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PERMANENT APPELATE COURTS - THE NEW SOUTH WALES COURT OF APPEAL TWENTY YEARS ON

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A TIMELY REVIEW OF APPELLATE ARRANGEMENTS

Appellate courts in Australia

It is timely to revive the debate about the appellate arrangements of the superior courts of Australia. As will appear, the debate was lively, including in this Journal, a quarter of a century ago. The product of that debate was the establishment of the Court of Appeal of the Supreme Court of New South Wales.

That Court is not an entirely separate court. Nor is it a Division of the Supreme Court of New South Wales as s 38 of the Supreme Court Act 1970 demonstrates. It is part of the Supreme Court and its judges must be judges of the Supreme Court but it operates with a very high degree of autonomy. The Court of Appeal was first established by legislation enacted in 1965.[1] The first President and Judges of Appeal were appointed to take office on and from 1 January 1966. Before its establishment, the general appellate court of New South Wales was the Supreme Court sitting in banc. A bench, typically comprising three senior judges of the Supreme Court, sat to hear appeals and to perform the other work of a Full Court.

Separate and permanent appellate courts had long since been set up at a national and sub national level in the United Kingdom, Canada and the United States. Australia had for a long time resisted the notion. Some of the resistance could be traced to the small population and limited legal and other resources. Some derived from the anxiety about the disruption which might be caused by that most un-Australian of activities: disturbance of relativities, this time in judicial seniority. However, other arguments against change were based on principle, including the suggested desirability of the involvement of all superior court judges in appellate work. Whatever the reasons, the forces of resistance and in favour of the status quo predominated.

Today, apart from the High Court of Australia, there is only one permanent appellate court of wide jurisdiction in Australia, namely the New South Wales Court of Appeal. In the other States and in the Federal Court of Australia, appellate work remains the province of the trial judges sitting in rotation. Several reasons combine to suggest that the debate which arose in the 1950's and produced the Court of Appeal, may again be on the boil. The purposes of this essay are threefold. First, to call to notice a number of developments of suggested relevancy to the revival of consideration of permanent appellate courts in Australia; secondly to review the history leading to the establishment of the New South Wales Court of Appeal in case there may be derived from that history lessons for other jurisdictions; and thirdly to indicate, by reference to recently available statistics, some of the features of appellate jurisdiction in Australia and of the work of the New

South Wales court, which may influence the shape of future developments in other jurisdictions of the country.

End of Privy Council appeals

Of the many reasons which make a revival of the debate about permanent appellate courts in the superior courts of Australia, four are specially important.

First, there is the changing role of the High Court of Australia and of the other Australian superior courts, following the gradual termination of Privy Council appeals. So long as such appeals remained and the High Court and Supreme Courts of the States could, inter se matters without certificate apart, be reversed in London, Australian jurisprudence was inescapably hitched to the star of the English legal system. This was not, despite fashionable recent assertions to the contrary, an entirely inappropriate umbilical chord. As F.C. Hutley once pointed out, the connection at least had the merit of linking the Australian legal system to one of the great world legal orders.[2] Especially in earlier times, it was probably appropriately tuned to our colonial economic organisation. It may even sometimes have saved us from provincial mediocrity. The tale of the Privy Council's contribution to Australian law, and a dispassionate evaluation of it, remains to be written.[3]

Because of a lack of imagination in Whitehall which deprived the Privy Council of a truly international character, its suitability as an Australian court declined during this century and an important opportunity was lost to establish a world court of the common law.[4] By the early 1970's, if not much earlier, it had become plain that the Privy Council

sometimes dampened the imagination of the High Court and occasionally frustrated its efforts to develop laws suitable for Australia. Indeed, in due course, this much was recognised by the Board itself.[5]

The era which followed the abolition of appeals from the High Court, Federal courts and State courts in Federal matters coincided with other developments of the law, in the High Court, suitable for Australia.[6] Released from the necessity of compliant application of English authority and English ways of thinking, the High Court of Australia in the past 15 years has been able from time to time to depart from such approaches and to look at the law afresh, as befits the final court of a sovereign country.

In 1986 the passage of the Australia Act terminated the last avenues of appeal from Australian courts to her Majesty in Council.[7] This development was not of practical importance for Federal courts which, for more than a decade, had been so released. But for State Supreme courts, in matters having no Federal element, the change was significant. Its importance is not yet fully appreciated. Not only does the 1986 Act terminate the last line of appeal which linked Australia in a subordinate and obedient relationship to a court overwhelmingly manned by English judges. It also terminated the last appeals as of right from the State Supreme courts to any court. The Act had the merit of ending the difficulty, presented to any legal system, of the bifurcation of the mainspring of final legal authority. This difficulty had been noted in Viro v The Queen.[8] But because all appeals from State appellate courts (however named) now lie to the High Court of Australia only by special leave of

that Court[9], the Australia Act 1986 operated a legal revolution. Henceforth, State appellate courts were not only released from that dutiful subordination to English law which necessarily derived from the typical composition of the Privy Council. With the departure of the final appeals as of right, the status of the State appeal courts themselves change. Contingently upon a grant of special leave to appeal from them by the High Court of Australia they are final courts of appeal. As Table 1 demonstrates, in the case of the New South Wales Court of Appeal, as a percentage of judgments of that court, the numbers proceeding to appeal in the High Court are miniscule. Even if the residual appeals to the Privy Council are included, for most litigants it is plain that the Court of Appeal is the end of the litigious road.[10] As Table 2 further demonstrates, the numbers of special leave applications to the High Court of Australia, in which that Court granted special leave to appeal in 1986 are comparatively few.

It is no lack of respect to the unchallenged paramountcy in the Australian judicial heirarchy of the High Court of Australia, to refer to this large extent of finality of orders and judgments of the appeal courts of the superior courts of Australia. It is simply a statistical fact which cannot be ignored. It is a reality derived from the practical obligation to impose manageable limits on the work load of the seven Justices of the High Court. This necessity has occasioned the system of special leave applications which recognise the desirability of reserving to the High Court of Australia matters of importance which are timely and "ripe" for consideration and ensuring that the Court can give the guidance

to all other courts in the Australian heirarchy on matters of principle, freed from the harrying necessity of a crippling work load forced on it by irrelevant or chance considerations.

Change in the role of the High Court of Australia

A second reason for timeliness of the reconsideration of permanent appellate courts derives from the first. As a consequence of the abolition of the last appeals as of right, the institution of the High Court's special leave arrangements and the declining number of appeals to that Court on matters of general law from the State supreme courts, the view has been expressed in the Australian legal profession that a new national appellate court should be established to take the place in the superintendence of general law developments once filled by the High Court when appeal lay to it as of right.[11] The fear is expressed that, as the High Court becomes more concerned with constitutional, federal and, possibly, bill of rights jurisdiction, its beneficial role as a unifying court of general law of Australia may be lost, or at least diminised. This is not just a local concern. In Canada, since the Canadian Charter of Rights and Freedoms imposed so many novel and difficult challenges for the decision of the appellate courts of the Provinces (and the Supreme Court of Canada itself), fears have been expressed that the Charter will distort the functions of the appellate courts, diminishing the opportunities for review and reconsideration of the major commercial cases which one enjoyed prominence in such courts.[12]

In the United States of America the crippling burden on the Supreme Court of the United States has also led to an extended debate about the creation of a new national appellate

court.[13] The establishment, in 1982, of the United States Court of Appeals for the Federal Circuit by merging the United States Court of Customs and Patent Appeals and the Appellate Division of the United States Court of Claims) created for the first time, under the Supreme Court of that country, a Federal court with nationwide jurisdiction.[14] The apparent success of this endeavour has provided fresh stimulus in that country to the suggestion that there should be created a general or rotating appeals courts for the United States, between the present Federal courts and the Supreme Courts.

THE PROPOSED AUSTRALIAN COURT OF APPEAL

These developments in Australia, Canada and the United States find reflection in the preliminary view of the Australian Constitutional Commission's Committee on the Australian Judicial System.[15] The reforms proposed in that Committee's discussion document provide a third reason for reviving debate on the appellate arrangements of Australia. The committee expressed opposition to the proposal of a further Australian court of appeal immediately below the High Court, with appeals lying to it as of right from the present appeal courts of the States. The primary reasons given for the Committee's conclusion are the increase in time and cost of litigation which would follow the advantage thereby procured by well funded litigants and the difficulty that could arise in securing suitable appointments as appellate or trial judges below the appeal court. Nevertheless the Committee did favour the establishment of an Australian Court of Appeal to replace the present State, Territory and Federal appellate courts.[16] The discussion document is circulating at this time. It is

bound to attract professional and community interest. Those who contemplate embarking on the creation of a permanent appellate court, especially a national one, should reflect carefully on the circumstances which led to the creation of the New South Wales Court of Appeal. They should also consider the experience of that Court since its establishment. It remains the only available Australian experiment from which it may be possible to derive instruction concerning the likely developments if such a step were taken in a broader and national context.

Moves towards other permanent appellate courts in Australia

Recent developments in Australian courts suggest that the notion of permanent appellate courts may be, at last, attracting interest in other Australian jurisdictions. In Queensland, a proposal for the establishment of a permanent court of appeal, similar to the New South Wales Court of Appeal, was made early in the 1980's. The proposal came to nothing. It is understand that a similar proposal may be again under consideration in Queensland.

In the Northern Territory of Australia, the Supreme Court Act 1979 (NT), which replaced the Northern Territory Supreme Court Act 1961 (Cth), provided, in Part III for a "Court of Appeal". By s 5(2) of the first mentioned Act, the Supreme Court "when exercising its appellate jurisdiction ... may be know as the Court of Appeal of the Northern Territory of Australia". This provision was not brought into effect until 12 March 1986. Before that date, appeals lay to the Full Court of the Federal Court of Australia. This arrangement has now been terminated. However, although the name chosen for the Northern Territory appellate court is "Court of Appeal", and although

that Court may be constituted to include vis
judges who also hold commissions as Judges o
of the Northern Territory, it is clear that
basically the same as that of other States,
Court of the Territory in banc. No separate a
with permanent appellate judges has been cons

In addition to the preliminary views of
the Constitutional Commission, suggestions ha
time to time for a special Federal appeals co
division of the Federal Court of Australia. Thi
Canada and the United States, where there are
appeal courts, are often cited. Specific propo
made in this connection concerning the reform
Court of Australia and its arrangements for a
Act. Sir Harry Gibbs suggested in August 1985
family law cases could lie to a court compris
Federal Court judges. Originally, the Full Co
Court of Australia was constituted by judges
Court along lines analogous to those establis
Courts sitting in banc and in rotation. Howeve
Family Law Act 1975 (Cth) was amended by the
and the amendment of s 22 of the Act. By these
Appeal Division of the Family Court of Austral
Particular Family Court judges have been assig
Division. Six permanent Appeal Judges are pro
including the Chief Judge of the Family Court
Division of the Family Court of Australia, co
specialist appellate judges (albeit appointed
and supplemented by many acting judges) repre

towards the recognition of the different function that is involved in appellate judicial work. It was, ultimately, the recognition of that difference, and of the need to enhance the availability of appellate review that led to those reforms in England to which, ultimately, the later Australian judicial appellate changes can be traced.

Deriving lessons from the NSW Court of Appeal

In summary, the debate about our appellate courts under the High Court of Australia should be revived. The considerations which make it appropriate now to do so include the recent termination of all appeals to the Privy Council in 1986; the need for special leave to secure appeal to the High Court of Australia; the consequent changing role and large area of practical finality of the appeal courts in Australia under the High Court; the pressure which has been building up in the legal profession for a further level of appeal, as of right; the suggested reforms put forward by the Constitutional Commission; and the tentative steps taken in a number of jurisdictions (most clearly in the Family Court of Australia) to designate permanent appellate judges. The coincidence of all of these moves, together with the completion of the first 20 years of the operation of the New South Wales Court of Appeal make it especially appropriate to consider the experience of that court. From its history and operations may be derived lessons for other jurisdictions in Australia. The publication in 1987 of the first Annual Review of the Court of Appeal[18] for the first time, provides data which, it is suggested, might assist those responsible for determining the future directions of Australia's appellate system.

ENGLISH AND COLONIAL APPELLATE ARRANGEMENTS

The early limited availability of appeal in England

The notion of separate courts to hear appeals from trial courts, was not generally accepted in England, at the time of the establishment of the Australian colonies. Accordingly it was not part of the inherited legal institutions of Australia. In Tudor times, in England, serious conflicts had arisen between a number of bodies, (including the Star Chamber and the Privy Council), and the common law courts concerning the power of the former to review decisions of the latter. In 1641, the Long Parliament took advantage of its victory to abolish or control those tribunals which had been regarded as the bulwarks of executive tyranny.[19] Although primarily directed against the Star Chamber, the Act of 1641 also prohibited "His Majesty or his Privy Council" from adjudicating upon questions relating to "lands, tenements hereditaments, goods or chattels of any of the subjects of the Kingdom". After the Restoration, the Stuart Kings did not restore the unpopular jurisdiction of review in England. However, the jurisdiction of the Privy Council, later exercised by the Judicial Committee of the Privy Council, had not been excluded in the case of British possessions beyond the seas. The Act of 1641 had never extended to the "foreign plantations", as such possessions were at first called. Appeals from such overseas jurisdictions lay to the Privy Council at the time the Australian colonies were established.[20] But in England, with anomalous and special exceptions, a general process of appeal was at that time limited to the writ of error.[21] This writ was really an original proceeding before another court (viz King's Bench for the Court of Common Pleas;

the Exchequer Chamber for the Exchequer and King's Bench; Parliament as a High Court of final resort). The review available was very restricted, essentially being limited to errors apparent on the face of the formal record of proceedings.

Initial colonial appellate arrangements in Australia

The first civil court established in the colony of New South Wales was created by Letters Patent issued on 2 April 1787 coinciding with the departure of the First Fleet. Provision was made in the Letters Patent for an appeal from the court to the Governor of the Colony. A further right of appeal existed to the King in Council, but only if more than 500 pounds was involved. It was nearly forty years later that the Supreme Court of New South Wales, which is continued by the Supreme Court Act 1970[22], was created and Sir Francis Forbes took office as Chief Justice on 17 May 1824. He was joined later by Justices Stephen and Dowling. Within the Australian colonies, the unsatisfactory features of appellate review were to become, as the 19th Century developed, one of the factors in the Federal movement. A "Local Court of Appeals" comprising the Governor in Council was scarcely satisfactory. Such a Local Court of Appeal for New South Wales and Van Diemen's Land existed until 1828. Appeal to the Privy Council in London involved such cost and delay as to be a serious inhibition upon the practical availability of appeal or review. The Supreme Court in Sydney had, from at least 1833, followed a procedure in criminal and court trials by which single judges could refer points of law to the full Court. The first recorded case of an application to a Full Court for a new trial occurs in 1845. The passage of the Administration of Justice Act 1840 provided the

first recognition of the Full Court's entitlement to move beyond the then English procedures. Section 5 of that Act provided for review of the decisions of the resident judge at Port Phillip by way of "appeal or otherwise" by the Supreme Court in Sydney sitting "in Banco". A general Australian court of appeal was proposed, as Quick and Garran point out, as early as 1849. The idea recurred frequently during the 19th Century. It ultimately came to fulfilment in s 73 of the Australian Constitution. The idea was constantly stimulated, particularly in the second half of the nineteenth Century by developments which were then occurring in the United Kingdom itself.

Coinciding with the establishment of the Supreme Courts in Tasmania, New South Wales, Ceylon and other British colonies and as part of the moves to reform and rationalise the administration of justice in England, steps were taken by the Imperial Government to enhance and centralise certain procedures for appeal. In 1833, a special committee of trained lawyers and ecclesiastics for ecclesiastical causes was set up for the administration of justice falling within the continuing jurisdiction of the Privy Council. This Committee was called the Judicial Committee.[23] Its composition underwent modification by subsequent statutes and practice in the century and a half which followed. Its composition became, in effect, the same as that of the Judicial Committee of the House of Lords, together with additional colonial and later Dominion Judges and Judges of superior courts who were members of the Privy Council although not members of the House of Lords.

19th Century appellate reforms in England

It had been established that, in Chancery, where there

was no formal record, a review on the merits existed in the form of a rehearing by the Lord Chancellor. In 1675 it was also established that an appeal lay to Parliament. That appeal came to be exercised exclusively by the House of Lords. These arrangements were radically changed in 1851. In that year, a development took place which was to affect the subsequent development of appellate institutions throughout the Empire and later the Commonwealth of Nations. It was said at the time to be the greatest change in English law since John de Waltham invented the writ of subpoena in the reign of King Richard II. A Chancery Court of Appeal was established as an intermediate court of appeal between the Chancery Court and the House of Lords.[24] It was constituted by two "Lords Justices" and the Chancellor, sitting as judges of appeal, together with the Vice-Chancellor or the Master of the Rolls, if the Chancellor asked them. A regular appellate court was thus provided to permit, as a normal attribute of the administration of justice, an appellate review in Chancery cases. Although the Chancery Court of Appeal did not enjoy a long life its achievement was significant. The first Lords Justices "carried the standard into the modern Court of Appeal".[25]

The Court of Appeal in Chancery, along with the Court of Chancery itself, was abolished in England by the Judicature Act, 1873. The original plan, devised by Lord Chancellor Selborne, was that the Court of Appeal of England would be supreme in function, as in name. The judicial work of the House of Lords and the Privy Council would be terminated and assumed by a "Court of Appeal". However, this proposal attracted criticism, especially from Scottish, Irish and colonial

Accordingly, in 1876, Lord Chancellor Cairns reversed
sion to abolish the House of Lords and the Privy
thereby leaving England with a "two tier" system of
which survives to this day. Such a system has been
in many parts of the Commonwealth of Nations and it is
ed in the judicial arrangements of New South Wales. The
ther major institutional reforms in England occurred in
1966. In the former, limits were placed upon appeals
e County Court which proceed to the Court of Appeal.
peals were not to progress further to the House of
save with the leave of the Court of Appeal or the House
s. 26 In the latter, the Court of Appeal assumed
ction in criminal appeals by the establishment of the
Division of the Court of Appeal. As was remarked in a
of the history of the English Court of Appeal given in
me in 1951, by the then Master of the Rolls (Sir Raymond
d, later Lord Evershed) 95% of the appeals in civil
erminated in the Court of Appeal and did not proceed to
se of Lords. A higher statistic applies now to criminal
An even higher statistic obtains in respect of cases in
lia terminating in the New South Wales Court of Appeal
ber like courts.

ISHMENT OF THE NEW SOUTH WALES COURT OF APPEAL

cations for a separate appeal court

It is rare for a graduation address to influence
uent developments in the structure of a country's courts.
e address of Sir Raymond Evershed, at Melbourne
rsity in 1951, plainly influenced thinking about appellate
in Australia in the fourteen years between its delivery

Wales Court of Appeal.
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on a number of occasions
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tralian jurisdictions.
t Court of Appeal, as
e as follows:-

(1) Appellate work typically involves functions and skills different in kind from those performed by trial judges.

(2) A permanent court of appeal is likely to result in an improved quality of judicial performance, by attracting and permitting the appointment of appellate judges of the highest ability to perform the special duties of an appellate court;

(3) The creation of a permanent appellate court also recognises the fact that such a body will, in practice, be the final resort for the overwhelming bulk of the cases coming to it.

(4) Just as in the highest tier, a permanent appellate court is necessary, so in that tier which disposes of the overwhelming majority of appeals it is desirable that a permanent court of appellate judges should be established. Only in this way can the primacy of the appellate court be assured. Evershed suggested that there was "no obvious primacy" in a court comprised of a rotating membership of judges, all of equal status;

(5) The necessary attention to the principled development of the law in an appeal court could better be secured by a comparatively small court of judges operating in repeated interaction with each other;

(6) Evershed also pointed to the need to avoid the appearance (or still worse the actuality) of appellate judges tempering their decisions

concerning the judgments of their colleagues by the prospect that, some time later, their colleagues might be sitting in review of their judicial performance. Whilst indicating that this consideration need not be given "great weight", it was nonetheless mentioned by Evershed. It is a reason of principle frequently advanced for the establishment of a permanent appeal court. Only by its separation from trial courts could the reality and appearance of complete independence on the part of appellate judges be secured. So long as trial judges review each other's work, the risk exists that the public and the legal profession will believe that, occasionally, appellate review may have been influenced, even unconsciously, by the pressures of comity and collegiality with brethren. This is a risk which the creation of a separate appeal can diminish or avoid.

To the above reasons, a number of additional reasons were offered in the New South Wales Parliamentary Debates of 1965 which preceded the establishment of the New South Wales Court of Appeal. They included -

(7) The mechanical and practical problems which arise, from having a rotation of judges especially in a court with a heavy workload. Judges who depart from the appellate tribunal and return to trial work, including sometimes trials at centres distant from the court of appeal, may find the task of writing judgments, often without the

availability of adequate research resources, a burdensome interruption to their duty of presiding at trials. Opportunities for consultation and discussion with appellate colleagues are necessarily reduced by dispersal of the bench when it is constituted by rotation to hear appeals. The coherent development of legal principle and the avoidance of unnecessary differences may be secured by the opportunity, to sit together daily, to discuss issues involved in reserved judgments. The application of peer pressure to ensure the prompt delivery of judgments, is enhanced in a permanent appeal court and reduced by rotational arrangements;

(8) Connected with the foregoing is the greater likelihood that a permanent appellate court will be in a superior position to develop consistent legal principles to secure consistency between appellate decisions even when delivered by the court differently constituted. Where it is appropriate, an appellate court is also typically better able to develop the common law in a principled manner than will be a court of constantly varying composition[28];

(9) Finally, there is the example of numerous permanent intermediate courts of appeal in other jurisdictions of the common law, including in England, the Canadian Provinces and New Zealand,[29] where the basic system of law is the same and the

operational needs of the legal s
virtually identical.

These were the principal reasons offere
establishment of the Court of Appeal of New So
if not all of them would seem to apply with e
the other Australian jurisdictions which have
with the Full Court arrangements discarded el

Proposals for a court of appeal in New South

By the 1960s, many proposals were being
Wales for a permanent appellate court. In 196
Attorney General (Mr. R.R. Downing, MLC) ra
permanent appellate court in the State with th
Bar Council. According to his observations in
debate of the 1965 Bill, the Bar Council reco
constitution of an appellate court "of the ty
proposed".[30] He explained the Bar Council's re

> "The reason actuating those who consider
> that time was their objection to a syste
> judges to sit in the Full Court. The pr
> developed over the years, not of having
> judges sitting in the full court, but of
> time to time each judge in turn as a me
> certain disadvantages which the constitu
> of appeal would overcome."[31]

However, in office, Mr. Downing did not
recommendation of the Bar. He decided that it
preferable to amend the legislation governing
to give the Chief Justice complete administrat
constitute the Full Bench "not on a roster sys

selecting the judges most competent to deal
type of appeal that was to come before the C
contemplated bringing up a judge from the pa
specialised jurisdiction of the Court in eac
an appeal, for example, from the Land and Va
Chief Justice would include a judge from tha
the constitution of the bench. This idea had
part, in the former constitution of the Full
upon appeal from judgments of the Supreme Co
Territories, by the provision that, in such
Federal Court would be constituted to inclu
of the Territory court.[32]

In addition to the support of the Bar f
appellate court, it appears that succeeding G
also informing the Governments of the day, of
for the establishment of a permanent appellat
Leader of the Government in the Legislative C
Bridges) speaking in support of the 1965 Bill
fact -

> "Both the present Chief Justice and his
> office, the present Lieutenant-Governor
> Street, have, over the years, urged tha
> made for two appeal courts, sitting req
> the organisation of the court should be
> provide for a special appellate as dist
> first instance, jurisdiction."[33]

The reorganisation of the New Zealand ap
with the establishment of the present New Zeal
Appeal in 1957 provided further stimulus to th

As appears from the Parliamentary Debates, Mr. Downing revealed that he had visited New Zealand and discussed the then new appellate arrangements of that country before coming to his conclusion that a separate appeal court was not warranted. However, he recorded that "it was fair to say" that the only criticism directed by New Zealand practitioners against the New Zealand Court of Appeal was "the fact that it had been given jurisdiction in criminal appeals".[34] He therefore welcomed the provisions in the 1965 Bill, excluding criminal appeal from the proposed new Court of Appeal.

Coinciding with the professional and political discussion in New South Wales of a permanent appellate court was academic and professional pressure in the same direction. In October 1964, an editorial statement in the Australian Law Journal, reviewed State appellate courts, in the context of the "pressing need for the establishment of further Federal courts". In late October 1964 Mr. Downing had announced that the establishment of a permanent appellate court had been under investigation for some time and that it was hoped "to introduce a bill on the subject early next year" [1965].[35] The editor of the Law Journal urged that it would be appropriate to consider a new system for appeals from State courts to deal with "all appeals in non-Federal cases" to coincide with the finalisation of a "new system of Federal courts". Reference was again made to the speech of Sir Raymond Evershed in 1951 and to the establishment of the New Zealand Court of Appeal, a development which, it was claimed, had not been regretted in that country. The comment concluded:

"The establishment of an appellate division has indeed been under consideration in New South Wales for some years. There are, of course, problems associated with setting up the Court, but these must be faced sooner or later and we take leave to suggest that the present would be an appropriate time to deal with them."[36]

It was in this context that there occurred the political event which overtook the more modest proposal of Mr. Downing. The election of the Askin government in 1965 led to the introduction of legislation with three initiatives designed to improve the administration of justice in the State. The first such initiative was the creation of a Law Reform Commission for the State. The second was the creation, by legislation of a permanent Court of Appeal. The third reform was the abolition of the use of juries in road accident cases. Only the third attracted widespread controversy, debate and opposition within the legal profession. Noting that the "three major alterations" in the institutional machinery of justice in New South Wales which had followed the change of Government in New South Wales, the Australian Law Journal commented, in relation to the permanent appeal court:

"This is a step which has been widely recommended ... and should contribute not only to the expeditious giving of judgments and the efficient handling of the appellate work generally, but also to a development of a coherent judicial approach and a high level of quality in the elaboration of grounds of judgments."[37]

The provisions of the Supreme Court and Circuit Courts (Amendment) Act 1965 establishing the Court of Appeal, were

also reviewed in the Journal. Its jurisdiction and the appointment of the first members of the Court were duly noted.[38]

Parliamentary Debates on the Bill

In the Parliamentary Debates on the 1965 Bill, only one matter of substance emerged in contention between the political parties. One other matter, which concerned the Opposition, was conceded by the Government's proposal that criminal appeals should remain the province of the Court of Criminal Appeal, constituted by the Chief Justice as provided by the Criminal Appeal Act 1912.[39] This concession distinguished the New South Wales Court of Appeal from the Canadian Provincial Courts of Appeal, the New Zealand Court of Appeal and the English Court of Appeal as it was to develop. It remains a source of concern. The justification given for retaining a separate Court of Criminal Appeal for criminal appeals was that such a court had already long been established by legislation, that particular urgency in the speedy determination of criminal appeals was more essential than in civil appeals[40] and that matters concerning the liberty of the subject and the level of sentence should be left to the Supreme Court sitting in banc, determined by members familiar with the day to day administration of the criminal law.[41] No attempt was made to distinguish that class of case from others in which a similar argument could have been mounted, such as review of the adequacy of damages for personal injury. A further consideration was the fact that, at that time, (although not after 1966) the Court of Appeal in England was not involved in ordinary criminal appeals.

The matter of contention expressed by the Shadow Attorney-General (Mr. Downing) was one which was soon to emerge

in the Supreme Court. It related to the status and precedence to be accorded to the new Judges of Appeal. As Mr. Downing pointed out, seniority, rank and precedence were sensitive questions. Assigning a higher seniority to a new appellate judge over, say, a judge performing the important tasks in the Commercial List might result in a disturbance of established seniority which might not be warranted.[42] The particular inconsistency of assigning a higher rank to the Judges of the Court of Appeal than to judges who might make up the Court of Criminal Appeal, but not be permanent appellate judges, was referred to by Mr Downing. An amendment was foreshadowed by the Opposition, although not ultimately pressed, to delete the provisions of the Bill according higher seniority, rank and precedence to the Judges of Appeal. It was the only substantial amendment suggested to the Bill. Otherwise, Opposition members generally welcomed the Bill, agreeing with the Government that it was desirable that it should be afforded the opportunity to work. The Government refused the foreshadowed amendment to delete the assignment of higher status to the Judges of Appeal. It was explained that such a provision was necessary for a court which would be regularly sitting in judgment upon the judgments of other Supreme Court judges.[44]

In the event, the anxiety of Mr. Downing on this issue proved perceptive. The introduction of the new Court of Appeal, and the assignment to it of some only of the senior judges of the Supreme Court (together with the appointment to it of two Judges, appointed virtually directly from the Bar (Asprey, JA and Holmes, JA) caused rifts in personal and professional associations. This had been foreseen by Chief Justice Herron in

his report to the Government following an overseas study tour which resulted nonetheless in his recommendation that a permanent court of appeal should be established -

> "In a court the size of the Supreme Court of New South Wales, such a reform [the establishment of the permanent Court of Appeal] seems unanswerable, although in its initial stages it may cause some internal difficulties. These were successfully negotiated in New Zealand where the reform now works well."[45]

In the nature of such controversies, although widely known in the legal profession, it was little known in the community generally. A hint of the deep feelings which were caused by this disturbance of seniority in the then Supreme Court can be seen in the obituary written by Else-Mitchell, J following the death of the Hon. Bruce Macfarlan who, like Else-Mitchell, J had been a senior judge of the Supreme Court not appointed to the Court of Appeal.[46]

The Judges of Appeal

Amongst the persons appointed as Judges of Appeal, one was to become the present Chief Justice of Australia (Mason, JA). Two were later to serve as Justices of the High Court of Australia (Jacobs, P and Walsh, JA). Another Judge of Appeal, was later appointed Chief Judge of the Federal Court of Australia, an office he still holds (Bowen, JA). Since the establishment of the Court of Appeal, there have been five Presidents, twenty Judges of Appeal and twelve additional Judges of Appeal appointed. The Presidents have been Sir Gordon Wallace (1966-70), Sir Bernard Sugerman (1970-72), Sir Kenneth Jacobs (1972-74), and A.R. Moffitt (1974-84). In addition, 15

permanent Judges of Appeal have held office. There have been 17 additional Judges of Appeal appointed under s 36 of the Supreme Court Act 1970. By an amendment to that Act in 1973, the Chief Judges of the Supreme Court are deemed to be additional Judges of Appeal. However, it is rare for the Court of Appeal to call upon the services of additional judges. It has done so in particular cases, as when Rogers J, who is in charge of the Commercial List of the Supreme Court, sat as an Additional Judge of Appeal in an early test case on the availability of the Mareva injunction in New South Wales.[47] Generally, the Court of Appeal is constituted exclusively by the permanent Judges of Appeal. Occasionally the Court sits in a bench of five judges, that constitution is reserved for cases of clear importance, where an application is foreshadowed to reargue previous authority of long standing[48] or where a difference has arisen in Divisions of the Court of Appeal differently constituted. Normally, the Court of Appeal sits in a Division of three judges. It is usual for there to be two Divisions of the Court sitting for at least three and often four days each week.

Workload of the Court of Appeal

The first Annual Review of the New South Wales Court of Appeal annexes a large number of schedules and charts concerning its work. This material sets out a great deal of information concerning the work of the Court and of the Judges of Appeal who constitute it. No other Australian court has previously made such information publicly available. The High Court of Australia[49] and the Australian Conciliation & Arbitration Commission[50] are required by statute to deliver an

annual report to Federal Parliament. The Judges of the Supreme Court of Victoria are also required to produce an Annual Report.[51] In the United States Federal[52] and State[53] superior courts are typically required by statute to produce annual reports. These reports are a source of a great deal of information upon the performance of the courts which made them. The obligation to produce such reports directs the attention of the judges to the necessities of efficient management of court business and to the obligation of regular accounting for their stewardship of an essential organ of government. There is at present no statutory obligation upon the Federal Court of Australia, the Supreme Court of New South Wales or most other State and Territory Supreme Courts to produce an annual, public report. In the past, the Supreme Court of New South Wales has not done so. Doubtless in every case, as in the New South Wales Court of Appeal, there have been internal, confidential statistical collections.

The Judges of Appeal gave as the reasons for now making public an annual report, the following:

(1) The legitimate interest of the public, the judiciary and the legal profession to have knowledge about the work of the Court of Appeal;

(2) The desirability of providing an accessible means of monitoring the appeal process in New South Wales and a vehicle for providing information, of legitimate public and professional interest, concerning that process;

(3) The desirability of providing comparative statistical information concerning the work of the Court of Appeal, together with commentary on trends derived from such statistics;

(4) The advantage of providing the Court itself with comparative statistical information, by which to measure and assess its own performance; and

(5) The opportunity provided to report upon matters of concern arising out of the business of the Court of Appeal.

Contained within the Annual Review of the Court of Appeal is a schedule collecting the suggestions for law reform made by the Judges of Appeal during the year. This is also the first time such a collection has been attempted by a court in Australia although s 28 of the Supreme Court Act 1958 (Vic) appears to contemplate such a procedure in that State. In civil law countries, it is quite normal for appeal courts, in reporting annually to the legislature, to list for attention those matters which have been considered during the year by the court to merit legislative attention. In the past, in Australia, such suggestions have tended to disappear into the law reports. Law Reform bodies now collect, and note in their annual reports, many such suggestions.[54] The schedule attached to the Annual Review provides a useful source of legislative ideas and a permanent reminder in the case of legislative inaction.

However, the most important statistics annexed to the Review are those which demonstrate the gradual growth of the work load of the New South Wales Court of Appeal, the changing nature of its work and the consequent increase in the burden upon the Judges of Appeal.[55] See Table 3. This burden is aggravated because of the decline in straight forward and simple appeals (eg damages assessments) and proportional

increase in appeals in complex litigation.[56] These changes affect numerous other statistical presentations, including the necessary length of hearing times for oral argument, the consequent delay in listing for argument, delays in delivery of judgments and the reduced number of appeals suitable for ex tempore judgment. All of these statistics are provided. Two charts, attached to the Annual Review show the overall growth of business of the Court of Appeal, since it was established. A more detailed analysis since 1978 of the appeals listed and heard, demonstrates also the declining numbers of appeals disposed of by ex tempore judgments. Another schedule shows the absolute fall away in the assignment of the Judges of Appeal to sit in the Court of Criminal Appeal.[58] Although there was substantial participation by the Judges of Appeal in the Court of Criminal Appeal between 1980 to 1984, more recently, save for the case of R v Murphy[59] which was concurrently in the Court of Appeal, and the Court of Criminal Appeal and in which the Court of Appeal was constituted by five Judges of Appeal, the Chief Justice has changed his policy. He no longer assigns the Judges of Appeal, other than the President, to sit in the Court of Criminal Appeal. Nevertheless a significant and increasing part of the jurisdiction of the Court of Appeal itself now includes criminal law questions, notably arising out of applications for prerogative relief. That aspect of the Court of Appeal's work is increasing. It would be incorrect to classify the Court as a one of civil law only.

One other feature of a permanent appellate court should be noted. It is the facility which stable membership of a collegiate body permits to ensure experimentation and

innovation in efficiency procedures. These are much less readily available in courts of large or changing composition. The New South Wales Court of Appeal's Annual Review shows the large number of measures which have been introduced by the Judges of Appeal to tackle the problems of delay in the Court. As the Review demonstrates, business meetings of the Judges of Appeal take place every fortnight at which the operation of the Court, the state of its list, the outstanding judgments and other house keeping problems are reviewed around the table.[59] Constant attention can be given to the introduction of new practices, new modes for the presentation of judgments, the introduction of new technology and consultation with the profession with a view to improvement of the performance of the Court. It is much more difficult to achieve innovation in a large body of constantly changing composition. It may not be doubted that the New South Wales Court of Appeal has been able to cope with its changing and rapidly increasing work load only because of management procedures possible in a small group of judges of fairly constant composition.

Whether the problems the New South Wales Court of Appeal faces are identical to those of other jurisdictions in Australia is a subject for further analysis. The statistics and other information contained in the first Annual Review of the Court at least provide a basis for grounding that discussion in facts. The reminder of the arguments advanced in this Journal by Sir Raymond Evershed more than 30 years ago, should elevate the consideration of the arguments for permanent appellate courts to a higher plain. What is at stake is not, ultimately, professional dignity and the status of a few judges. It is not

even the attraction of the most talented lawyers to judicial office or the provision of another level of effective review of contentious cases. What is really at stake is the most efficient means of providing appellate review and at the same time developing consistent and wall thought out legal principles in an age of rapid social and technological change where, inevitably, only a very small proportion of cases can reach the ultimate court of the nation.

If the conclusion is inescapable, as I believe it is, that all of these objectives are better attained for the good government of our community, by permanent appellate courts, the debate sparked by Lord Evershed 30 years ago, which produced the New South Wales Court of Appeal, could, with advantage be revived in Australia at this time.

TABLE 1

EXTENT OF FINALITY OF JUDGMENTS AND ORDERS OF THE CA ON APPEAL

Stated in relation to all judgments and orders in 1st and appeals lodged and determined in the same period

TOTAL NO. OF ORDERS ON JUDGMENTS = 226

TOTAL NO. OF ORDERS ON JUDGMENTS & MOTIONS = 725

	NUMBER OF J & O	AS % OF JGMENTS APPEAL	AS % OF ALL ORDERS INCLUDING MOTIONS
APPEALS TO JCPC FROM CA	2	.75	.28
REVERSALS BY JCPC	1	.38	.14
FINALITY IN CA IN RELATION TO REVERSALS IN JCPC		99.6	99.86
APPLICATIONS FOR SPECIAL LEAVE TO APPEAL TO HCA	32	12.03	4.41
REVERSALS BY HCA	4	1.5	.55
FINALITY IN CA IN RELATION TO REVERSALS IN HCA		98.5	99.5
TOTAL REVERSALS	5	1.87	.68
TOTAL NO. OF APPEALS (JCPC AND HCA)	34	12.78	4.68
FINALITY IN CA IN RELATION TO TOTAL REVERSALS		98.13	99.32

TABLE 2

ANALYSIS OF APPEALS TO & FROM THE FEDERAL & STATE APPEAL COURTS IN 1986

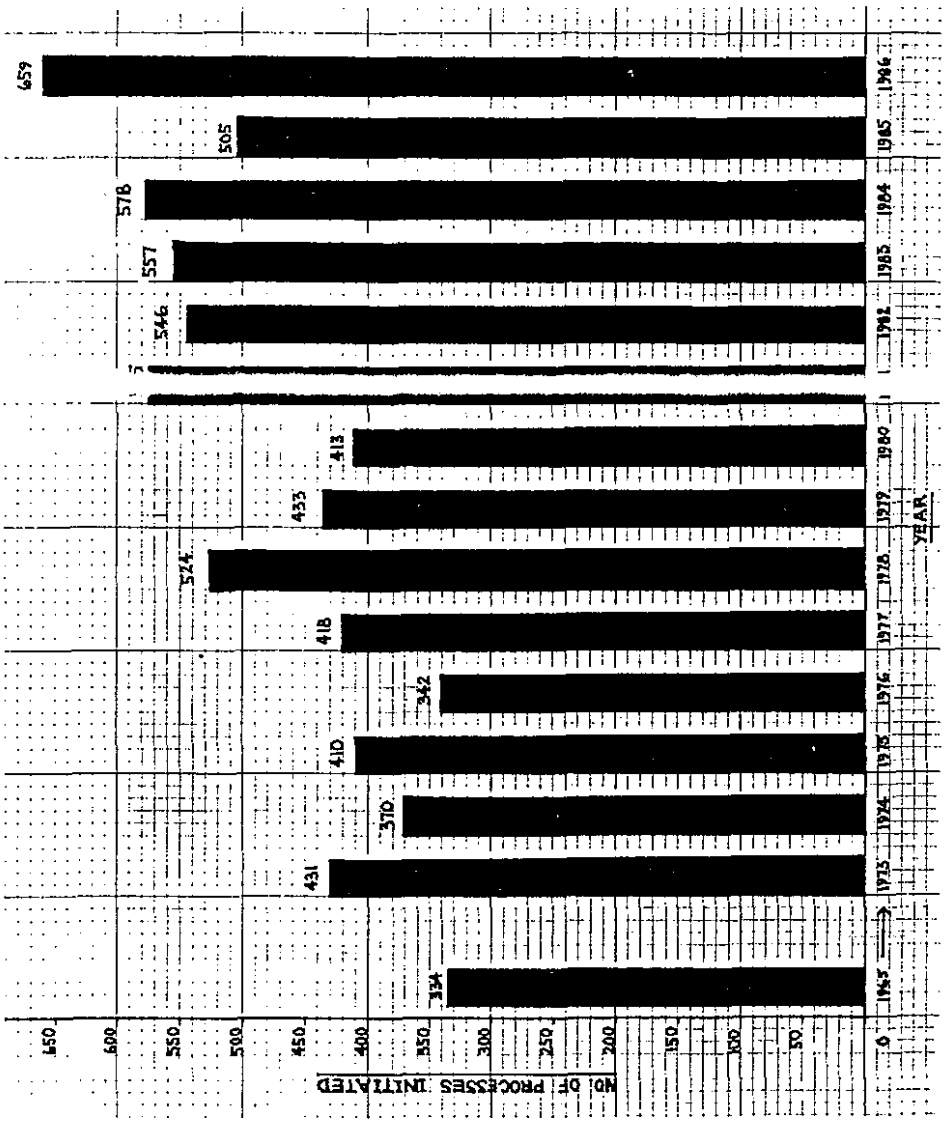
APPELLATE JURISDICTION	NO. OF APPEALS	NO.OF MOTIONS	CIVIL SPECIAL LEAVE APPLICATIONS TO HIGH COURT OF AUSTRALIA GRANTED
FEDERAL COURT OF AUSTRALIA (1)	321	NA	11
FAMILY COURT OF AUSTRALIA (2)	197	16	0
NSW COURT OF APPEAL	266	459	11
VIC FULL COURT	80	50	2
QLD FULL COURT	198	NA	4
SA FULL COURT	148	NA	6
WA FULL COURT	91	NA	1
TAS FULL COURT	7	NA	0
NT COURT OF APPEAL	26	NA	0

1. APPELLATE JURISDICTION - FEDERAL COURT OF AUSTRALIA includes civil and criminal appeals for 1986.

2. APPELLATE JURISDICTION - FAMILY COURT OF AUSTRALIA includes civil and criminal appeals for 1986. The MOTIONS figure represents the number of callovers in the Family Court for 1986.

3. The NO. OF APPEALS represents the number of **civil** appeals actually heard and disposed of within the designated jurisdiction, except in the Federal Court of Appeal, where there is no differentiation between civil and criminal appeals.

TABLE 3: GROWTH IN NUMBER OF PROCESSES INITIATED IN THE COURT OF APPEAL 1965-1986



FOOTNOTES

* The historical and statistical materials in this article are derived from the Annual Review 1986 of the Court of Appeal of the Supreme Court of New South Wales, Sydney 1987.

1. Supreme Court and Circuit Courts (Amendment) Act 1965 (NSW).

2. F.C. Hutley, "The Legal Traditions of Australia as Contrasted with those of the United States" (1981) 55 ALJ 63, 69.

Court for the British Empire 1833-1971" 7 Georgia Journal of International and Comparative Law 47 (1977).

4. See M.D. Kirby, "Closer Economic and Legal Relations Between Australia and New Zealand" (1984) 58 ALJ 383, 387 ff.

5. See eg Australian Consolidated Press Limited v Uren [1969] 1 AC 590, 641; Cf Geelong Harbour Trust Commissioners v Gibbs Bright & Co (A Firm) [1974] AC 810, 821.

6. Privy Council (Limitation of Appeals) Act 1968 (Cth); Privy Council (Appeals from the High Court) Act 1975 (Cth). See also (1976) 50 ALJ 389 and 6 Ad L LR 201.

7. Australia Act 1986 (Cth). See Wentworth v Rogers (No. 9) unreported, CA NSW, 6 March 1987.

8. (1978) 141 CLR 88. Note, as to the continuing authority of Privy Council decisions the observations of McHugh JA in Hawkins v Clayton & Ors t/as Clayton Utz & Co (1986) 5 NSWLR 109, 11. See also A.F. Mason, Address to Sydney

University Law Graduates Association, mimeo, 23 March 1987.

9. Judiciary Act 1903 (Cth), s 35(2).

10. Two Privy Council appeals from the New South Wales Court of Appeal remain to be determined at the time of writing.

11. D. Williams, President's Page, Australian Law News, January/February 1987, 5.

12. See F.L. Morton and W.J. Whitey, "Charting the Charter 1982-1985: A Statistical Analysis, noted Canadian Bar Association National, Vol 13 no 10 November 1986, 19

13. United States, The Commission on Revision of the Federal Court Appellate System: 'Structure and Internal Procedure: Recommendation for Change' 67 FRD. 195 (1975) (Hruska Commission); Federal Judicial Center, Report of the Study Group on the Case Load of the Supreme Court, 1972 (Freund Committee); S.M. Hufstedler, "Bad Recipes for Good Cooks - Indigestable Reforms of the Judiciary." 27 Arizona Law Rev 785, 795 ff (1985).

14. J.D. Plaschkes "A Portrait of the United States Court of Appeals for the Federal Circuit" 33 Federal Bar News and Journal 124 (1986).

15. Australia, Constitutional Commission, Committee on the Australian Judicial System, Statement of Preliminary Views, 1986, 7.

16. ibid, 11.

17. H.T. Gibbs (1985) 59 ALJ 522.

18. New South Wales Court of Appeal, Annual Review 1986.

19 16 Car I c 10.

20. Fryer v Bernard (1724) 2 PW 262.

21. See R. Evershed, 'The History of the Court of Appeal'

(1951) 25 ALJ 386, 387.

22. Section 22.

23. 3 and 4 Will 4 c 41.

24. 14 and 15 Vic c 83.

25. Evershed, op cit, n 21, 387.

26. ibid.

27. id, 388.

28. A.D. Bridges, New South Wales Parliamentary Debates (Legislative Council) 14 October 1965, 1341, 1342.

29. Cf Howley v Lawrence Publishing Co Ltd, unreported, CANZ, 1 May 1986 reviewed in D.V. Williams 'Towards being a Court of Final Resort' (1986) 12 NZ Unis L Rev 206.

30. R.R. Downing, New South Wales Parliamentary Debates, Legislative Council, 14 October 1965, 1344.

31. ibid.

32. Federal Court of Australia Act, 1976 s 25(3). It was so enacted "except where the Chief Judge considers it impracticable to so provide."

33. Bridges, op cit n 28, 1342.

34. Downing, op cit n 30, 1346.

35. (1964-65) 38 ALJ 185.

36. ibid, 186.

37. (1965) 39 ALJ 79, 80.

38. (1965) 39 ALJ 217.

39. Criminal Appeal Act 1912, s 3.

40. W.F. Sheahan, New South Wales Parliamentary Debates, Legislative Assembly, 12 October 1965, 1268.

41. Bridges, op cit, n 28, 1343.

42. Downing, op cit, n 30, 1346.

43. ibid, 1347.

44. Bridges, op cit, n 28, 1341.

45. Bridges, ibid, 1344.

46. See (1978) 52 ALJ 403.

47. Riley McKay Pty Limited v McKay [1982] 1 NSWLR 264.

48. See Proctor v Jetway Aviation Pty Limited [1984] 1 NSWLR 166, 171.

49. High Court of Australia Act 1979 (Cth) s 17.

50. Conciliation & Arbitration Act 1904, (Cth) s 70.

51. Supreme Court Act 1958 (Vic) s 28.

52. United States Code, Title 28, s 604 (a)(3).

53. See eg Illinois State Constitution 1970, Article VI, s 17.

54. See eg Australian Law Reform Commission, Annual Report 1984

55. New South Wales Court of Appeal Annual Review 1986, Schedule 18, Chart 4.

56. See eg ibid Schedule 11 Contrasting patterns of work in 1978, 1982 and 1986.

57. ibid, Schedule 8, Chart 2.

58. ibid, Schedule 16, Chart 3.

59. (1985) 63 ALR 53.

60. New South Wales Court of Appeal, op cit n 18 pp 34, 41.