Williams J. held in a single sentence that the Privy Council's interpretation "is of course binding upon us".[33] The rest of the Court, despite their "respectful doubt" of the Privy Council's position, also disposed of the matter in a single sentence: "But their Lordships' authority is supreme on such a matter and it remains only for this Court to comply with their pronouncement."[34]

Such automatic submission to higher authority, unexamined and unsupported by reasons, can hardly give the result much satisfactory basis as precedent.[35] It seems clear from their Honours' eloquent silence that they must have been acting upon what has now emerged in *Viro*[36] as the "sanction" theory of precedent: that, as a pragmatic or prudential matter, a subordinate court *must* submit to the views of a higher appellate tribunal if it is clear that, on appeal, that tribunal will reassert those views. This, of course, is hardly an adequate approach to the *theory* of precedent, except perhaps in the narrowest Austinian

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were tentatively treated as probably also strictly binding. On the other hand, in *Gore-Booth* v. *Bishop of Manchester* [1902] 2 K.B. 412, 420, the rule is said to derive from the fact that the Privy Council is not strictly bound by its *own* decisions.

[29] *Fatuma Binti Mohamed Bin Salim Bakhshuwen* v. *Mohamed Bin Salim Bakhshuwen* [1952] A.C. 1, 14. *Semble*, no similarly explicit rule was ever adopted with regard to appeals on Roman-Dutch law.

[30] (1957) 97 C.L.R. 624.

[31] In *McKenna* v. *Porter Motors Ltd* [1956] A.C. 688.

[32] In *Burling* v. *Chas. Steele & Co. Pty Ltd* (1948) 76 C.L.R. 485, 490-491.

[33] Note 30 *supra*, 632.

[34] *Id.*, 630.

[35] I assume for this purpose that the rules of precedent *can* be the subject of precedent. But see the discussion accompanying notes 158-164 *infra*.

[36] Especially *per* Barwick C.J. at 260; see discussion at notes 78-79 and 134 *infra*.

theory of jurisprudence. Its pragmatic appeal rests not on theory but on acceptance of "facts of life": that is, on political and predictive appraisal of probable appellate reactions in a hierarchical system.[37] But, even if this predictive approach to appellate reactions could be adequately grounded in theory, and even if it could be frankly acknowledged without judicial discomfort,[38] no prediction that the Privy Council will transpose its rulings uniformly from one jurisdiction to another can nowadays safely be made.[39]

The truth is that the "facts of life" which doctrines of precedent must reflect, are not in 1978 what they were in 1958 (when *Morris* v. *E., S. & A. Bank* was reported), nor even what they were in 1968 (when *Mayer* v. *Coe* was decided). The changes go not merely to the predictive probabilities on which a "sanction" theory must rest, but to the functions and responsibilities of the Privy Council itself, in a changing hierarchical setting. I shall later argue that it is from such hierarchical functions and responsibilities that any viable doctrine of precedent must be educed. What are they, for the Privy Council, in 1978?

In 1901, when appeals to the Privy Council were retained for what was then "the Australian colony within the Empire",[40] it was possible (though even then with ambivalence) to regard the Judicial Committee as a distinctively imperial court, sitting technically *outside* the Australian or any other colonial legal system, and reviewing each system's decisional output from the viewpoint of imperial interests—amongst which was an interest in the uniform development and preservation of British legal traditions. Indeed, in this colonial setting, it remained significant to insist that the appeal was not to a court at all, but rather (in the terminology long used in India) to the King-Emperor, to whom the Judicial Committee rendered merely advisory aid. The appeal was thus bound up with the metaphysical (or at least supranational) symbolism of the indivisible imperial Crown. In 1926 this metaphysic was still in full flower:

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[37] In a similar pragmatic and predictive spirit, it used to be said that Dominion courts were effectively "bound" by the House of Lords, since that House was "the *alter ego*" of the Privy Council, and its pronouncements were thus indicia of what the Privy Council would do. The *alter ego* notion apparently derives from Brett, note 16 *supra*, 122. Yet even in its most deferential phase, the High Court never adopted such a doctrine; see the cases cited in note 16 *supra*. See also Wright, "Precedents" (1943) 8 *Camb. L.J.* 118, 135.

[38] *Cf.* Harrison, note 19 *supra*, 409.

[39] Since diversity in Dominion legal development is nowadays fully acknowledged by the Privy Council itself. See *Australian Consolidated Press Ltd* v. *Uren* [1969] 1 A.C. 590, 641-644; *Geelong Harbor Trust Commissioners* v. *Gibbs Bright & Co.* [1974] A.C. 810, 819-821; *Abbott* v. *R.* [1977] A.C. 755, 768. *Viro* is fully attentive to, and generally seeks to build upon, these changes in Privy Council attitudes: see the text at notes 90-91 and 93-94 *infra*.

[40] As Barwick C.J. put it in another context in *N.S.W.* v. *Commonwealth* (1975) 8 A.L.R. 1, 16.

> The Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the law. He may as well sit in Dublin, or at Ottawa, or in South Africa, or in Australia, or in India as he may sit here, and it is only for convenience, and because we have a Court, and because the members of the Privy Council are conveniently here that we do sit here. . . . We sit as an Imperial Court which represents the Empire, and not any particular part of it.[41]

Even then, of course, in hearing an appeal from any country, their Lordships were "bound to take notice of what the law is in that country, . . . and decide it as well as [they] can".[42] But at least on matters of general principle, and fundamental legal conceptions, the ideal of uniformity throughout the Empire was a central part of the symbolic meaning of the Privy Council appeal. As to the hierarchy of judicial institutions, the Privy Council itself was the bond which might be regarded (as long as one did not examine the weld too closely) as welding the Empire's judicial structures in a single hierarchy.

Today the old metaphysical notions are gone—though not without historical paradox, as *Ibralebbe* v. *R.*[43] made clear. There it was argued that the Ceylon Independence Act 1947 (Imp) had had the effect of extinguishing any Ceylonese right of Privy Council appeal, since "the continuance of such a right is necessarily inconsistent with the status of Ceylon as an independent political body".[44] *If* the Judicial Committee's proceedings had remained in substance as well as in form a matter of advice to the sovereign (the effective appeal being then merely a non-judicial procedural avenue for invoking prerogative power), and *if* the resulting joint intervention of Crown and Judicial Committee in the litigious affairs of independent Ceylon had been an exercise of imperial as distinct from Ceylonese functions, then the challenge to any continued appeal as inconsistent with Ceylonese independence would have had substance. Accordingly, in order to reject the challenge their Lordships had necessarily to reject both the above hypotheses.

On the first point, they were able to marshal authority going back to A. V. Dicey's prize essay of 1860[45] to show that, ever since the establishment by the Judicial Committee Act 1833 of a separate Judicial Committee, that Committee had been "in substance an independent court of law", exercising a jurisdiction still founded on the

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[41] *Hull* v. *McKenna* [1926] Ir. Rep. 402, 404.

[42] *Sumboochunder Chowdry* v. *Naraini Dibeh* (1835) 3 Knapp 55, 12 E.R. 568, 570. And see note 99 *infra.*

[43] [1964] A.C. 900.

[44] *Id.*, 912.

[45] Published as Dicey, *The Privy Council* (1887).

prerogative, but exercising it in a true judicial capacity.[46] On the second point, their Lordships relied on the combined effect of the imperial and Ceylonese laws regulating the Privy Council appeal to hold that

> Between them, these various legislative provisions establish that the Privy Council appeal is part of the judicial system of Ceylon, a part of the structure of original and appellate courts by which legal decisions, judgments, decrees and orders are passed and recorded. . . . If and when a territory having constitutional power to do so, as Ceylon now has, decides to abrogate the appeal to the Judicial Committee from its own local courts, what it does is to effect an amendment of its own judicial structure.[47]

It was thus *because* the Privy Council appeal no longer reflected any overriding imperial interest, but was merely a "part of the judicial system of Ceylon", that their Lordships were able to hold that the grant of Ceylonese independence had not detracted from the right of appeal.

We need not seek to identify precisely the point of time at which the old supranational role of the Privy Council fell away. Perhaps the process was a part of the transition from British Empire to British Commonwealth of Nations. Perhaps it occurred even later, as a by-product of the fragmentation since 1953 in the indivisibility of the Crown,[48] or in that of the Privy Council itself.[49] Certainly, by the time the *Ibralebbe* case was decided, the appeal had become, for each Commonwealth jurisdiction which retained it, a part of the judicial

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[46] [1964] A.C. 913, 918-921.

[47] *Id.*, 921-922.

[48] De Smith, *Constitutional and Administrative Law* (3 ed. 1977) 98-99, 109, argues that with the introduction by the Royal Titles Act 1953 of separate titles for separate dominions, and the desuetude since that time of the relevant convention recited in the preamble to the Statute of Westminster (that for new royal titles the assent of Dominion Parliaments was required), the Crown can no longer be regarded as one and indivisible. If this is correct, then analytically the change in the Privy Council's status might best be seen as a corollary of these developments.

[49] Through diversification of the formal theories by which the Privy Council appeal is reconciled with the modern Commonwealth's motley political structures. In Malaysia, which has its own Head of State, the Privy Council's "advice" is tendered not to Her Majesty, but to that Head of State, the Yang Dipertuan Agung. See Federation of Malaya (Appeals to Privy Council) Order in Council 1958, S.I. 1958 No. 426; Malaysia (Appeals to Privy Council) Order in Council 1963, S.I. 1963 No. 2086 (amended by S.I. 1969 No. 369). For republics within the Commonwealth, the appeal is not to "Her Majesty in Council" *but to "the Judicial Committee"*, which sits as a fully conventional court and not even technically as an advisory body. See Republic of Singapore (Appeals to Judicial Committee) Order 1966, S.I. 1966 No. 1182 (amended by S.I. 1969 No. 370); The Gambia (Appeals to Judicial Committee) Order 1970, S.I. 1970 No. 1114; Trinidad and Tobago Appeals to Judicial Committee Order 1976, S.I. 1976 No. 1915. No metaphysic of unity could conceivably survive such a startling proliferation of roles. And *cf.* Rath J., in *Calvin* v. *Carr* [1977] 2 N.S.W.L.R. 308, 342.

system of that jurisdiction. Whatever the position in the past,[50] it is now clear that the binding authority of any Privy Council decision must rest on the Privy Council's position as the highest court in the legal system within which the decision is rendered. For all other legal systems, even those which themselves retain a Privy Council appeal, its authority must be merely persuasive. Even if the rule of precedent formulated in *Mayer* v. *Coe* had at one time been correct, its enouncement in 1968 was (or at best was rapidly becoming) anachronistic. No such rule ought now to be followed.

It is therefore regrettable, for several reasons, that their Honours did not pay more attention to this aspect of *Viro* v. *R.* First, though it is undoubtedly true that the whole issue is now outmoded and irrelevant *for the High Court*,[51] it is equally true that the issue may still be a live one for the States. State courts must still be strictly bound by *some* Privy Council decisions; and that constraint (as we shall see) may give rise to quite intractable problems. It would therapeutically ease this constraint to adopt the rule which in any event is now analytically correct: that the only Privy Council decisions strictly binding in Australia are those which were given in Australian appeals.[52]

Secondly, insofar as the judgments in *Viro* did decide this question, they tended to give the wrong answer, by reaffirming *Mayer* v. *Coe*.[53]

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[50] Parsons, "English Precedents in Australian Courts" (1949) 1 *U.W.A. Ann. L. Rev.* 211, argues in effect that the true rule was always that in *Negro* v. *Pietro's Bread Co.*

[51] Since the Court is no longer strictly bound by *any* Privy Council decisions, it no longer matters whether or not it was formerly bound by *some* of them. Most of the judges in *Viro* appeared to assume this point; it was stated expressly by Barwick C.J., 260.

[52] Indeed, to confine the binding force of decisions to the hierarchy in which they are given would mean (if taken literally) that courts in any Australian State are bound *only in appeals from that State. Cf. A.-G. of British Columbia* v. *Col* [1934] 3 D.L.R. 488, 491 (*per* Martin J.A.). On this view, the binding force attached to Privy Council decisions would dwindle almost to vanishing point. Hitherto, the fact that appeals from Australian States to the Privy Council were sometimes channelled through the High Court, might perhaps have sufficed to weld State jurisdictions into a single hierarchy for precedent purposes. But that channelling or welding is gone.

[53] Judges in New South Wales appear to be moving away from *Mayer* v. *Coe* in any event; and the dicta in *Viro* leave them free to do so. See, *e.g.*, Rath J., in *Calvin* v. *Carr* [1977] 2 N.S.W.L.R. 308, 342, expressing no final opinion on the view here proposed but finding it "not without its attractiveness". And *cf.* Moffitt P., in *National Employers' Mutual General Association* v. *Waind* (see note 3 *supra*). As for the relevant dicta in *Viro*, Gibbs J., 281, acknowledged the force of contemporary common law diversity (see note 39 *supra*); but treated this as "exceptional" and reaffirmed *Mayer* v. *Coe*. Jacobs J., 306, did not "accept as significant that the appeal was from Jamaica and not from an Australian court". On the other hand Murphy J., 318-319, thought that an *earlier or later* conflicting High Court decision should be preferred to "a Privy Council decision on appeal from outside Australia"; and that "Australian courts will inevitably pay less regard to past Privy Council decisions on appeals from elsewhere". And Mason J., 295, while apparently *accepting* the rule "that a Privy Council decision . . . is binding on all courts from which an appeal lies directly or indirectly to the Privy Council",

Thirdly, as to Privy Council decisions rendered at any time after 8 July 1975, a rejection of *Mayer* v. *Coe* would have reinforced the main holding in *Viro*. For any such decisions must necessarily belong to a hierarchy of which the High Court is not now a part.[54]

Indeed, even as to past Privy Council decisions, the true explanation of *Viro* may be that those decisions were made in a hierarchy of which the High Court is no longer a part. In other words, the application of the principle that decisions are binding only within the system to which they belong, may have to be predicated on temporal, as well as territorial and jurisdictional, boundaries between legal systems.

III IS THE HIGH COURT BOUND BY PRIVY COUNCIL DECISIONS?

To this, the major question in *Viro*, the answer was firm and unanimous.[55] The High Court can never again be *bound* by any Privy Council decision, whether of past or future. In matters of federal jurisdiction (and of State appellate jurisdiction insofar as an appeal formerly lay *from the High Court*), no *future* Privy Council decision can indeed occur. Any that did occur would be pronounced without jurisdiction, and might therefore be consigned to the same legal dustbin as *Webb* v. *Outtrim*.[56] In State appellate matters there may be *future* Privy Council decisions; but the High Court will approach these with the courtesy due to a coordinate court, not with the subservience due to a superior court.[57] *Past* Privy Council decisions are not simply swept aside; they retain the status they formerly had as authoritative pronouncements of the highest court in our precedent system. They thus

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thought also that contemporary diversity "entails that 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". The leeways in this formulation would leave a State court free, in practice, to decide the matter either way. Moreover, even for Jacobs J., the significant word is "significant", which may invite similar leeways. On a strict reading there was, of course, a similar equivocation in *Mayer* v. *Coe* itself, which applied only to non-Australian decisions whose "principles or lines of reasoning" were "directly applicable" in Australia. See the quotation at notes 22-23 *supra*. In any event, the treatment of the matter in *Viro* is quite inconclusive: even if Mason and Jacobs JJ., are counted with Gibbs J., as affirming *Mayer* v. *Coe*, there is still no majority view either way.

[54] *Cf.* Joanes, note 24 *supra*, 189.

[55] Barwick C.J., 260; Gibbs J., 282; Stephen J., 289-290; Mason J., 294-295; Jacobs J., 306; Murphy J., 318; Aickin J., 326.

[56] [1907] A.C. 81, in which for the first and last time the Privy Council purported to speak on an *inter se* matter under s. 74 of the Constitution.

[57] Thus Gibbs J., 282, spoke of "two final courts of appeal, neither of which is subordinate to the other"; and Stephen J., 290, of "the co-existence of two . . . courts of ultimate recourse, neither necessarily deferring to the other", and of "two coordinate appellate courts". And see Jacobs J., 306 ("two co-ordinate tribunals").

remain binding unless overruled, and only the highest court in the system has power to overrule them. But that court is now the High Court.

The exact mechanics of this role transference remain rather obscure. Is it a matter of the High Court taking the place of the Privy Council, of High Court judges stepping into Privy Councillors' shoes? In that event High Court judges are heirs not only to a body of precedents, but to *the same power of departure therefrom as the Privy Council had.*[58] Or is it a matter of the corpus of Privy Council precedents being assimilated to the precedents of the High Court itself, which must therefore (as the highest court in the system) extend to *all* the precedents for which it is thus now responsible *the same power of departure therefrom as has hitherto been applicable to prior decisions of the High Court?*[59] In short, are the relevant rules of precedent now to be the Privy Council rules, or the High Court rules?

In practice little turns on the question, since on either footing the result is the same: the High Court *can* now overrule a Privy Council decision, but will normally be reluctant to do so.[60] For what it is worth, the South African precedents appear to point to the former answer: that a court freed from Privy Council appeals inherits *the Privy Council's* power of overruling decisions. In *John Bell & Co.* v. *Esselen,*[61] Centlivres C.J. asserted:

> As this Court is now the final Court in respect of appeals from courts in the Union, it must naturally have the power, which the Privy Council had and which it does not now have in respect of these appeals of departing from an erroneous decision of the Privy Council.

And in *Fellner* v. *Minister of the Interior*[62] he repeated:

> At one time the Privy Council was our final court. It was not bound by its own decisions. . . . And now, the appellate Division being the final Court of Appeal in respect of appeals from Courts

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[58] The Privy Council rule as to self-overruling is most fully stated in *Ridsdale* v. *Clifton* [1877] 2 P.D. 276, 305-307; and most recently in *Baker* v. *R.* [1975] A.C. 774, 787-788.

[59] The High Court rule as to self-overruling was first stated by Isaacs J., in *Australian Agricultural Co.* v. *Federated Engine-Drivers & Firemen's Association of Australasia* (1913) 17 C.L.R. 261, 274-279; and perhaps most authoritatively in *A.-G. for N.S.W.* v. *Perpetual Trustee Co. (Ltd)* (1952) 85 C.L.R. 237. For a recent discussion see *Queensland* v. *Commonwealth ("The Second Territorial Senators' Case")* (1977) 16 A.L.R. 487, where the earlier cases are fully collected by Aickin J., 514-523. And see Prott, "When Will a Superior Court Overrule its Own Decision?" (1978) 52 *A.L.J.* 304, 310-314.

[60] It would be particularly fruitless to try to distinguish between the two powers since the seminal statement of Isaacs J., in the *Engine-Drivers' Case* (1913) 17 C.L.R. 261, 275-277, was explicitly directed to claiming for the High Court *the same* power of self-overruling as the Privy Council had.

[61] [1954] 1 S.A.L.R. 147, 154.

[62] [1954] 4 S.A.L.R. 523, 530. See on these cases Joanes, note 24 *supra,* 191-193.

> in the Union, has the power which the Privy Council had, of departing from an erroneous decision of the Privy Council.

In Canada, the only explicit[63] judicial pronouncement on the matter is to the same effect. In *Reference re Farm Products Marketing Act*,[64] Rand J. maintained:

> The powers of this court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee has modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92, and in its general interpretive formulations, and that incident of judicial power must, now, in the same manner, and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us.

Extrajudicially, however, the present Chief Justice of Canada, Bora Laskin, has dismissed this approach as "quite artificial because it ignores the substantial reason" for the Privy Council's freedom to depart from its own decisions.[65] This ground of rejection is unconvincing because "the substantial reason" for the Privy Council rule is notoriously obscure;[66] but rejection of *any* solution through role-transference as "quite artificial" is considerably more attractive. This applies even to the view of Laskin C.J., that the Supreme Court of Canada (and now the High Court of Australia) should treat past Privy Council decisions

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[63] But see also Rinfret C.J. (dissenting), in *In re Storgoff* [1945] S.C.R. 526.

[64] [1957] S.C.R. 198, 212. Although the explicit reference is to decisions under the British North America Act 1867, it seems clear that the reasoning is not limited to these decisions. See Joanes, note 24 *supra*, 176-177.

[65] Laskin, "The Supreme Court of Canada" (1951) 29 *Can. Bar Rev.* 1038, 1073.

[66] Laskin, in a footnote at 1073, appeared to assume that the reason lay in their Lordships' advisory function. But, as he himself there pointed out, this reason can no longer be valid. Wright, note 37 *supra*, 134-135 relies on the "advisory" rationale and also on the exclusion (before 1966) of dissents, presumably because the unanimity of what *may* be only a bare majority view gives no opportunity to assess the "weight" of the resulting precedent. Allen, *Law in the Making* (7 ed. 1964) 252 argues that the "advisory" power includes a power to hear referrals, which may operate in effect as a procedure for rehearing—so that, at least until the Order in Council is made, a Privy Council "decision" lacks the finality of judgments in an ordinary court. (Indeed, "finality" is lacking even after the Order in Council. See *Venkata Narasimha Appa Row* v. *Court of Wards* (1886) 11 App. Cas. 660; *Re Transferred Civil Servants (Ireland) Compensation* [1929] A.C. 242; *Rai Jatindra Nath Chowdhury* v. *Uday Kumar Das* (1931) 47 T.L.R. 274.) Yet surely all this affects *res judicata* as distinct from *stare decisis*. Finally, Isaacs J., in the *Engine-Drivers'* case (1913) 17 C.L.R. 261, 275, relied on the inapplicability to the Privy Council of the special "constitutional" reason for the House of Lords (before 1966) being bound by its own decisions—"namely, that House of Lords decisions are in the nature of acts of legislation". This last rationale at least has the advantage of treating a power of self-overruling as the norm, rather than the exception. It is somewhat weakened, however, by Viscount Dilhorne's use in *Davis* v. *Johnson* [1978] 2 W.L.R. 553, 570, of precisely the above "constitutional" reason as the reason why the House of Lords is *not* bound by its own decisions.

as if they were its own.[67] For this is merely the alternative role-transference already suggested: that the High Court should extend to the corpus of precedents newly entrusted to it, its own previously established rules in relation to overruling. Instead of working by more or less maladroit inference from a system of roles and hierarchies that no longer exists, it seems better to try to tease out the appropriate rules of precedent from the roles and hierarchies presently constituted.

The joint judgment delivered by Griffith C.J. in *Baxter's Case*, setting out to explain why *Webb* v. *Outtrim* did not bind the High Court, conceded that this would involve a departure from the usual rule:

> No one disputes that in ordinary cases this Court is bound by the decisions of the Privy Council, for the very obvious reason that, if it declined to follow them, the decision of this Court would be reversed on appeal, so that such a refusal would be both futile and mischievous. Apart from this reason, it is a recognized working rule, necessary for establishing consistency and uniformity in the law, that Courts whose decisions are subject to appeal shall follow the decisions of Courts of final appeal.[68]

In two sentences, this passage neatly encapsuled the two main approaches to the elucidation of precedent doctrines. The first sentence appealed to the "sanction" theory; the second, invoking the need for "consistency and uniformity", assumed that these are the purposive goals to which a hierarchical system of courts is dedicated, and which must therefore generate the working rules of the system. The underlying theory approximates that of the institutionalist movement in continental legal philosophy. An "institution", wrote the founder of the movement, Maurice Hauriou,

> is the idea of an activity or an enterprise which realizes itself in the social milieu. A power organizes itself for the realization of this idea, and it provides the idea with organs. Manifestations of a communion are produced among the members of the social group interested in the realization of the idea; and these manifestations are directed by the organs and ruled by procedures.[69]

An "institution" in this sense is itself a legal order: it generates its own regulative norms through the functional adaptation of "organs" and "members" and "procedures" to its purposively driving "idea". A hierarchy of courts is an "institution" in just this sense, assigning

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[67] Laskin, note 65 *supra*, 1075. I had myself formerly endorsed this view: see Blackshield, "Judges and the Court System", in Evans (ed), *Labor and the Constitution 1972-1975* (1977) 105, 108. In *Viro* it is adopted by Murphy J., 318.

[68] (1907) 4 C.L.R. 1087, 1102.

[69] Hauriou, *"La Théorie de l'Institution et de la Fondation"*, printed in (1925) *Cahiers de la Nouvelle Journée*, No. 4 (*"La Cité Moderne et les Transformations du Droit"*); reprinted (and here cited) in (1933) *Cahiers de la Nouvelle Journée*, No. 23 (*"Aux Sources du Droit: Le Pouvoir, l'Ordre et la Liberté"*) 89-128, at 96. See also Romano, *L'Ordinamento Giuridico* (2 ed. 1946); Stone, *Social Dimensions of Law and Justice* (1966) 516-545.

judges to specialized roles within an overall framework of collaborative striving for a common purpose. That purpose is the authoritative determination and application of "law"; and the rules of precedent are among the institutional norms inherent in collaborative pursuit of that purpose. To articulate the rules of precedent appropriate to any one court, it is necessary to reflect on the role and responsibility of that court in relation to the underlying institutional purpose, and to the rest of the hierarchy.

It was Gibbs J. who, in *Viro*,[70] came closest to making this explicit:

> Although the rules of precedent are not immutable, it seems to me that when the Parliament made this Court an ultimate court of appeal, with the responsibility of deciding finally and conclusively every question that it is called upon to consider, it must have intended[71] that we should discharge that responsibility for ourselves, and that we should have the power and the duty to determine whether the decision of any other court, however eminent, should be followed in Australia. . . . It is for this Court to assess the needs of Australian society and to expound and develop the law for Australia in the light of that assessment. It would be an impediment to the proper performance of that duty, and inconsistent with the Court's new function, if we were bound to defer [to] . . . the Privy Council.

Mason J. expressly agreed with this reasoning, though adding his own comments on "the responsibility of this Court to determine ultimately what is the law for Australia", and adding also

> that as this Court has never regarded itself as bound by its previous decisions it would be quite incongruous that it should be bound by decisions of the Privy Council now that this Court's decisions are final and are not subject to appeal to the Privy Council.[72]

Stephen J. at first merged inference from "the first duty of a court . . . to administer justice according to law",[73] with appeal to the "sanction" theory. But in the end his position was based unequivocally on the High Court's "assumption of the role of a final court of appeal and with it of the responsibility which that involves ultimately to determine for itself the true state of the law".[74] Aickin J., too, stressed the

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[70] (1978) 18 A.L.R. 257, 282.

[71] His Honour thus glossed over in a throwaway line the simplest solution of all to the problem of *why* the High Court should no longer be bound by Privy Council decisions: namely, that Parliament, in enacting the 1968 and 1975 Acts, *intended* that this should be the result. On this assumption, *Viro* does no more than to discover and give effect to the legislative intention. Barwick C.J., 261, also refers to this result as one which "the federal statute . . . was . . . intended to effect". And see Joanes, note 24 *supra*, 197.

[72] (1978) 18 A.L.R. 257, 294.

[73] *Id.*, 289.

[74] *Id.*, 289, 290. At 292 he returned to the "sanction" theory to reinforce his contention that, in the State Supreme Courts, the doctrine of precedent has now broken down. See the text at notes 151-156 *infra*.

functional needs of the Court's new place in the hierarchy of courts;[75] and even Murphy J. cryptically endorsed "[a]n orderly approach to precedents".[76] By contrast, Jacobs J. emphasised the disorderliness of the present position, basing the High Court's new freedom on the kind of anarchic breakdown in "an orderly approach to precedent" which Stephen and Aickin JJ. were to postulate as to *State* courts:

> The law of precedent depends upon the existence of a hierarchy of courts and now there is no longer a hierarchy. Therefore the strict law on precedent cannot be applied.[77]

Only the Chief Justice, Sir Garfield Barwick, based the new power of departure from Privy Council decisions solely on the disappearance of "sanctions".[78]

The "institutional" theory seems preferable to the "sanction" theory. The latter has obvious practical force as pointing *negatively* to the removal of the former inhibition on High Court departures from Privy Council decisions; but to treat this alone as a *positive* reason for saying that the Court *should* now so depart would impart an air of almost larrikin irresponsibility. By contrast, it is precisely on the Court's *responsibility* that the majority view depends. And this emphasis on "responsibility" is in satisfying accord with the reasons given for the Court's refusal to be bound by *Webb* v. *Outtrim* seventy years ago.[79]

If the Court's "responsibility . . . to determine ultimately what is the law for Australia" is the key to the conclusion that Privy Council decisions are no longer binding, it is also the key to the practical tasks which follow from this conclusion. *Viro* itself was a good example. The immediate conflict was between *R.* v. *Howe* and *Palmer* v. *R.*, and the obvious temptation was to say that, with *Palmer* no longer binding, the Court's task was *to choose between the two.* Indeed, in two separate passages (though perhaps through ellipsis or inadvertence), Stephen J. expressed the Court's task in just this way.[80] But Sir Garfield Barwick, in a clarification of seminal importance, rejected this approach. The matter "ought not to be resolved by deciding whether [to follow] . . . *Howe's* case or *Palmer's* case"; rather "the occasion should be used . . . by this court to clarify the common law in Australia".[81]

In like manner Gibbs J., though initially speaking in terms of a two-way choice, went on to emphasise that

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[75] (1978) 18 A.L.R. 257, 325.

[76] *Id.*, 318.

[77] *Id.*, 306.

[78] *Id.*, 260; see the text at note 36 *supra.*

[79] *Baxter* v. *Commissioners of Taxation (N.S.W.)* (1907) 4 C.L.R. 1087, 1103, 1114-1115, esp. 1117-1118 (Griffith C.J., Barton and O'Connor JJ.), 1152-1154 (Isaacs J.).

[80] (1978) 18 A.L.R. 257, 289, 292.

[81] *Id.*, 261.

> This question cannot be decided simply by reference to authority. . . . Now that we have to reconsider the matter, in the light of the decision of the Privy Council, it is apparent that the question is not whether the law stated in *R.* v. *Howe* is supported by earlier authority, but whether it is sound in principle and likely to be beneficial in its operation.[82]

So, too, Mason J. thought that the question was one of the "proper" direction to be given to a jury, "this question requiring a consideration of the conflicting views" in *Howe* and *Palmer*. "As the Court is not bound to follow either *R.* v. *Howe* or *Palmer* v. *R.* the conflict between the two decisions calls for a re-examination of the question".[83] And Jacobs J. thought that the Court was "bound to reach the conclusion which it believes correctly to represent the law", and could not "seek comfort in simply conforming with a binding precedent".[84]

This approach is clearly correct. When two decisions conflict, and neither is binding, *neither* can logically compel. What is called for is a reexamination of the whole question, in order to arrive at a clarified restatement of the law.[85]

IV IS THE PRIVY COUNCIL "BOUND" BY HIGH COURT DECISIONS?

In *Baxter's* case,[86] faced with the Privy Council's decision in *Webb* v. *Outtrim*, Sir Samuel Griffith permitted himself to observe:

> It would not, perhaps, have been extravagant to expect that the Judicial Committee would recognize the intention of the Imperial legislature to make the opinion of the High Court final in such matters. But that is their concern, not ours.

Similarly, in *Viro's* case, several members of the Court suggested with varying degrees of subtlety that the Privy Council, for its part,

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[82] *Id.*, 283, 284.

[83] *Id.*, 294, 296.

[84] *Id.*, 307.

[85] Stone, *Legal System and Lawyers' Reasonings* (1964) 278, 287. Given their emphasis on clarification, it is an unfortunate irony that the seven separate judgments in *Viro* shed so little collective light. Barwick C.J. and Gibbs J. preferred *Palmer* to *Howe*; Stephen, Mason and Aickin JJ. preferred *Howe* to *Palmer*; and Jacobs and Murphy JJ. found neither decision satisfactory, essaying instead their own major reconstructions of the relevant law. The *reasoning* in the judgments thus yields no clear majority view. Fortunately for trial judges Mason J. had formulated (303) six propositions encapsulating *his* understanding of what *R.* v. *Howe* required. Stephen and Aickin JJ. had expressly agreed with these propositions; Gibbs, Jacobs and Murphy JJ., in evident judicial afterthought, appended to their judgments (288, 312-313, 323) brief statements indicating that (for the sake of certainty in "the daily administration of justice") the view of Mason J. was to prevail—at least (as Murphy J. added) "until this Court expresses a different view". Despite the wryness of this device in the immediate context of *Viro*, it is one which might usefully be emulated in other cases which evoke a diversity of High Court views.

[86] (1907) 4 C.L.R. 1087, 1117.

might defer to the High Court's new role as the "final" arbiter of Australian law, by accepting the Court's pronouncements even in preference to its own views. For Sir Garfield Barwick, "[n]ow that there is no . . . appeal from the decisions of this court, it seems to me that in the ascertainment of Australian law, the decisions of this court might well be regarded by their Lordships as compelling".[87] For Murphy J. "[i]t would be mischievous for the Privy Council to state Australian law otherwise than in accordance with this court's pronouncement".[88] More gently, Gibbs J. saw "no room to doubt that in deciding appeals from Australia the Privy Council will give the same careful consideration to decisions of this Court as we shall give to decisions of the Board";[89] while Mason J., more gently still, reminded their Lordships of their own acknowledgment, in *Geelong Harbor Trust Commissioners* v. *Gibbs Bright & Co.*,[90] "that this court is pre-eminently equipped to decide what is the law for Australia".[91] Finally, Stephen J., reflecting on the insoluble conflicts of precedent which might hereafter face State courts bound by "two coordinate appellate courts", remarked that no "unilateral declaration" by either of these courts, "*unless it be of a self-denying character*", could "effectively resolve their dilemma".[92] Since the High Court in *Viro* was making it unanimously clear that, for its part, it did not propose to offer a self-denying declaration, this may have been a veiled invitation to the Privy Council to do so.

Most of the judgments seemed in any event to proceed on a rather sanguine assumption that in fact the Privy Council will acquiesce in the new realities, at least by avoiding outright decisional conflict with the High Court. Both Gibbs and Mason JJ. drew much comfort from the *Geelong Harbor Trust* case,[93] where Lord Diplock acknowledged that the High Court "is much better qualified than their Lordships" to assess the satisfactory working of a rule of law in Australia, and also to "assess the national attitude" to "the appropriate limits of the [judicial] lawmaking function". Yet it was Lord Diplock, also, who in *Oteri* v. *R.*[94] based a Privy Council decision on premises flatly at odds with three recent High Court cases[95] which had been cited in argument,

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[87] (1978) 18 A.L.R. 257, 261.
[88] *Id.*, 318.
[89] *Id.*, 283.
[90] [1974] A.C. 810, 819-821.
[91] (1978) 18 A.L.R. 257, 295.
[92] *Id.*, 290.
[93] [1974] A.C. 810, 819-821.
[94] [1976] 1 W.L.R. 1272. The case has been omitted from the official English reports; in *Viro*, it is properly castigated by Murphy J., 315-316. And see Note (1978) 52 *A.L.J.* 345, 346.
[95] *R.* v. *Bull* (1974) 131 C.L.R. 203; *N.S.W.* v. *Commonwealth* (1975) 8 A.L.R. 1; *Pearce* v. *Florenca* (1976) 9 A.L.R. 289. See now *A. Raptis & Son (Regd)* v. *S.A.* (1977) 15 A.L.R. 223 and *Robinson* v. *Western Australian Museum* (1977) 16 A.L.R. 623, in both of which the High Court returns the compliment by pointedly omitting any reference to *Oteri*.

but to which Lord Diplock nowhere referred. And, generally, some Australian lawyers have thought that Privy Council decisions since the passage of the Privy Council (Appeals from the High Court) Act 1975 (Cth) have displayed a marked tendency to resile from their Lordships' indulgence towards Australian decisions during the 1960s.[96] If indeed such a change of attitude can be detected, it may be merely an instance of the familiar social phenomenon that a waning normative tradition, once seriously under threat, will be reasserted in a last frenetic display of intransigence before its final collapse.[97] If so, and if *Viro* can be seen as precipitating the final crisis, then their Lordships may henceforth revert to polite acquiescence in the pronouncements of Australian courts.[98]

As a matter of principle, there are excellent reasons why their Lordships *should* thus acquiesce. The Privy Council has always been bound to base its decisions on the substantive law of the jurisdiction appealed from, as indigenously determined;[99] and of that law, for all Australian jurisdictions, the authoritative indigenous arbiter is now the High Court. Moreover, the Privy Council has often been properly solicitous for the orderly administration of justice in the jurisdictions it oversees.[100] Arguably, in a country whose main appellate avenues are now those contemplated in *Viro*, the mere *existence*, alongside those main avenues, of surviving Privy Council appeals is so disruptive of orderly administration that their Lordships, as a matter of discretion,

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[96] In addition to *Oteri* v. *R.*, see *Becker* v. *Marion City Corporation* [1977] A.C. 271; *Commissioner of Stamp Duties* v. *Bone* [1977] A.C. 511; *Cumberland Holdings Ltd* v. *Washington H. Soul Pattinson & Co. Ltd* (1977) 13 A.L.R. 561; *B.P. Australia Ltd* v. *Nabalco Pty Ltd* (1977) 16 A.L.R. 207; *B.P. Refinery (Westernport) Pty Ltd* v. *Shire of Hastings* (1977) 16 A.L.R. 363; and *Director of Aboriginal & Islanders Advancement* v. *Peinkinna* (1978) 17 A.L.R. 129. On the other hand, see *Perpetual Trustee Co. Ltd* v. *Commissioner of Stamp Duties* [1977] A.C. 525; *Ashfield Municipal Council* v. *Joyce* (1976) 10 A.L.R. 193; *Marene Knitting Mills Pty Ltd* v. *Greater Pacific General Insurance Ltd* (1976) 11 A.L.R. 167; *Gilbertson* v. *S.A.* (1977) 14 A.L.R. 429; *Queensland Mines Ltd* v. *Hudson* (1978) 18 A.L.R. 1; and perhaps *Australian Mutual Provident Society* v. *Chaplin* (1978) 18 A.L.R. 385, in which the appeal was allowed but with remarkable tenderness for Australian sensibilities. The disappearance of appeals *from the High Court* may, of course, be a crucial reason for the apparent statistical increase in the number of appeals allowed.

[97] *Cf.* Parsons, *The Social System* (1952) 310-312, elaborating in this respect on Durkheim, *"Deux Lois de l'Evolution Pénale"* (1899) 4 *Année Sociologique* 65. And see Mead, "The Psychology of Primitive Justice" (1918) 3 *American J. Sociology* 577; Stone, note 69 *supra*, 566-567.

[98] *Cf. A.-G. for Ontario* v. *A.-G. for Canada* [1947] A.C. 127.

[99] *Sumboochunder Chowdry* v. *Naraini Dibeh* (1835) 3 Knapp 55, 12 E.R. 568; *Scott* v. *Paquet* (1867) L.R. 1 P.C. 552, 559; *King* v. *Tunstall* (1874) L.R. 6 P.C. 55, 93.

[100] *R.* v. *Joykissen Mookerjee* (1862) 1 Moo. P.C. (N.S.) 273, 15 E.R. 704 and *Dinizulu* v. *A.-G. of Zululand* (1889) 61 L.T. 740, both protesting that indiscriminate acceptance of appeals in criminal matters would be "destructive to the administration of criminal justice" in colonial courts. In practice many of their Lordships' other discretionary maxims of judicial restraint reflect this solicitude.

should henceforth refuse leave to appeal.[101] Certainly, a Privy Council decision in direct conflict with the law as determined by the High Court would now be so potentially disruptive of the administration of justice in the State courts, that their Lordships must have an imperative duty to refrain from such a decision.

In several respects, the decision of the New South Wales Court of Appeal in *National Employers' Mutual General Association Ltd* v. *Waind*[102] may bear upon these counsels of wisdom or duty for the Privy Council itself. First, the Court was emboldened by the hints already given in *Viro* to add its own tactful suggestion that the Privy Council might henceforth "decline as a matter of policy to substitute a view different from a recent decision of the High Court". Secondly, the Court served clear notice, so far as New South Wales was concerned, that any such substitution of views as *might* occur in the Privy Council would be a mere *brutum fulmen*, since in any conflict of High Court and Privy Council the view of the High Court would now always be preferred.[103] This announcement must elevate appeals *from the States* —at least in matters where the High Court has already "occupied the field"—to a level of immunity from Privy Council interference *almost* equivalent to that which for half a century has characterized *inter se* matters under section 74 of the Constitution.[104] Thirdly, the Court essayed what may well be the first full expository interpretation of the words of rule 2(b) of the 1909 Order in Council which regulates appeals from New South Wales *by leave of the State Supreme Court.* Under that rule an appeal "shall lie"

> at the discretion of the Court . . . if, in the opinion of the Court, the question involved . . . 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.

This, said the Court of Appeal, requires that in order for leave to be granted, there must first be the affirmative "formation of an opinion by the relevant State court that, for one of the reasons set out in the rule, the question 'ought' to be submitted to Her Majesty in Council". But, the Court went on, it follows from the new hierarchical parity of High Court and Privy Council that there is now no conceivable case as to which an affirmative opinion that it "ought" to be heard by the Privy

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[101] For discussion of this and other options now open to their Lordships see Crawford, note 1 *supra*, 222. And note that in *A.-G. for Ontario* v. *A.-G. for Canada* [1947] A.C. 127, 151-152, the disruptive effect of having appeals on some subject-matters but not on others was treated as a reason for construing the Canadian Parliament's power of abolition as extending to *all* appeals, while at 154 the disruptive effect of having appeals from some Canadian provinces but not from others was given a similar effect.

[102] See notes 3-4 *supra.*

[103] For the reasons explained in note 5 *supra* and at notes 171-173 *infra.*

[104] *Jones* v. *Commonwealth Court of Conciliation & Arbitration* [1917] A.C. 528.

Council could properly be formed.[105] The result is that, in New South Wales, leave to appeal under rule 2(b) will never be granted again.

It seems likely that, by the time this comment appears, similar pronouncements will have been made in other States, perhaps even by way of "Practice Statement". Even in default of such other pronouncements, the reasoned conclusions of the New South Wales Court of Appeal must, in every State, be accorded strong persuasive authority. And, even if the effect of *Waind's* case be confined to New South Wales, its drastic curtailment of appeals—in the State which has hitherto been the most prolific source of appeals—must be a further prudential reason for their Lordships to adopt a posture of judicial restraint towards any Australian appeals that remain.

Nor is this all. *Waind's* case, predicated as it is on the words of rule 2(b), does not purport to deal with appeals under rule 2(a), which provides that appeals shall lie "as of right, from any final judgment of the Court" involving a claim of the value of £500 sterling or more.[106] Nor, of course, could it *directly* affect the power of the Queen in Council, expressly preserved by rule 28 of the Order in Council, to grant *special* leave to appeal (the so-called "prerogative" appeal).[107] Yet indirectly it may affect this. In the first place, the Privy Council has always sought to assimilate the principles which govern its own (prerogative) grants of *special* leave, to those applied in local courts to the legally regulated grant of *leave*.[108] On this basis, *special* leave to

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[105] *Before* 1975, as the judgment of Moffitt P. pointed out, the choice was between a "two-tiered" appeal to the High Court and thence perhaps to the Privy Council, and appeal to the latter direct. In that context, an affirmative view that there "ought" to be a direct appeal could be reached on grounds analogous to those in the English "leap-frog" procedure for bypassing the Court of Appeal. But that context and justification are gone. *After* 1975, to say that a matter "ought" to be heard by the Privy Council must imply a judgment that such a hearing is somehow *preferable* to a hearing in the High Court. But since the two courts are now strictly coordinate (see note 57 *supra*), no such judgment can ever be made.

[106] Procedurally, even for appeals "as of right", Supreme Court *leave* must be sought. This might make it possible to argue that the Court has a discretion in the matter, which might then be exercised on grounds analogous to those stated in *Waind's* case. But see *Lopes* v. *Valliappa Chettiar* [1968] A.C. 987. Alternatively, in the post-1975 institutional setting, it might be possible to argue that *no* judgment of the Supreme Court can ever be "final" in the sense required by rule 2(a), since there is always the possibility of appeal *to the High Court*. "Final" for this purpose might now be equated simply with "unappealable"; or with "*locally* unappealable"; or with "unappealable *within Australia*". See Blackshield, note 8 *supra*, 168; Crawford, note 1 *supra*, 222.

[107] Indeed, Moffitt P. acknowledged in *Waind's* case that *in that very case*, "refusal of leave by this Court . . . of course, leaves it open to the Privy Council upon a petition to it, to entertain the appeal sought".

[108] See, *e.g.*, *Prince* v. *Gagnon* (1882) 8 App. Cas. 103; *Esnouf* v. *A.-G. for Jersey* (1883) 8 App. Cas. 304; *La Cité de Montréal* v. *Les Ecclésiastiques du Seminaire de St Sulpice de Montréal* (1889) 14 App. Cas. 660; *Daily Telegraph Newspaper Co. Ltd* v. *McLaughlin* [1904] A.C. 776; *Albright* v. *Hydro-Electric Power Commission of Ontario* [1923] A.C. 167.

appeal should henceforth invariably be refused for the reasons stated in *Waind's* case with regard to *leave* to appeal.[109] In the second place, on two crucial occasions, their Lordships have insisted that, for the purpose of determining whether Privy Council appeals can continue, there cannot be "any significant distinction between those that are entertained only by special leave and those which are regulated and admitted in accordance with a fixed set of rules".[110]

Yet, for all this, so long as appeals "as of right" or by special leave remain *possible*, there will always be litigants (or counsel)[111] convinced that theirs is the exceptional case that warrants such an appeal; and, as to appeals by special leave, there will always be the possibility that their Lordships may be so convinced, too. It follows that, so long as State appeals to the Privy Council survive at all, *some* divergence of Privy Council and High Court views must continue to arise. For divergence in streams of authority may (and typically does) arise *without* direct conscious conflict.[112]

Moreover, even as to direct conflict, there remains a dangerous double edge to the fact—so persuasively exploited in *Waind's* case—that the High Court and the Privy Council are now *coordinate* courts of appeal. If the High Court's freedom to depart from the Privy Council's view of the law flows from its "responsibility", as a final court of appeal, "ultimately to determine for itself the true state of the law", then the *same* responsibility must give their Lordships reciprocal freedom to reject the views of the High Court.[113] So long as appeals survive at all, it seems inevitable that, sooner or later, the Privy Council will feel impelled to reassert this freedom.

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[109] Either because their Lordships might themselves be convinced by the rather compelling reasoning in *Waind's* case, and adopt it as their own; or because, though unconvinced, they should as a matter of discretion defer to the local view.

[110] *Ibralebbe* v. *R.* [1964] A.C. 900, 915-916; *A.-G. for Ontario* v. *A.-G. for Canada* [1947] A.C. 127, 145.

[111] The sanguine assumption discussed above, that the Privy Council will henceforth defer to the High Court's "pre-eminent" function of declaring the law for Australia, appears to be coupled with an assumption that counsel, perceiving that High Court views must now always prevail in the end, will give up advising litigants to waste their time by appealing to England. Unfortunately, it is not yet clear either that appeal to England is in fact a waste of time, or that members of the profession will be inclined to perceive it as such. On the other hand, there does not appear to be much evidence, either, to support the converse prediction that abolition of appeals from the High Court would lead to an increase in the number of appeals direct to the Privy Council. See Sen. Deb. 7 May 1968, 806 (Senator Wright), 808 (Senator Greenwood); St John, "The High Court and the Privy Council; the New Epoch" (1976) 50 *A.L.J.* 389, 392, 394-395. All such speculation either way must of course be tempered by the capacity of judges, as in *Waind's* case, to take matters into their own hands.

[112] Stone, note 85 *supra*, 254.

[113] *Cf.* St John, note 111 *supra*, 400.

V HOW SHOULD STATE COURTS HANDLE CONFLICT BETWEEN HIGH COURT AND PRIVY COUNCIL?

The persuasive answer to this question given for New South Wales in *Waind's* case has already been referred to, and will be further considered below. But it needs to be set in the context of *Viro*—and also to be kept in perspective.

It is clear that the High Court's new freedom to depart from *all* Privy Council decisions cannot extend to the State Supreme Courts. So long as those Courts—on any basis—are subject to appeals *either* to the Privy Council, *or* to the High Court, each of these is a higher appellate court by whose decisions the State Supreme Courts must be strictly bound. The New South Wales policy announced in *Waind's* case, of refusing leave to appeal under rule 2(b), may reduce the incidence of "binding" Privy Council decisions; it cannot eliminate them altogether.

It is also clear that, in the vast majority of cases, this creates no practical problem. Where there is a relevant High Court decision and no competing Privy Council decision, it is clear that a State Supreme Court must follow the High Court. Where there is a relevant Privy Council decision and no competing High Court decision, it is clear that a State Supreme Court must follow the Privy Council. Only when there are relevant decisions of both High Court and Privy Council, *and when these decisions are directly in conflict*, does any problem arise.

But, of course, the traditional interpretive techniques of the common law judicial process are excellent devices both for creating, and for dissolving, the appearance of direct conflict.[114] On the one hand, this means that apparent puzzles of precedent under *Viro* are likely to arise far more frequently than may at first appear. On the other hand, it means that all such puzzles can be overcome by resort to traditional techniques of distinguishing or limiting, redirecting or reinterpreting, "explaining" or reconciling, apparently inconsistent decisions. If this approach in the State Supreme Courts were to entail a greater degree of acknowledged judicial *creativity* in the manipulation of these techniques, then so much the better. As *Viro* admirably illustrates, the High Court's reformulation in recent years of the formal doctrine of precedent has gone hand in hand with increasing willingness to acknowledge the creative lawmaking responsibilities of the judicial process. In these responsibilities, in a hierarchy dedicated to the common purpose of fashioning the law for Australia, all Australian judges should share; and in this respect High Court leadership in the Australian judicial system should operate, above all, by way of exemplarship.

It would fecundize this exemplarship to extend the response of the High Court, in *Viro*, to conflict of High Court and Privy Council

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[114] Stone, note 85 *supra*, 281-285, 304-309.

decisions, to the State Supreme Courts as well. The High Court's response, as we have seen, was to say that a conflict of relevant precedents, *neither of which is binding*, creates a leeway of judicial choice which should be used as an opportunity to clarify the law. But a conflict of precedents, *both of which are binding*, creates a similar leeway and a similar opportunity. For if *both* are binding, *neither* can logically compel.[115]

No doubt, in availing itself of such a creative opportunity, a State court would need to pay due regard to its proper role in relation to courts hierarchically above it. This is so not only in the formal sense of respecting "tiers" of authority, but in the more intangible (but no less important) sense of the need to preserve an atmosphere of collaborative commitment to common tasks, and of "that strong collegiate feeling between judges [of different tiers] which has long been a remarkable feature of the common law".[116] Beyond this, however, the appeal to hierarchy in such a context simply begs the question. It is precisely *because* a lower court is bound by the views of a higher court in the same appellate system, that the precedent rules of State Supreme Courts may lead now to a logical contradiction, and hence to a legal vacuum. W. N. Harrison made the point clearly over forty years ago:

> When it is said that an inferior court must take the decision of an appellate court to be correct, it is contemplated that the appellate court has no rival in presumed authority. If for any reason a lower court has to pay attention to the decisions of courts other than those to which an appeal lies from it, it could not be so easily presumed that the decision of the appellate court was correct.[117]

He went on to point out that "the rule contemplates a fixed hierarchy of courts", so that in England before the present hierarchy emerged, no strict doctrine of precedent was possible. Given a plurality of coordinate courts of potentially coordinate authority, it was *necessary* to have recourse to a concept "of the law as existing apart from and superior to precedents". In such a situation precedents cannot be blindly followed; they must be *used* to ascertain the *law*.[118]

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[115] *Id.*, 293. For the English Court of Appeal the point is implicit in Viscount Dilhorne's speech in *Cassell & Co. Ltd* v. *Broome* [1972] A.C. 1027, 1107; and, indeed, in the first exception (as to conflicting "binding" decisions) to the rule in *Young* v. *Bristol Aeroplane Co. Ltd* [1944] K.B. 718, 729. That the Court cannot be bound to follow *either* of the conflicting decisions was made clear in *Fisher* v. *Ruislip-Northwood U.D.C.* [1945] K.B. 584, both in the result and in the reasoning of Lord Greene M.R., 591 and 617. See Gooderson, "The Rule in *Young* v. *Bristol Aeroplane Co. Ltd*" (1950) 10 *Camb. L.J.* 432, 433-437, 441-442; Cross, *Precedent in English Law* (3 ed. 1977) 137. And see Stamp and Scarman L.JJ. in *Tiverton Estates Ltd* v. *Wearwell Ltd* [1975] Ch. 146, 171, 172. For Australian courts faced with conflicting "binding" decisions after *Viro*, the rule thus laid down (as far as it goes) is decisive: but see the discussion of *Waind's* case at note 170 *infra*.

[116] Prott, "Refusing to Follow Precedents" (1977) 51 *A.L.J.* 288, 294.

[117] Harrison, note 19 *supra*, 406.

[118] *Id.*, 406-407.

This appeal to "a permanent foundation of fundamental legal doctrine", which both *underlies* and (at a pinch) *overrides* the "elaborate structure of precedents",[119] is one which would have been readily understood in the days of Lord Mansfield;[120] but in modern times it has lingered in the common law tradition only as a source of uneasy ambivalence. C. K. Allen's well-known attempt[121] to reconcile the contradictions is valiant but in vain; the normal day-to-day operation of precedent seems intractable to such explanations. Yet it is precisely in the *breakdown* of precedent that the "higher obligation" to "correct statement of the law" must reassert itself; in the very moment of primordial darkness, there turns out to be "a brooding omnipresence in the sky" after all. In such a moment of crisis, precedents (including the incompatibly "binding" ones) may still offer a review

> of social contexts comparable to the present, and of results thought to be apt in those contexts by other minds after careful inquiry. They also point to the available paths of reasoning by which one result or another can be or has been reached.[122]

But in the end the outcome must depend on "the elements of technique, skill, experience and plain wisdom"[123] which each judge must bring to bear on *his* development of the law.

To stress this responsibility is not to deny, but precisely to interpret and to express, the role of the State Supreme Courts in the *Australian* judicial system. If the Privy Council must henceforth give discretionary weight to the need to foster the orderly growth of *Australian* law, with the High Court as its ultimately authoritative indigenous arbiter, analogous discretionary factors must govern the response of the State Supreme Courts.[124] If the role of those Courts is to complement the High Court's responsibility of determining the law for Australia, they can do this *not only* by giving effect to the High Court's pronouncements once made, *but also* by facilitating in advance the process of determination itself. And this involves not merely the settling of facts and the sharpening of issues,[125] nor even merely the development of "a course of thought, a line of argument, a body of material" or an illuminating statement of reasons.[126] It involves, beyond these, a meticulous preliminary exploration of alternative social and legal solutions to be tested, sifted and sieved. "[Intermediate] Courts of

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[119] Allen, note 66 *supra*, 293.

[120] *Fisher* v. *Prince* (1762) 3 Burr. 1363, 97 E.R. 876; *Jones* v. *Randall* (1774) 1 Cowp. 37, 39, 98 E.R. 954, 955; *Rust* v. *Cooper* (1777) 2 Cowp. 629, 632, 98 E.R. 1277, 1279; Fifoot, *Lord Mansfield* (1936) 215-225; Llewellyn, *The Common Law Tradition* (1961) 63, 404-407; Stone, note 85 *supra*, 237-240.

[121] Allen, note 66 *supra*, 294-295.

[122] Stone, note 85 *supra*, 282.

[123] *Id.*, 283.

[124] *Waind's* case is of course an ideal illustration of such a response. See discussion at notes 99-110 *supra*.

[125] Llewellyn, note 120 *supra*, 28-29.

[126] *Id.*, 317-321.

Appeal are a laboratory to try out ideas on a regional basis";[127] their judgments are *travaux préparatoires* for those of the High Court itself.

There is in all this a crucial element of equivocation. The mature discretion here demanded of *State* judges may lead in the present context (as we shall see) to a strategy of resolving decisional conflicts of High Court and Privy Council *always in favour of the High Court.* By contrast, the responsibility of such judges for making their own contribution to Australian legal development may mean that High Court decisions should *not* unquestioningly be accepted, but rather (even in the Supreme Court decision-making *of single judges*) should constantly be reworked and rethought, especially in the light of the comparative perspective which a divergent Privy Council view opens up. To some extent, of course, the two strategies may be complementary. The apparent conflict may reduce only to saying that High Court decisions should be "followed", but that "following" here should mean the same kind of interpretive readjustment as the "following" of cases has always involved in the process of common law judgment. Insofar as there is a conflict, its resolution must presumably depend upon striking a balance between the competing needs (on the one hand) for "legal development", and (on the other hand) for consistency and coherence in the administration of State legal systems, as between different Supreme Court divisions and even as between single judges.[128] And this balance may have to be struck differently for different "tiers" of the State judicial system. The crucial point is that informed assessment of the factors thus involved, as well as the basic responsibilities giving rise to the need for such assessment, must lie peculiarly within the province of the State Supreme Courts.

In England in recent years, however, the House of Lords' acknowledgment of its *own* creative role[129] has tended to be coupled with a newly authoritarian insistence that all *lower* courts must confine themselves to the strict application of precedent even more stringently than before. The implication is that because the House of Lords is creative, it has a *monopoly* on creativity. Instead of creative collabo-

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[127] Quoted from an (unidentified) U.S. circuit judge in Howard, "Role Perceptions and Behavior in Three U.S. Courts of Appeals" (1977) 39 *J. Politics* 916, 920. And *cf.* the (dissentient) protests of Burger C.J. and Blackmun J. against the short-circuiting of this process in *New York Times Co.* v. *U.S.* (1971) 403 U.S. 713, 748-749, 751, 760-762.

[128] *Cf.* Lord Diplock's argument in *Davis* v. *Johnson* [1978] 2 W.L.R. 553, 560. Such arguments must of course be appraised in the context of the institutional system to which they relate. Arguments which are unconvincing when directed to different divisions of the English Court of Appeal may nevertheless be decisive when directed to individual State trial judges, and *a fortiori* when each of six State Supreme Courts must strive to contribute to a common solution of a common problem.

[129] Notably in the famous Practice Statement [1966] 1 W.L.R. 1234 (26 July 1966) proclaiming the House's power to depart from its own prior decisions "when it appears right to do so".

ration throughout the hierarchy, there are signs of a new rigidity, which (if it developed) would in the end inhibit the activity of the House of Lords itself.[130] Lord Denning, in the Court of Appeal, has strenuously resisted this tendency (and thereby no doubt provoked it) by arguing, on the one hand, that because the House of Lords is no longer bound by its own decisions, the Court of Appeal is no longer bound by *its* own decisions, either;[131] and, on the other hand, that because departure from House of Lords decisions is now possible in the House of Lords, a similar departure *from House of Lords decisions* is now possible in the Court of Appeal.[132] As to the first of these arguments, Lord Denning's position has merit;[133] as to the second, it clearly has

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[130] If indeed it has not already done so. See Stone, "Judicial Precedent and Common Law Growth", in Vuylsteke (ed.), *Law and Society: Culture Learning Through the Law* (East-West Center, Honolulu, Hawaii, 1977) 143, 144-145.

[131] The above approach is unequivocal in *Gallie* v. *Lee* [1969] 2 Ch. 17, 37; *Hanning* v. *Maitland (No. 2)* [1970] 1 Q.B. 580, 587; *Barrington* v. *Lee* [1972] 1 Q.B. 326, 338; and *Farrell* v. *Alexander* [1976] Q.B. 345, 359-360. The same result can of course be achieved by the different approach of expanding the exceptions to the rule in *Young* v. *Bristol Aeroplane Co. Ltd* [1944] K.B. 718; and in some cases Lord Denning has squarely stated these as *alternative* approaches, while in other cases he has equivocated between the two—initially in *Boys* v. *Chaplin* [1968] 2 Q.B. 1, 24, and most dramatically in *Davis* v. *Johnson* [1978] 2 W.L.R. 182, 193-198. Kidd, "Stare Decisis in Intermediate Appellate Courts" (1978) 52 *A.L.J.* 274, 274-276; Prott, note 59 *supra*, 309-310.

[132] Lord Denning has made this claim explicitly only in *Conway* v. *Rimmer* [1967] 1 W.L.R. 1031, 1037. He explicitly disavowed it in *Gallie* v. *Lee* [1969] 2 Ch. 17, 37. But he has sought the same *result*, by various novel devices or novel uses of established devices, in a series of cases from *Broome* v. *Cassell & Co. Ltd* [1971] 2 Q.B. 354, 380-382, to *Schorsch Meier G.m.b.H. v. Hennin* [1975] Q.B. 416, 425 and *Federal Commerce & Navigation Co. Ltd* v. *Tradax Export S.A.* [1977] Q.B. 324, 338-339. See Stone, "On the Liberation of Appellate Judges: How Not To Do It!" (1972) 35 *M.L.R.* 449; Lapres, "Stare Decisis—Binding Effect of Decisions of House of Lords on Lower Courts" (1974) 52 *Can. Bar Rev.* 128; Prott, note 116 *supra*, 288-290.

[133] Wright, note 37 *supra*, 144, expressly endorses the claim now made by Lord Denning as to precedents set by the Court of Appeal, while expressly rejecting his claim as to precedents set by the House of Lords. And see Bentil, "The Court of Appeal's Adherence to its Jurisprudence" (1974) 124 *New L.J.* 733. The continued binding force of the rule in *Young* v. *Bristol Aeroplane Co. Ltd* [1944] K.B. 718 has been reaffirmed by the House of Lords in *Farrell* v. *Alexander* [1977] A.C. 59, and less gently in *Davis* v. *Johnson* [1978] 2 W.L.R. 533. The only substantial argument was that of Lord Diplock, 560, for a balance of interests as between "certainty" and legal development. In a court of last resort, he said, the need for legal development must sometimes prevail; whereas, in an intermediate court, this need can be catered for by appeal, while (since such courts have a larger membership, and sit in smaller divisions) the damage to "certainty" may be greater. But this argument gravely overestimates both the actual *threat* to "certainty" and the degree to which "certainty" is in any event achieved. As to the other factors relied on—of legal expenses, expedition, efficiency, urgency and compassion for litigants—such factors depend on the circumstances of each individual case. The House of Lords had the better of this argument in *Cassell & Co. Ltd* v. *Broome* [1972] A.C. 1027, the Court of Appeal in *Davis* v. *Johnson* [1978] 2 W.L.R. 533.

none.[134] But, to both, the House of Lords' response has been implacably and depressingly rigid. Moreover, it has led to preoccupation with the *formal* aspects of precedent which increasingly threatens to divert attention from the creative resources which, at every hierarchical level, are available *without* overt departure from precedent.[135]

It would be a tragedy if *Viro* were to herald, in Australia, an era of false preoccupations like those which have followed in England from the House of Lords' "Practice Statement" of July 1966. But there are signs that it may. It was, by a coincidence,[136] in March 1966 that the High Court first essayed a major restatement[137] of the rule in *Piro* v. *Foster*.[138] But at least two judges[139] were at pains to add that High Court decisions would still be binding on all Australian courts, *unless there was a later conflicting Privy Council decision*; and when, a month later, on this very principle, the New South Wales Court of Appeal preferred a Privy Council decision to an earlier High Court authority,[140] they were sternly rebuked for their pains:[141]

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[134] See Rinfret C.J. in *Woods Manufacturing Co. Ltd* v. *R.* [1951] S.C.R. 504, 515; and *cf.* the discussion at notes 68-79 *supra*. If the higher courts in a system have a special responsibility of declaring the law for that system, the lower courts must have a complementary responsibility of giving effect to such declarations. The traditional position was reaffirmed by the House of Lords in *Cassell & Co. Ltd* v. *Broome* [1972] A.C. 1027, and again in *Miliangos* v. *George Frank (Textiles) Ltd* [1976] A.C. 433 (responding to the Court of Appeal's rebellion in the *Schorsch Meier* case [1975] Q.B. 416); but the main lesson to emerge is that of the inadequacy of the "sanction" theory of precedent. In *Miliangos,* as in several other cases, the *result* achieved by "insubordination" in the Court of Appeal *was affirmed in the House of Lords.* Obviously, no appellate court will reject for the sake of "sanctions" *what it perceives as a sound result.* But, if not, any continued discussion of "sanctions" recalls the famous interjection (not recorded in Hansard) that two newspaper editors "severely reprimanded" for breach of parliamentary privilege (Sen. Deb. 14 May 1971, 1935) had been "thrashed with a feather".

[135] Stone, "1966 And All That! Loosing the Chains of Precedent" (1969) 69 *Colum. L. Rev.* 1162, 1201-1202; Stone, "A Court of Appeal in Search of Itself: Thoughts on Judges' Liberation" (1971) 71 *Colum. L. Rev.* 1420, 1421-1422, 1441-1442; Stone, note 132 *supra*, 450-451, 461-463, 467-469, 475-477; Stone, "The Lords at the Crossroads—When to 'Depart' and How!" (1972) 46 *A.L.J.* 483, 488-489; Lapres, note 132 *supra*, 130, 132.

[136] But see St John, note 16 *supra*, 810-811, 814-815.

[137] In *Skelton* v. *Collins* (1966) 115 C.L.R. 94 (7 March 1966).

[138] (1943) 68 C.L.R. 313. See note 14 *supra*.

[139] Note 137 *supra*. Kitto J., 104; Owen J. (with whom Taylor J. agreed), 138-139.

[140] *Jacob* v. *Utah Construction & Engineering Pty Ltd* (1966) 66 S.R. (N.S.W.) 406 (6 April 1966), preferring *Utah Construction & Engineering Pty Ltd* v. *Pataky* [1966] A.C. 629, to *Australian Iron & Steel Ltd* v. *Ryan* (1957) 97 C.L.R. 89.

[141] *Jacob* v. *Utah Construction & Engineering Pty Ltd* (1966) 116 C.L.R. 200 (4 November 1966) 207 (Barwick C.J.). McTiernan, Taylor and Owen JJ., agreed, 217. Fortunately the rebuke has not deterred State courts from independent judgment in later conflicts of High Court and Privy Council. See esp. Street J. in *Ratcliffe* v. *Watters* (1969) 89 W.N. (Pt 1) (N.S.W.) 497, 503-505; Hutley J.A. in *Millett* v. *Regent* [1975] 1 N.S.W.L.R. 62, 67 and of course *Viro* itself. See Prott, note 116 *supra*, 293; St John, note 111 *supra*, 399 note 43.

> It is not . . . 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.

Echoes of this pronouncement by the Chief Justice in 1966 are discernible in his judgment in *Viro* in 1978. There can be no quarrel with his first proposition: that once the High Court has squarely *rejected* a Privy Council decision, the State courts will "thereafter" be bound to accept the High Court's view. This, of course, would merely reflect what is prima facie the simplest rule: that as between conflicting decisions of two coordinate courts of appeal, the later in time should prevail. He goes on, however, to deny that State courts can *ever* "choose" between High Court and Privy Council. Instead they must *always* uphold the High Court, even if its decision is "an old one":

> I do not think it can ever be left to a State court to decide whether or not it will 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.[142]

Jacobs J. also thought that in case of conflict State courts must henceforth *always* prefer the High Court; but for a very different reason. The Constitution itself, he said, creates (by section 73) an appellate hierarchy in which the High Court is "the" court of appeal from the Supreme Courts of the States.[143] The 1975 Act perfects this constitutional hierarchy, by making the High Court the final court of appeal. Whatever other hierarchy may subsist by virtue of the Judicial Committee Act 1833 (Imp), or of any surviving prerogative power, the hierarchy expressly set up by the Constitution must prevail.[144]

Gibbs, Mason and Murphy JJ. all showed an evident intuitive sympathy with a simple solution according supremacy always to the High Court; but each of them used qualified language which, for practical purposes, tends to reduce to assertion that, in case of conflict, the more recent decision should prevail. For Gibbs J., State courts are "bound to act in accordance with the law as declared by this Court unless they are directed by a later decision of the Privy Council to take a different course". Apparently he would extend this principle even

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[142] Note 1 *supra*, 261.

[143] *Id.*, 306.

[144] Note 1 *supra*, 306-307. This passage was to prove crucial in *Waind's* case. The reasoning comes close to saying that any surviving prerogative power has now been *extinguished; i.e.*, that all appeals to the Privy Council have now been abolished. In context it seems clear that only the narrower significance paraphrased above is *intended*; but of course the wider significance is not thereby *excluded*.

to cases falling short of direct decisional conflict; for he added that there may be "other situations" in which the Privy Council view should be preferred: "for example if the decision of this court was an old one and obviously out of line with principles more recently established".[145] Again, this can only refer to a *later* Privy Council decision.

Mason J. thought that "State courts should, as a general rule, follow decisions of this court in case of conflict"; but added that "every general rule has its exceptions or qualifications". However, his only stated exception (to which in turn there was an exception) was that where the Privy Council, after *considering* a High Court decision, has decided not to follow it, the Privy Council view should prevail. This reduces to saying that in case of conflict, the more recent decision prevails—with the rider that this rule is applicable only to *overt* conflict. In a case where Privy Council divergence from High Court authority seems to be due to *incuria* or inadvertence—or, presumably, in a case where their Lordships' explicit departure from High Court views stops technically short of "not following"—it is not for a State court to conclude that the High Court decision which binds it has *impliedly* been overruled. Only the High Court can do that.[146]

The exception to the exception was that, even where the Privy Council has expressly rejected the High Court view, the latter should still prevail if their Lordships' rejection of it appeared to be "based on considerations . . . not relevant to Australian circumstances or conditions".[147] To this his Honour appended his equivocal treatment of *Mayer* v. *Coe*,[148] which seems to offer such commodious leeways as to enable *any* State court, in *any* instance of conflict, to reach a solution either way.

For Murphy J., a State court "faced with a Privy Council decision and a later conflicting decision of the High Court" should follow the High Court; and an (earlier or later) High Court decision should also be preferred to any "Privy Council decision on appeal from outside Australia".[149] The *casus omissus* is that in which a High Court decision conflicts with a *later* Privy Council decision on appeal from *within* Australia; and the implication *appears* to be that the latter should there prevail. But, of course, his Honour's reason for this calculated omission is that, in his view, no such case can ever again arise—since Australian sovereignty has evolved so far that *any* appeal to the Privy Council is

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[145] *Id.*, 283. This theme is taken up and developed by Moffitt P. in *Waind's* case.

[146] *Id.*, 295. His Honour thus seems to reaffirm the rule in the *Utah Construction Case*, set out at note 141 *supra*; it is also expressly reaffirmed by Jacobs J., 306.

[147] *Id.*, 295.

[148] (1968) 88 W.N. (Pt 1) (N.S.W.) 549, as to which see note 53 *supra*.

[149] Note 1 *supra*, 318-319.

incompatible with it, and is therefore already invalid.[150] On this view, a *later* Privy Council decision should simply be ignored (by State courts and High Court alike) as given without jurisdiction.

Stephen and Aickin JJ. felt unable to offer any way out of the predicament now facing State courts; but they described it in eloquent terms.[151] In particular, Stephen J. argued as to the State courts (as Jacobs J. had done as to the High Court) that the doctrine of precedent had become "a casualty of events". The attempt to impose a uniform rule asserting supremacy for High Court decisions would, he thought, be counter-productive. For this would mean that the unsuccessful litigant in the Supreme Court would always be the party disadvantaged by the High Court's view, and would thus, in every such case, elect to appeal to the Privy Council. Thus the Privy Council view would always prevail. By converse reasoning, more pleasing *results* would be obtained by a rule of supremacy for the Privy Council; for if *this* rule were always applied in State courts, the losing party would always be driven to appeal to the High Court, whose views would thus triumph in the end. But "such a sacrifice of principle for expediency cannot, of course, be countenanced".[152]

This charming excursion into game theory can be carried further. Assume that the true position now is that the law enunciated by the High Court will always prevail in the end. *Then and only then*, the correct rule of precedent is that the High Court should always be followed. But in that event unsuccessful litigants will always appeal to the Privy Council; so the law enunciated by the Privy Council will always prevail in the end.[153]

The exact converse equally follows. Just as the *premise* that the High Court view must always prevail leads to a *conclusion* that the Privy Council view must always prevail, so the *premise* that the Privy Council prevails will lead to a *conclusion* that the High Court must prevail. Either way, the rule of precedent is caught in an insoluble paradox.

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[150] *Id.*, 317, summarising and supplementing his fuller argument in *Commonwealth* v. *Queensland* (1975) 134 C.L.R. 298, 333-337. It is, no doubt, on these grounds that in *Waind's* case Moffitt P. concluded that Murphy J. "should be taken as agreeing" with Barwick C.J. and Jacobs J. that in *all* conflicts with the Privy Council the High Court should be followed. By contrast Crawford, note 1 *supra*, 227, has no doubts about so interpreting the position of Murphy J., but hesitates over where to place Jacobs J.

[151] *Id.*, 290-292 (Stephen J.), 324-327 (Aickin J.). *Cf.* Blackshield, note 67 *supra*, 109; St John, note 111 *supra*, 394-395, 398-401; Crawford, note 1 *supra*, 221-222, 228-230. The discussion in *Waind's* case both recognises and surmounts the predicament thus described.

[152] *Id.*, 291.

[153] Even if "the law enunciated by the Privy Council" were *in fact* (through their Lordships' self-abnegation) always to coincide with that enunciated by the High Court, the above *logical* contradiction would not be avoided.

Now assume what appears for the time being to be the true position: that High Court and Privy Council rank as strictly coordinate courts, for neither of which we can postulate supremacy over the other. *Then and only then*, the correct rule of precedent might seem to be that when equally authoritative decisions conflict, whichever is later in point of time should prevail. But consider how this works in practice. In Case A the appeal is to the High Court; so the High Court view prevails. In Case B the State court is therefore bound to follow the High Court view—which ensures an appeal to the Privy Council, whose view will therefore prevail. In Case C the State court is therefore bound to follow the Privy Council. . . . And so *ad infinitum*.

This time the analysis is not paradoxical, nor even unworkable. Instead, there is a reliable and predictable rule of precedent: namely, that the practical outcome of every case in the series will be the *opposite* of that in the last preceding case. But "predictability" and "stability", usually thought to march together in any system of precedent, have been torn asunder. The result is absurd.[154]

To reduce the problem of *Viro* v. *R.* to a series of logical puzzles is not to trivialize it, but rather to reveal its essential nature. In real life, State courts may or may not face a conflict of binding decisions of High Court and Privy Council; and even before *Waind's* case it was clear that, if and when the real-life problem arose, it would have a real-life solution. Whether (as in *Waind's* case itself) the State courts tackle the problem of precedent directly, or whether (as may happen in other States) they work their way *around* the problem by distinguishing or reconciling the apparently conflicting cases, *some* decision (more or less satisfactory) will always be forthcoming. That is what courts are for.

But, however ingenious the real-life solution, the logical puzzles will remain. The problem is not that the hierarchy of precedent has broken down, but that there are now *two* hierarchies—two separate legal systems—which within each State now coexist. In one the apex is the High Court, in the other the Privy Council. Thus, as to each of these ultimate courts, it is simultaneously *true and not true* that it is the highest court in the system.

Even two parallel legal systems can coexist in a polity if criteria can be found for assigning a sphere of competence to each.[155] But here there are no such criteria. The two systems overlap and interpenetrate; and each fundamentally challenges the existence of the other. Whatever happens in real life, the mutual superimposition of two such legal systems is a mutual contradiction.

It follows that, whatever pragmatic expedients may be found for coping with the problem of precedent, no *doctrinal* solution purportedly

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[154] In *Waind's* case this approach was rejected as leading only "to the futile vacillation exposed by Aesop (Fable XLIII)".

[155] See *Madzimbamuto* v. *Lardner-Burke* [1968] 2 S.A.L.R. 284.

based on orthodox systemic theory can be viable. This is one reason, a logical one, why Stephen and Aickin JJ. were right to abstain from any attempt to prescribe a solution for the State Supreme Courts. But there were other reasons as well.

To state these reasons is not to belittle the depth of fraternal sympathy and constructive concern which led a majority of the High Court to offer their brethren in the State courts such assistance as they could muster. It is only to argue that, even if there had emerged—as there did not—a clear majority view of the proper advice to be offered to State courts, the enterprise of offering such advice was doomed to failure.

In the first place, there are nowadays thought to be logical difficulties about a decision which, in formulating rules of precedent, does so in such a way as to affect its own precedent status. This is so whether the tendency is to self-affirmation, as in the *London Street Tramways* case;[156] or to self-undermining, as in *Young* v. *Bristol Aeroplane Co. Ltd.*[157] *Viro* creates this sort of puzzle insofar as it is itself the source of its own binding force. It is *Viro* that proclaims the power of the High Court to depart from a Privy Council decision in a way that binds State courts; but *Viro* itself then departs from a Privy Council decision in a way that purportedly binds State courts. It does not help to say that the holding on the question of precedent was *necessary to the decision* on the question of self-defence; for this is just where the difficulty lies. The test is whether the decision on self-defence could have had the *same* binding force if the issue of precedent had not been decided. If not, there is a problem.

Secondly, even apart from such logical problems, the better view nowadays appears to be that the rules of precedent *cannot themselves be the subject of precedent*,[158] for the reason that such rules *are not rules of law*, but only of curial "practice"—or, as Lord Simon of

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[156] *London Street Tramways* v. *London City Council* [1898] A.C. 375, laying down that House of Lords decisions are absolutely binding, and itself claiming absolute binding force by virtue of that rule.

[157] [1944] K.B. 718, affirming *inter alia* that when two Court of Appeal decisions conflict, neither is binding: see note 115 *supra*. But *Young's* case was itself in conflict with earlier Court of Appeal decisions, now fully collected by Lord Denning M.R. in *Davis* v. *Johnson* [1978] 2 W.L.R. 182, 195-196. The effect of the rule in *Young's* case is therefore that the rule in *Young's* case is not binding.

[158] The definitive statement must now be that of Cross, note 115 *supra*, 225. And see Kavanagh, "Stare Decisis in the House of Lords" (1973) 5 *New Zealand U.L. Rev.* 323, 324-326; Crawford, note 1 *supra*, 229. Perhaps for this reason, the N.S.W. Court of Appeal's pronouncement in *Waind's* case (see notes 3-4 *supra*) was structured so as to suggest a strategy of legitimation larger than (or at least different from) that of routine adjudication. The Court was constituted by a special bench of five judges; the reasons for decision were announced in a single judgment handed down by the President (Moffitt P.); and each of his brethren (Reynolds, Hutley, Glass and Samuels JJ.A.) delivered only a bare one-sentence concurrence. The judgment itself, while meticulously reasoned, was simple and direct in style and largely unencumbered by citations; it was clear that the Court had sought both a solemnity and a simplicity transcending diurnal tasks.

Glaisdale has suggested,[159] of "constitutional convention". The source of this view is in Scottish law;[160] but the Scottish view became current in England as the need for the House of Lords to find a means of escape from *London Street Tramways* came to be felt more acutely.[161] And, of course, the "Practice Statement" of July 1966 set a seal of approval on this view. The matter is clinched, in Scotland, by the fact that the *London Street Tramways* rule bound the House of Lords in both English and Scottish appeals (whereas, had it been a rule of law, it could have governed only English appeals).[162] It is clinched, in England, by the fact that *London Street Tramways* has never been overruled (whereas, had it laid down a rule of law, the first necessary use of the "Practice Statement" would have been to discard that rule).[163] It follows that even if *Viro* had yielded a majority view on the matter, no pronouncement of that view in the course of judgment could have been legally binding.

Thirdly, precisely because the rules of precedent are rules of practice, the formulation of such rules for itself lies within the inherent power of each superior court.[164] In Scotland, the matter was assigned to "the inherent power of the Justiciary to modify the practice of the Courts where circumstances no longer require the imposition of restraints";[165] in England, Lord Denning now contends that the 1966 Practice Statement

> shows conclusively that a rule as to precedent (which any court lays down for itself) is not a rule of law at all. It is simply a practice or usage laid down by the court itself for its own guidance; and, as such, the successors of that court can alter that practice or

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[159] In *Knuller (Publishing, Printing & Promotions) Ltd* v. *D.P.P.* [1973] A.C. 435, 485 and in *Miliangos* v. *George Frank (Textiles) Ltd* [1976] A.C. 443, 472. See Blackshield, " 'Practical Reason' and 'Conventional Wisdom': The House of Lords and Precedent" (Australian Society of Legal Philosophy, 5 April 1973) 1-2, 15-28; Kavanagh, note 158 *supra*, 342-344.

[160] *Sugden* v. *H.M. Advocate*, 1934 J.C. 103, 109-110; and *cf.* Lord Normand's assertion in argument (106) that even the rule in *London Street Tramways* was a "practice" which "rested upon a resolution of the House". See also Smith, *Judicial Precedent in Scots Law* (1952) 33-35, 40, 104, 108; Gardner, *Judicial Precedent in Scots Law* (1936) 92.

[161] Landau, "Precedents in the House of Lords" (1951) 63 *Juridical Review* 222, 223; Note, "Precedent in the House of Lords" (1958) 102 *Sol. J.* 609; Harris, "An Unfettered House of Lords?" (1961) 105 *Sol. J.* 140; Cross, *Precedent in English Law* (1 ed. 1961) 249-250. Note also Lord Reid's choice of language in *London Transport Executive* v. *Betts* [1959] A.C. 213, 232 and in *Vane* v. *Yiannopoullos* [1965] A.C. 486, 497. See now Wortley, *Jurisprudence* (1967) 82, 87; Stone, "1966 And All That! Loosing the Chains of Precedent" (1969) 69 *Colum. L. Rev.* 1162, 1162-1168; Blackshield, note 159 *supra*, 2-15; Lapres, note 132 *supra*, 130; Cross, note 115 *supra*, 104, 109-111, 209-210.

[162] See Smith, note 160 *supra*, 48-51.

[163] Indeed, the argument assumes without warrant that this would then be a *possible* use.

[164] See Blackshield, note 159 *supra*, 10-15.

[165] *Sugden* v. *H.M. Advocate*, 1934 J.C. 103, 110. *Cf.* Smith, note 160 *supra*, 14, 33-35.

> amend it or set up other guide lines, just as the House of Lords did in 1966. Even as the judges in *Young* v. *Bristol Aeroplane Co. Ltd* . . . thought fit to discard the practice of a century and declare a new practice or usage, so we in 1977 can discard the guide lines of 1944 and set up new guide lines of our own or revert to the old practice laid down by Lord Esher. Nothing said in the House of Lords, before or since, can stop us from doing so. Anything said about it there must needs be obiter dicta.[166]

That reasoning, of course, has been flatly rejected by the House of Lords on appeal;[167] but the very ineffectualness of this rejection bears out Lord Denning's contention. In Australia, the problem of conflict between High Court and Privy Council decisions is a problem for the State Supreme Courts; and only those Courts, in their own inherent power to devise their own rules of practice, can formulate strategies to cope with the problem.

In any event, it is in this inherent and self-sufficient power of State Supreme Court self-regulation that the ultimate solution *should* lie. Any attempt by the High Court to furnish a predetermined solution, however well-intentioned, courted grave institutional dangers; and insofar as the guidance tendered took the form of a ruling that in case of conflict the High Court should always be followed, these dangers were enhanced. The danger is one of reducing—or even just *seeming* to reduce—Australia's judicial structure to one of dominance from the top, with attendant risks of restriction or outright repression of those independent initiatives, at all levels of the system, on which the sound development of Australian law depends. Unruliness in the lower levels of judicial hierarchies is a threat to this sound development; but hubris at the higher levels is equally a threat. And the unintended *semblance* of hubris may be no less an impediment to the collaborative search for wise judgment.[168]

It is on these grounds, as well as for its inherent lucidity and statesmanship, that the response of the New South Wales Court of Appeal in *Waind's* case to the problems left unanswered by *Viro* is to be especially welcomed. The President of the Court, Moffitt P., read three of the judgments in *Viro* (those of the Chief Justice and of Jacobs and Murphy JJ.) as suggesting that in case of conflict the High Court view should always be followed; and took care throughout to acknowledge this expression of High Court opinion as *one* possible reason why the Court of Appeal should adopt such a rule. From the other four judgments in *Viro*, however, he felt able to conclude that "the most

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[166] *Davis* v. *Johnson* [1978] 2 W.L.R. 182, 197. *Cf.* Cross, note 115 *supra*, 116, 226.

[167] *Davis* v. *Johnson* [1978] 2 W.L.R. 553. See note 133 *supra*.

[168] *Cf.* Murphy, *Elements of Judicial Strategy* (1964) 91-100. And generally on the role of State courts see Crawford, note 1 *supra*, 229; Note (1978) 52 *A.L.J.* 345, 347.

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".[169] Besides, he added,

> What if each of those Courts [High Court and Privy Council] directs this Court to disregard the other? It seems to me that the State Courts must make their own decision on this matter.

But this formula, as his Honour then acutely pointed out, is still susceptible of two interpretations. One is that the State courts should adopt a rule similar to that of the English Court of Appeal when faced with a conflict of *its own* prior "binding" decisions:[170] namely, that the resulting choice

> could be left for decision in each case by the particular State court confronted by a conflict. [But] this would be a most unsatisfactory course, involving as it would a breakdown in the uniform administration of the law depending on basic concepts of the precedent system. The alternative is that this Court, now confronted with the question, should authoritatively lay down for courts of this State the precedent to be followed in the event of conflict. I think this course of necessity should be taken to avoid the uncertainty which otherwise will exist.

Just as the High Court, in *Viro*, had assumed "the responsibility . . . to determine ultimately what is the law for Australia", so the Court of Appeal, in *Waind*, thus assumed the responsibility to determine authoritatively the practice to be followed in New South Wales in all cases where "binding" decisions conflict.[171] In arriving at its determination the Court at no stage denied the "binding" force of the precedents set by both High Court and Privy Council; but, accepting that such precedents are *exactly coequal* in "binding" force, found two compelling reasons, of general application, for saying that of any two decisions thus equally "binding", the one emanating from the High Court must always be more "persuasive". One was the argument used so tellingly by Jacobs J. in *Viro*:[172] that, as between the competing appellate hierarchies which now coexist, the one to which the Constitution gives its imprimatur is the one whose apex is the High Court. The second was the *Geelong Harbor Trust* argument, used by Gibbs

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[169] More precisely, he thought that the seven judgments in *Viro* supported "three conclusions": (1) *either* that "the State Courts are bound to follow High Court decisions in preference to those of the Privy Council", *or* that "it being a matter for the State courts, it is open to them to so decide"; (2) that Privy Council decisions can no longer have "higher authority" than those of the High Court; and (3) that "the precedent system has broken down resulting in great difficulty and uncertainty in the law". All of his own conclusions in *Waind* were based upon these three planks.

[170] See note 115 *supra*.

[171] See note 4 *supra*.

[172] Note 1 *supra*, 306-307.

and Mason JJ. in *Viro*,[173] that as to any Australian question, whether of law or of judicial policy, "the High Court sitting in Australia is better qualified than their Lordships are".

Moffitt P. graciously added that, in *Viro* itself, the High Court had been "in a position of particular advantage to decide what was appropriate to meet the needs of the Australian judicial system". To this one can only add that, in *Waind*, the Court of Appeal displayed in full measure its own capacity to share in that task.

[173] *Id.*, 283, 295.