NICOLA M. DRAYTON-GLESTI

THE PRIVY COUNCIL
SHALL WE KEEP IT, LEAVE IT OR REPLACE IT...?

LLM RESEARCH PAPER
PUBLIC LAW (LAWS 545)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

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CHAPTER III – REPLACING THE PRIVY COUNCIL WITHIN NZ *continued*

ABSTRACT

This research paper aims to answer the following questions:

- Should NZ continue to use the Privy Council in London as the final Court of Appeal?
- How can we replace the Judicial Committee, if the final appeal to London is terminated?
- Is it simply a question of adjusting the current NZ legal system to accommodate final appeals?
- Could a Supreme Court of NZ or a Supranational Court deliver a satisfactory answer?
- How many appeals should our legal structure provide anyway?

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 14,000 words.

CHAPTER I - JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

I INTRODUCTION

The New Zealand legal system is hierarchically structured and modelled on the English legal system.[1] On the bottom layer we have dispute and administrative tribunals, a level higher the District Court, sitting with or without a jury and having original jurisdiction for most cases. Above the District Court is the High Court and the Court of Appeal in Wellington is the final court within the national borders of New Zealand.

Since 1849, final appeals from the NZ Courts have been heard by the Judicial Committee of the Privy Council in London. The Privy Council (or Board) has the authority to hear both civil and criminal applications, although civil cases dominate.[2] This research paper will concentrate on the role of the Judicial Committee and look into the consequences of abolishing final appeals.

A *Aim of the Research Paper*

Subsequent to the Lange Government's announcement in October 1987[3] that appeals to the Board would end in the near future, much discussion and debate has emerged on the role of the Judicial Committee.[4] Significantly, relatively little opinion has been expressed concerning a suitable replacement for the Board. It is the view of the author, that discussing the abolishment of final appeals to the Privy Council must include suggestions of adequate alternatives. Not much progress has been made since 1987, because not enough thought was put into the issue of an appropriate alternative to the Board. The current status quo will persist until the questions of abolition and

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1 **R D Mulholland** *Introduction to the New Zealand Legal System* (7ed, Butterworths, Wellington, 1990) 40-41.

2 See the Privy Council (Judicial Committee) Rules Notice of 1973.

3 **Sir Geoffrey Palmer** "Privy Council Appeal Right to go" (1987) 272 LawTalk 3.

4 For example **Gabrielle Meech** *The Privy Council, will it be missed?* (LLM Research Paper, Wellington, 1988), **Bernard H Clark** "When the Court of Appeal is wrong" (1990) NZLJ and "Chief Justice at the Privy Council: Interview with Sir Thomas Eichelbaum on 2 March 1994, concerning the Privy Council and other topics" (1994) NZLJ.

replacement are addressed together.[5] The Prime Minister and the Law Society have both recently called for suggestions on how to replace the Judicial Committee.[6]

In view of the current state of affairs, this research paper will aim to answer the following questions:

- Should NZ continue to use the Privy Council in London as the final Court of Appeal?
- How can we replace the Judicial Committee, if the final appeal to London is terminated?
- Is it simply a question of adjusting the current NZ legal system to accommodate final appeals?
- Could a Supreme Court of NZ or a Supranational Court deliver a satisfactory answer?
- How many appeals should our legal structure provide anyway?

These questions are complex and demanding and there is no easy solution in sight. At the heart of the subject lies the dilemma of tradition and security v national identity and autonomy. Only the people of NZ can themselves decide the future of their legal structure. This research paper aims to assist the debate on who should decide about final NZ appeals and where they should be settled.

B *Arrangement of the Research Material*

The remainder of Chapter I will lay out some background and statistical information about the Privy Council.

Chapter II will discuss whether NZ should continue or discontinue appeals to the Board. It will look closely at both sides of the controversy and outline the merits of each proposal.

Chapters III and IV concentrate on the question of the Judicial Committee's replacement. Chapter III discusses NZ alternatives to the Board such as the restructuring of the courts making the NZ Court of Appeal into our final court, or the introduction

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[5] Above N1, 52.

[6] **Judith Potter** (until recently the Law Society President) and Prime Minister **Jim Bolger** have called for suggestions on television and radio, and in the press. Eg see "Bolger says 2000 appropriate time for republic" *The Dominion*, Wellington, New Zealand, 17 March 1994.

of a further tier, the Supreme Court of NZ. The chapter will also address the debate around the amount of appeals our legal system should allow.

A Supranational Court is the subject matter of chapter IV. The suggestions of a Trans-Tasman Court and Pacific Court of Justice will both be discussed. Chapter IV will finally consider the possibility of combining both together to create a truly international court for the Pacific region.

Chapter V will offer a summary and evaluation of the research for this paper and answer the questions from chapter I. A timetable for change and suggestions for further research will complete the main text.

Appendix I will display statistical material about NZ cases that applied to be heard by the Board.

II BACKGROUND INFORMATION

Before examining the issues surrounding the right of appeal to the Privy Council, it is obligatory to recognise the structure of the Judicial Committee, its members, location and the relevant facts regarding the right of appeal.

A The Judicial Committee of the Privy Council

The Board itself sits in London at 6 Downing Street, approximately 100 metres from Number 10. The chamber where the cases are heard is situated on the second floor, in a room designed in 1828 by Sir John Sloane. The enclosure bears little resemblance to a NZ court, especially as the Lordships do not sit on a platform but in a semi-circle at floor level near to counsel.[7]

Although the Board is often referred to as the final court of appeal, technically the Judicial Committee of the Privy Council is an adviser to the Queen in her Privy Council. The role of the Board emerged from the Committee of Trade and Plantations, whose original function was to hear petitions from British overseas possessions. The petitions were made to the Crown as the Fountain of all Justice. The Privy Council was eventually formalised by the Judicial Committee Act 1833, which made the Board the final appeal court for the Empire, later it took over the same role for

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[7] **John McLinden** "The Privy Council in the 1990s" (1992) 364 LawTalk 10.

the independent Commonwealth countries.[8]

Apart from hearing appeals from the Commonwealth, the Privy Council is also responsible for hearing appeals from the Isle of Man and the Channel Islands (Jersey and Guernsey). Professional disciplinary tribunals of doctors, dentists, opticians and vets also send their petitions to be heard and the Judicial Committee considers ecclesiastical appeals too. The Board has jurisdiction in prize appeals (seizure of cargo and shipping during hostilities) and the ability to deliberate on cases sent by special reference of the Monarch. Altogether it is estimated that the Privy Council delivers 40-50 judgments annually.[9]

Members of the Judicial Committee are the Lord Chancellor, the Lords President of the Council, Privy Councillors who have held high judicial office, the Lords of Appeal in Ordinary and judges or former judges of the Superior Courts in the Commonwealth. From New Zealand, both the Chief Justice and the President of the Court of Appeal are members of the Judicial Committee of the Privy Council.[10]

NZ appeals to the Judicial Committee have been regulated since 1910 by an Order in Council that provided for appeals from the NZ courts. The Order has been supplemented by the Privy Council (Judicial Committee) Rules Notice 1973, which sets out under which conditions and how an appeal can be made.[11] For civil actions Rule 2 of the Rules Notice provides an open right of appeal if the amount involved is above $5,000. Under $5,000 the appeal lies within the discretion of the court. Leave to appeal may be granted by either the Court of Appeal or the High Court,[12] if the Court "considers that the question is one which by reason of its great general or public importance or of the magnitude of the interests affected or for any other reason, ought to be submitted."[13] In criminal matters the Board can be petitioned as well, although criminal cases are rarely heard unless a major point of law is involved. The

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8 **New Zealand Law Commission** *The Structure of the Courts* No 7 (Wellington, 1989) 228.

9 Above N7, 10.

10 Above N1, 50. In 1993 **Sir Thomas Eichelbaum**, the Chief Justice, sat on the Board during the Michaelmas term and **Sir Robin Cooke**, the President of the Court of Appeal, periodically also sits on the Privy Council. See **Philip Bradley** "Lord Goff on Privy Council Appeals" (1993) Conferentia-NZ Law Conference 1-2.

11 Above N1, 50.

12 High Court appeals are provided for by Rule 2(c) but are regarded as basically obsolete. The Court of Appeal has not encouraged the High Court to grant appeals to the Privy Council as shown in the comments expressed by **Cooke J** (as he then was) in ***Finnigan v NZ Rugby Football Union (No 3)*** [1985] 2 NZLR 190, 193. See **J W Turner** "Aspects of Privy Council practice" (1992) NZRLR 25.

13 Above N8, 228-229.

Privy Council can under its prerogative powers grant litigants special leave to appeal and special leave has been given in the past to the Maori Land Court.[14]

Since 1931, with the Statute of Westminster, the UK has allowed its Dominions to discontinue appeals to the Judicial Committee.[15] Canada took the opportunity in 1949,[16] India in the same year, Pakistan and South Africa in 1950,[17] Ceylon (Sri Lanka) in 1972,[18] Australia eventually in 1986,[19] and Singapore in 1993.[20] Countries that still use the Board include NZ, Hong Kong, Brunei, Gambia, Mauritius, Gibraltar, Trinidad Tobago and Jamaica.[21]

B *Statistics*

An interesting overview of NZ appeals to the Privy Council is contained in Appendix I. Of particular interest is the fact that between 1849 and 1 July 1994, **213** reported cases (less than two per year) applied to be heard by the Judicial Committee. The low figure is significant when one measures the influence the Board has had on the NZ legal system.

Of **213** cases one third or **73** appeals were allowed (an average of one every second year), while **116**, or more than five ninth were dismissed. **24** cases or one ninth were either refused to be heard or withdrawn, or the judgment was varied. About three fifth of the cases that went to the Board from NZ concerned Commercial, Public, Land (including Maori claims) and Taxation law. Less than a third concerned Tort, Wills and Trust, Contract and Criminal law. Only one tenth involved Transport, Maori and Family issues, Employment, Landlord/Tenant and Law Practitioner cases.

The statistics give a clear indication of what NZ litigants can expect when they

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[14] Above N8, 229.

[15] Above N7, 10.

[16] An abolition Bill was enacted in 1949 but the Privy Council determined the final Canadian case only in 1959. See **Maurice Kelly** "Leaving their Lordships: The Commonwealth experience" (1994) NZLJ 102-103.

[17] Above N16, 107.

[18] Above N16, 108.

[19] The Australians abolished the right of appeal to the Board over a period of time. The **Privy Council (Limitation of Appeals) Act** 1968 restricted appeals from the High Court, the **Privy Council (Appeals from the High Court) Act** 1975 abolished all High Court appeals and the ***R v Viro*** [1978] 18 ALR 257 affirmed that the High Court of Australia was no longer bound by decisions of the Judicial Committee. Finally the **Australia Act** 1986 terminated all appeals, although the last case to be heard was ***Austin v Keele*** [1987] 72 ALR 579. Above N16, 103-106.

[20] See **Catriona MacLennan** "Our judicial apron strings loosened" *The Dominion*, Wellington, New Zealand, 28 July 1994, 8.

[21] Above N7, 10.

appeal to the Judicial Committee of the Privy Council.[22]

III CONCLUSION

After the structure of the Privy Council, the boundaries of its jurisdiction, its constitution and its legal foundation have been explained, and figures been given about the number of NZ cases and their distribution on different areas of law, Chapter II will discuss whether or not NZ should continue to use the Board as the final Court of Appeal.

[22] See Appendix I. The source for the statistics from 1849-1988 is Above N8, 262-275. 1989-1994 statistics were supplied by **Gordon Thatcher**, Registrar of the Court of Appeal Wellington via **Phillip Speir** from the Department of Justice.

CHAPTER II – CONTINUE V DISCONTINUE THE APPEALS

I INTRODUCTION

Whether NZ should continue to send final appeals to the Board has been the dominant factor in any discussion on the Privy Council thus far.[23] The role of the Judicial Committee has been widely and openly debated, especially since the Lange announcement in 1987 on ending appeals.[24] In general, it appears that there is a lot of support for giving up the right of appeal, with many voices including Sir Robin Cooke supporting Lange's proposition. Cooke P acknowledged in 1988 that the time had come to abolish appeals because NZ and English law is so different.[25] The mood at the time of the Lange declaration was positive and euphoric. Sir Geoffrey Palmer, the Attorney-General in 1987, described the atmosphere as: "It is not a matter for sadness but for rejoicing. We have the confidence, the competence and the distinctiveness to rely on ourselves."[26]

In contrast arguments were advanced regarding the prestige and tradition connected with the Board and the wider pool of judicial talent available in the UK.[27] Altogether a lively debate had emerged, especially amongst academics.

A closer look at the arguments for and against the Privy Council as the final appeal court allows a better understanding of the main issues.

II THE NZ LAW SOCIETY SUBMISSIONS

In 1977 the NZ Law Society presented to the Royal Commission on the Courts many reasons in favour and against the right of appeal to the Judicial Committee.[28]

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[23] For example **John McManamy** "To be or not to be–the Privy Council" (1982) NZLJ and **The New Zealand Law Society** "First submissions by the NZ Law Society to the Royal Commission on the Courts" (1977) NZLJ.

[24] Above N3, 3.

[25] **Sir Robin Cooke** "Fundamentals" (1988) NZLJ 158.

[26] Above N3, 3.

[27] For example "Chief Justice at the Privy Council: Interview with **Sir Thomas Eichelbaum** on 2 March 1994, concerning the Privy Council and other topics" (1994) NZLJ 88.

[28] **The NZ Law Society** "First submissions by the NZ Law Society to the Royal Commission on the Courts" (1977) NZLJ 134-135.

A *The Main Arguments in Favour of the Privy Council:*

1 *Having a right of appeal to the Judicial Committee of the Privy Council means that the highest calibre of legal expertise is available to the litigant in NZ at no cost to the NZ taxpayer*

In this first argument the main point is the expense, but where the highest calibre of legal expertise exists could also be questioned.

While it is true that the NZ taxpayer does not fund appeals to the Board, the procedure is extremely expensive for the parties concerned. In addition to the usual costs of an appeal, the litigant is expected to pay airfares, accommodation and agency expenses in London. For a NZ litigant it is usually advisable to use a Privy Council agent,[29] who is able to recommend suitable counsel from the English Bar and liaise with the Registrar and other parties.[30]

Apart from the extra expenses, legal aid is not available for Judicial Committee appeals, therefore final appeals are available to few people only:[31]

> The cost of an appeal prices most New Zealanders out of the market, leaving only the Crown, substantial corporations or wealthy litigants able to sustain an appeal.

The costs involved help explain why relatively few appeals reach the Board in comparison to the amount of appeals heard in the Court of Appeal. As a consequence one could argue that the appeal to the Privy Council is practically reserved for the wealthy New Zealander.

2 *The Privy Council acts as a check on the NZ Court of Appeal*

I consider this argument to be rather unconvincing. A quick look at the statistics proves that the majority of NZ appeals are either refused or dismissed. Out of the 213 reported cases, 140 or two thirds had no success. Relatively few cases are allowed by the Judicial Committee (just over one third), making the suggestion that the Board is a check on our Court of Appeal a tenerous idea. A one third success rate is hardly overwhelming especially as so few cases go to the Board in the first place. In addition it has been argued that the usual cases heard by the Privy Council often reflect

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[29] A London Solicitor with whom the Court has a working relationship, see above N7, 10.

[30] Above N7, 10.

[31] **Gabrielle Meech** *The Privy Council, will it be missed?* (LLM Research Paper, Wellington, 1988) 8.

areas of law where there is no definite right or wrong answers.[32] Therefore when the Board comes to a different conclusion from the Court of Appeal, it does not necessarily mean the NZ court was wrong, it could rather indicate a differing interpretation of the law and that both views were legitimate interpretations.[33]

Often, the cases involved issues inappropriate to be determined by a remote European court.[34] On occasions the Privy Councillors themselves hinted that some topics were beyond their jurisdiction. *Reid v Reid*[35] was a case concerning a matrimonial property dispute and eventually the court concluded:[36]

> This is essentially the sort of issue where the courts of the society to which the spouses belong are in a position far superior to that of their lordships in forming a judgment.

One academic commented that the Board had expressly shirked its duty to address itself to the Reid case. The writer compared the decision to the Court of Appeal sending a case back to the High Court, the former taking the view that the latter was in a better position to determine a legal problem, all of which led to the conclusion, "One can only ask then, why a Privy Council."[37] How can the Judicial Committee act as a check on our appeal courts when the Board's members themselves admit that they are not always competent to adjudicate a specific matter?

On the other side criticism has been addressed to the current Court of Appeal in NZ. It has recently been suggested that because of the danger of insularity, a strong personality in the Court of Appeal could influence our law in a direction that was not necessarily desirable. The Court of Appeal has further been accused of operating in two factions, meaning Sir Ivor Richardson taking a strictly legal approach to the Bill of Rights cases while Sir Robin Cooke taking a broader and more liberal view. It has been postulated that a final appeal court should operate more as a team, in the interest of justice and that until the Court of Appeal had a more unified approach to the interpretation of the law, we needed to retain our links with the Judicial Committee

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[32] Above N31, 9.

[33] Meech illustrates this point quoting **Justice Jackson** of the United States Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final." See above N31, 9.

[34] See for example ***Lesa v Attorney-General*** [1982] 1 NZLR or ***New Zealand Maori Council v Attorney-General*** [1992] 2 NZLR.

[35] ***Reid v Reid*** [1982] 1 NZLR 147.

[36] Above N35, 152, per **Lord Simon of Glaisdale.**

[37] **John McManamy** "To be or not to be–the Privy Council" (1982) NZLJ 213.

as a precaution against extreme and unwarranted excesses from the Court of Appeal.[38] Some important differences in approach can be seen in case law. A recent example is the *Auckland Electric Power Board v Electricity Corporation of New Zealand* (the AEPB case).[39] The Court of Appeal concluded that the power to terminate the contract arose from the Companies Act and not the State Owned Enterprise (SOE) Act, the action therefore not being an exercise of statutory power and not subject to judicial review under section 4 of the Judicature Amendment Act (JAA) 1972. Whereas the Court of Appeal looked at the source of the power to supply, the Privy Council was prepared to consider whether the relevant statute conferred a function or an area of operation and the Judicial Committee ruled that the exercise of contractual powers was subject to the SOE Act and could be judicially reviewed under the JAA. Although on the facts the Board dismissed the appeal, their approach has in effect broadened the scope of judicial review under the JAA, contrary to the more restrictive approach applied by the Court of Appeal.[40]

Even if one could argue the necessity for the Judicial Committee to keep a check on NZ's Court of Appeal, the check can not be very effective because of the small number of cases reaching the Board.

NZ must also consider the issue of Parliamentary sovereignty. Almost 40 years ago Lord Kilmuir, then British Lord Chancellor, had expressed what today is widely felt by lawyers and politicians:[41]

> The right of appeal has been regarded rightly or wrongly as a badge of inferiority, and there is a feeling that as long as it exists, a "colonial" country has not really achieved independence, for a Parliament, so it is said, is not sovereign if its measures can be questioned in some other Court than its own Supreme Court.

3 *Principally because of its distance from NZ, the Privy Council possesses a greater measure of detachment than a local court*

Sir Michael Myers CJ, stated in 1930 the widely held opinion that:[42]

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38 Above N20, 8.

39 ***Auckland Electric Power Board v Electricity Corporation of New Zealand*** [1994] 1 NZLR 551. The case concerned the supply of electricity from ECNZ to Mercury Energy (successors to AEPB). Mercury Energy wanted to seek judicial review of ECNZ's decision to terminate the contract.

40 **Mai Chen** "The Reconfiguration of the State and the Appropriate Scope of Judicial Review" presented at the Conference *The Reconfiguration of the State: Some Contremporary Issues* (VUW, Wellington, 8 July 1994) 2-8.

41 **David B Swinfen** *Imperial Appeal-The Debate on the Appeal to the Privy Council 1833-1986* (Manchester University Press, UK, 1987) 195.

42 Above N16, 101.

> (The Privy Council) is, I consider, the finest tribunal in the world, the greatest of all tribunals. You receive from it the judgment of the finest minds in the Empire, and you know there is a freedom from the unconscious local bias which, sometimes, try as he [or she] will, the man [or woman] in a small country cannot avoid.

This euphoric view has been criticised by academics.[43] There is no evidence to presume that NZ judges were less independent than British judges or judges in Australia and Canada, where the final appeal to the Board has been abolished. NZ judges are not insensitive to overseas developments in common law nor would they always follow the Executive's whim.[44] If anything, the Privy Councillors can be considered so detached from NZ society that, in some notable cases, it actually had a detrimental effect for NZ.

A dramatic example is the case of *Lesa v Attorney-General*[45] in which the Board took a Western Samoan woman for a NZ citizen. The decision had important constitutional and legal implications[46] and caused substantial debate regarding the role of the Judicial Committee.[47] One view was in favour of the Privy Council's judgment and described it as correct, logically impeccable, and only controversial in its effect. The supporters of the Board suggested: "To blame the Privy Council for drafting in the 1920s[48] which failed to give effect to the intentions of Parliament would be wholly erroneous."[49] The other view considered the Judicial Committee's decision as wrong. The Board was criticised for failing to understand the historical background of the 1928 legislation and the constitutional and international legal relationship between NZ and Samoa.[50] It was held that the Privy Council had misread the New Zealand legislation and imputed to the Parliament of New Zealand an intention which it never had.[51] The debate questioned the usefulness and wisdom of retaining links with a final appellant court on the other side of the world, whose many members had little idea

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43 See for example **Charles Cato** "Privy Council: The Takaro Properties case" (1988) NZLJ 114.

44 Above N43, 114.

45 ***Lesa v Attorney-General*** [1982] 1 NZLR 165.

46 Within two months of the decision the NZ Government passed the **Citizenship (Western Samoa) Act** 1982.

47 A good example is the article "Lesa v Attorney-General–two views" (1982) NZLJ 315.

48 The Statute in question was the **British Nationality and Status of Aliens (in New Zealand) Act** 1928.

49 **Rupert Granville Glover** "The Privy Council was right" in Above N47, 317.

50 **E J Haughey** "The Privy Council was wrong" in above N47, 317.

51 Above N50, 319.

about the social, economic and legal implications of their decisions in NZ.[52]

4 *Because of the far greater population in the United Kingdom there is a larger reservoir of judicial talent to draw from*

The first part of the argument is no doubt correct. NZ has a very small population and consequently a smaller pool of senior judges to chose from. Concern has been expressed that abolishing links with the Judicial Committee could isolate NZ from international developments in common law, but especially from those in the UK.[53] Sir Thomas Eichelbaum CJ alluded to the quality of the English judiciary, when he explained why NZ judges should be exposed to the work of the Board:[54]

> To be exposed to the variety of styles and the reasoning process of the top English legal brains undoubtedly is of a value to any New Zealand Judge and, of course, the earlier in his [or her] career that he [or she] is able to obtain the experience the more valuable it would be [...] and bringing back insights and experiences simply not available in New Zealand.

But quality does not just come from quantity. Other factors such as lawyers education and training are also important. Officially the UK still operates under a divided profession and it is questionable whether this system produces better lawyers and judges than the training in NZ.[55]

Furthermore so few cases go to the Judicial Committee and so many NZ lawyers practise overseas because of their employment prospects in NZ, that the author can only conclude, that if enough jobs were provided to keep the legal talent in the country, NZ had plenty of good lawyers to hear final appeals here.[56]

5 *The right of appeal to the Privy Council is essential to maintain a two-tier appeal system*

This point will later be discussed. The author finds it important to maintain a two-tier appeal system, although other alternatives to the Judicial Committee are available.

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[52] Above N47.

[53] **Bernard H Clark** "When the Court of Appeal is wrong" (1990) NZLJ 175.

[54] Above N27, 88.

[55] Based on the author's own experiences as a resident in London for over ten years, including three years as a law student and several summer clerk positions in Law firms.

[56] This point was also made by Charles Cato, see above N43, 114.

B *The Main Arguments Against the Right of Appeal:*

1 *Fewer countries are retaining the right of appeal to the Privy Council and it is doubtful that the Judicial Committee will continue to exist*

Only a handful of countries still consider the Judicial Committee as their final court, so prima facie the statement is correct. Some of the remaining nations still sending final appeals to the Board would need an other external Court of Appeal, if the Privy Council was abolished. Some of the smaller countries[57] do not have the necessary facilities available for a final appellant court and in some countries human rights abuses could increase without outside control. For example Jamaican final appeals concerning capital punishment always go to the Board, as a matter of right. [58]

But the author would nevertheless suggest that sending final appeals to London may not be the best solution. A final appellant court in one's own region could be more convenient, less expensive and provide better access for all concerned. It may only be a question of time before the Judicial Committee will cease to be the final appeal court for the independent Commonwealth countries. For the countries requiring an external Court of Appeal, a regional appellant court could become a feasible option.

2 *English jurisprudence will be influenced by the United Kingdom's membership of the European Economic Community and will become less relevant to New Zealand*

The UK joined the European Union (EU)[59] in 1972, anticipating a profitable trading future within the Common Market. In fact, the EU represents much more than a trading convenience, incorporating the Parliament, the Commission, the Council of Ministers, the Court of First Instance and the European Court of Justice (ECJ) in Luxembourg.

The EU also produces a considerable amount of primary and secondary legislation concerning areas beyond trade. Primary legislation refers to the Treaty of Rome, the Single European Act and the Treaty of European Union (Maastricht Treaty). Secondary legislation includes regulations, directives and decisions as outlined under Article 189 of the Treaty of Rome. The huge volume of EU legislation covers a wide

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[57] Such as some of the Pacific Islands.

[58] eg ***R V Beckford*** [1987] 3 ALL ER 425.

[59] The **European Communities Act** 1972 section 2(1).

range of law from immigration to competition law and social policy.

In the late 1970s the ECJ's supremacy over national state courts was established in some notable cases. It has been a Dutch case[60] which first held that: "the community constitutes a new legal order in international law, for whose benefit the states have limited their sovereign rights, albeit within limited fields." *Van Gend en Loos* gave the first indication that the law of the European Union (or European Community as it was known then) was to take supremacy over national states law.[61] The first major English case confirming the ECJ jurisdiction's supremacy was *Factortame*, a fishing dispute.[62] The House of Lords were obliged, in order to obey a Community right, to grant an interim injunction against the Crown, which under national law would have been impossible. The ECJ held:[63]

> [T]he full effectiveness of European Community law would be impaired if a rule of national law could prevent a court seized of a dispute governed by European Community law, from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under European Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

The House of Lords disapplied the English law against the grant of interim junctions and followed the ECJ's ruling. In the same year Hoffmann J expressed in a different case, the UK's position in relation to the EC:[64]

> The European Community treaty is the supreme law of this country, taking precedence over Acts of Parliament. Our entry into the community meant that Parliament surrendered its sovereign right to legislate contrary to the provisions of the treaty on the matters of social and economic policy [...] [P]artial surrender of sovereignty was seen as more than compensated by the advantages of membership.

The ECJ's influence and its supremacy have major implications for UK law and jurisdiction. The above examples demonstrate that the British no longer have complete control over their own legal destiny, while being obliged to adopt European laws which reflect their diminished sovereign status on the one side and their geographical position on the other. The Privy Council as part of the English legal system

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60 ***Van Gend en Loos*** (1963) ECR 1, CMLR 105.

61 Soon after ***Costa v Enel*** (1964) followed. It concerned a conflict between a provision of the Treaty of Rome (TOR) and an Italian statute passed after the incorporation of the TOR. The ECJ affirmed that the TOR prevailed over any act passed within a member state whether before or after the TOR. ***Internationale Handelsgesellschaft*** 1974 was a conflict between the TOR and the German constitution. The ECJ ruled that a Community instrument could not be affected by the fundamental rights of a states constitution, thus the TOR took supremacy over the national states superior law.

62 ***R v Secretary of State for Transport ex parte Factortame*** no 2 [1991] 3 ALL ER 769.

63 Above N62, 772.

64 ***Stoke on Trent CC v B and Q*** [1991] 2 ALL ER 250.

is clearly affected by those decisions.

NZ legislation on the other side, is taking in consideration South Pacific law and in particular Maori concepts. Under the Children, Young Persons and their Families Act 1989, the Maori philosophy of collective responsibility is reflected in the use of the Family Group Conferences.[65] The Act represents a substantial move away from the Pakeha concept of individual responsibility, by allowing the offender's family to be involved in the decision making judicial process and to take collective responsibility for the act committed by the young person.

Even procedural matters in the court process are beginning to exhibit Maori input. Section 4 of the Maori Language Act 1987 allows Maori the right to speak their own language in legal proceedings and an offender, before being sentenced, may call a witness to testify the offender's ethnic or cultural background and how that background might contribute in preventing further offences.[66]

The NZ and UK legal structures have grown apart from one another in terms of philosophy and society's needs.[67] Sir Robin Cooke has also noted this trend and he saw in particular the law of negligence evolving in different directions with the consequences that the Board might try to impose English answers to NZ law of negligence cases.[68] Using the Privy Council becomes more and more obsolete as NZ is making steps away from the Westminster model of government with the decision to introduce MMP and the Citizens Initiated Referenda Act 1993. Should NZ ever become a republic, we would have to replace the use of institutions deriving from colonial tradition, like the Judicial Committee of the Privy Council.

III MAORI CONCERNS

Some Maori leaders[69] have expressed concerns: they worry that giving up the right of appeal to the Board will affect the regard for their needs and close their only

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[65] See the **Children, Young Persons and their Families Act** 1989, Part IV Youth Justice. In particular section 208 (c) and (f).

[66] See section 16 of the **Criminal Justice Act** 1985. The case of ***Wells v Police*** [1987] 2 NZLR 560 confirms that the witness can speak from the body of the court and no oath is required, per Smellie J 570.

[67] The current Attorney-General **Paul East** has recently stated : "[O]ver time, one can see the two legal systems moving apart." in above N20, 8.

[68] Above N20, 8.

[69] For example the Maori Council Chairman **Sir Graham Latimer** in Above N20, 8.

access to the British system "whereby the Queen confirms her end of the pact."[70] In the early days of the NZ colony, the Privy Council appeared to protect Maori rights. The *Nireaha Tamaki v Baker* case[71] shows the Board accepting that a Maori tribe's title to traditional lands was recognised both by statute and the common law. The NZ Government's reaction to the Board's decision was to enact the Land Titles Protection Act 1902, which effectively overruled the judgment by allowing a Crown grant to extinguish tribal title.[72] *Wallis v Solicitor-General*[73] followed a similar pattern. The case concerned the status of a tribal grant of traditional land given to the Bishop of Wellington in order to establish a school. The Court of Appeal accepted that the Crown grant gave the Bishop full legal title to the land but the Privy Council decided that the Bishop could only take legal title subject to negotiations with the tribe. The NZ legislature acted again by instigating the Native Land Act 1909. This was an attempt to stop native title being recognised in the NZ courts unless expressly allowed by statute.[74] Comparing the Court of Appeal and the Judicial Committee led Paul McHugh to the conclusion, "that lawyers in London at the seat of the British Empire might be more aware of the legal principles upon which British colonial activity revolved than their colonial brethren."[75]

More recently the Board has been seen as more likely to follow the NZ Court of Appeal on cases concerning Maori needs. A good example is the *NZ Maori Council v Attorney-General*.[76] The Privy Council upheld the Court of Appeal's decision and ruled: "[t]reaty rights cannot be enforced in the courts except insofar as they have been given recognition by statute."[77]

Whether today British Law Lords should still make decisions on issues peculiar to NZ, is highly questionable. The Prime Minister Jim Bolger recently pondered: "[W]e

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[70] Above N20, 8.

[71] ***Nireaha Tamaki v Baker*** [1900-1901] NZPCC 371.

[72] **Paul McHugh** *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 118.

[73] ***Wallis v Solicitor-General*** (1902-03) NZPCC 23.

[74] Above N72, 119-121.

[75] Above N72, 126.

[76] ***New Zealand Maori Council v Attorney-General*** [1992] 2 NZLR 576. The case is also known as the broadcasting assets case.

[77] Above N76, 603. See also ***Te Heuheu Tukino v Aotea District Maori Land Board*** [1941] NZLR 590, where the Judicial Committee had already ruled that the courts could not enforce treaty rights and that in spite of the treaty, the NZ legislature had the power to change native land law, as the British Parliament could have done.

don't really want issues relating to unique New Zealand cases such as the Treaty of Waitangi dealt with in a distant court."[78] Other politicians have also indicated how unacceptable it is that British judges decide Treaty claims on the other side of the world.[79] A final Court of Appeal in NZ would certainly have the potential to ensure more Maori influence on the whole NZ legal structure. Sending final appeals to London puts the judicial decision making power into the hands of British judges, who by the nature of their living environment and the complexity of their task within the frame of the EU, can only have limited understanding and insight into Maori rights and needs.

IV CONCLUSION

The author has found little, which would justify keeping the Privy Council as NZ's final appeal court. In some respects the retention of the Board could hinder NZ's development of its own body of law[80] and even our development as a nation. The Government has recently taken further steps towards an abolishment of the right of appeal to the Board by requesting further information from the solicitor-general on all the implications of such a move. The cabinet may in the near future take a decision on whether or not to retain the link with the Privy Council.[81]

The next two chapters will discuss different options of replacements for the Judicial Committee of the Privy Council.

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78 "Bolger says 2000 appropriate time for republic" *The Dominion*, Wellington, New Zealand, 17 March 1994.

79 For example former Prime Minister **Sir Geoffrey Palmer** and the current Attorney-General **Paul East**. **Mike Munro** "Palmer rejects Maori concern at appeal move" *The Dominion*, Wellington, New Zealand, 19 October 1994, 7.

80 For example in negligence and Maori issues.

81 **Mike Munro** "Move to scrape Privy Council" *The Dominion*, Wellington, New Zealand, 18 October 1994, 1.

CHAPTER III – REPLACING THE PRIVY COUNCIL WITHIN NZ

I INTRODUCTION

Over the years a wealth of material has been written on the issue of the Judicial Committee's replacement.[82] The establishment of a viable alternative to the Board is essential, if NZ wants to abolish final appeals to the Privy Council. There are several possible options that could be considered. Although they all have certain merits, they could also create difficulties and nobody has come up with the perfect solution to a Judicial Committee replacement.

Chapter III will look at the notions available within NZ.

II RESTRUCTURING THE COURTS

In 1989 the NZ Law Commission published a report outlining what they deemed the best judicial system for NZ if appeals to the Privy Council were abolished.[83]

The Commission's proposals saw the District Court being given much wider original jurisdiction. For criminal prosecutions the District Court would have exclusive authority over any case where a right of trial by jury existed. The only exception would be the right of either party to apply to a High Court Judge for an order to remove the case to the High Court, on the grounds that the case involved a question of complexity or was of general importance.[84]

The District Court's civil jurisdiction would be extended, except for cases concerning supervisory powers and the judicial review of administrative action. The Law Commission also proposed that any action involving the sum of $250,000 or more would automatically be transferred to the High Court, and if a case involved a matter of public importance, it could also be removed at the request of either party. The

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[82] For example **David B Swinfen** *Imperial Appeal–The Debate on the Appeal to the Privy Council 1833-1986* (Manchester University Press, Manchester, UK, 1987), **New Zealand Law Commission** *The Structure of the Courts* No 7 (Wellington, 1989), **Philip A Joseph** "The Judicial Committee and the Bill of Rights" (1985) 2 CLR.

[83] See above N8.

[84] Above N8, 11.

authority of the Family Court would also be increased to include wardship, family protection, testamentary and paternity applications.[85]

It was expected that the suggested changes to the District Court jurisdiction could substantially reduce the High Court's workload to mainly major criminal trials and the most important commercial and public law cases. The Law Commission envisaged a larger appellate role for the High Court in addition to the limited original jurisdiction under the reforms. Virtually all criminal and civil appeals from the District Court would be heard in the High Court. The Commission anticipated that appeals would usually be heard by three judges, unlike most appeals at present which are heard by a single judge.[86]

The Court of Appeal would be renamed the Supreme Court and have the function of a final court for our justice system. The Supreme Court would hear criminal appeals from the High Court and second appeals from the District Court jury trials, as well as appeals on civil matters from either court. The Supreme Court would keep an overview of all areas of law and be responsible for clarification and development of the law and legal policy.[87]

Finally the Commission pondered where the Chief Justice of NZ,[88] who is currently seated in the High Court, would be located under the new regime. They concluded that the Chief Justice as the principal judicial officer of NZ and head of the judiciary should sit in the Supreme Court and a Senior Justice would head the High Court.[89]

The Law Commission did not see the necessity of a further appellate court, as they considered the structure of three courts being sufficient. Further provision within the proposed legal structure would allow the Supreme Court to either sit in a panel of three or as a full court of five or more.[90]

A *District Courts Amendment Act 1991 and Amendments*

Some of the Commission's suggestions concerning the District Court have been

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85 Above N8, 12.

86 Above N8, 13.

87 Above N8, 13-14.

88 **Sir Thomas Eichelbaum**, at the present time.

89 Above N8, 15.

90 Above N8, 14.

implemented since the Commission's 1989 report. Later in 1989 the financial jurisdiction of the District Court was increased from $12,000 to $50,000, as an immediate response to the report.[91]

Further adjustments were made to the financial authority of the District Court. By virtue of Section 6 of the District Courts Amendment Act 1991, as amended by Section 3 of the District Courts Amendment (No 2) 1992:

> Subject to the provisions of this Act, the Courts shall have-
> (a) The same equitable jurisdiction as the High Court to hear and determine any proceeding (other than a proceeding in which the amount claimed or the value of the property claimed or in issue is more than $200,000):
> (b) Jurisdiction to hear and determine any proceeding for the dissolution or winding up of any partnership (whether or not the existence of the partnership is in dispute), where the whole assets of the partnership do not exceed in amount or value the sum of $200,000.

In effect, this provision allows the District Court to determine any proceeding where the debt, demand, damages or value of chattels claimed do not exceed $200,000. If the action concerns the dissolution or winding up of a partnership, the assets must lie within the $200,000 fiscal range.

Section 4 of the District Courts Amendment (No 2) 1992 further provided:

> (1) A Judge shall have jurisdiction in any proceeding pending to make any order or to exercise any authority or jurisdiction which, if it related to a proceeding pending in the High Court, might be made or exercised by a Judge of the High Court in Chambers.

This section allows District Court judges the same equitable jurisdiction as High Court judges, namely to grant injunctions including Mareva injunctions, if the amount involved is within the $200,000 limit. The only exception is under section 4(3), which prevents District Court judges from making Anton Piller orders.

In addition to the Amendments other areas of law, such as the Accident Rehabilitation Compensation and Insurance Act 1992, now fall under the District Court jurisdiction.[92]

New District Court Rules were designed to reflect as closely as possible the High Court Rules. Both courts now have similar procedures and remedies, which facilitates the transfer of cases between the District and High Court. The number of District Court judges was increased to handle the enlarged workload and the increase of

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[91] **Dame Silvia Cartwright** "Reorganisation of the District Courts" in the NZ Law Society Seminar "The District Courts Amendment Act/New District Court Rules" (1992) 3.

[92] Above N91, 3.

complex litigation.[93]

The restructuring of the courts under the recent legislation has found favour with some of our top judges. The Chief Justice, Sir Thomas Eichelbaum, in a speech in 1993 came to the following conclusion:[94]

> [....] although theoretically there were other options the only viable choice was a system under which the remainder of the present structure would stay much as before, without the final appeal presently available.

Further developments and effects of the restructuring of the courts could also be observed this year. Concern has been expressed at the rising backlog of pending District Court trials all over the country.[95] The District Court crisis could lead to the dismissal of cases because they had taken so long before they were heard and therefore breached the principle of undue delay.[96] Main reasons for the backlog could be a shortage of available court time, a more than 13% increase of trials over the last three years and that "pressure was building as more High Court trials were shifted to [D]istrict [C]ourts."[97] Considering that the District Court's volume of work has increased so much, are the High Court judges under the same stress? The Chief Justice has recently offered the following answer: "There is little left in the High Court but the most difficult, stressful and high profile of the first instance work, and that is what the High Court Judges mostly do."[98]

The most recent development was announced on 3 November, a dividing of the Justice Department, with courts and tribunals becoming a separate government department with its own chief executive. The restructuring of the Justice Department is designed to make the court system more efficient.[99]

The Law Commission's proposals and their implementation are a relatively cheap and uncomplicated alternative to our final appeals travelling to London.

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93 Above N91, 4-5.

94 **NZ Law Society eds** "Chief Justice sees end to Privy Council appeals" (1993) 396 LawTalk 8.

95 For example in September 1994, 82 jury trials were waiting for a starting date in Hamilton, 70 in Christchurch and 86 in Wellington. See **Karyn Scherer** "Backlog may let some off hook" *The Evening Post*, Wellington, New Zealand, 21 September 1994, 2.

96 A case in the Bay of Plenty was arguing this very point last September. See above N95.

97 Above N95.

98 Above N27, 89.

99 **Sarah Boyd** "Tribunals and courts to form govt department" *The Evening Post*, Wellington, New Zealand, 3 November 1994, 3.

B *How Many Appeals?*

The main defect of the Law Commission's recommendation concerns the number of available appeals. If the court of first instance is the District Court, two appeals are theoretically possible. The most important criminal and civil cases, however, would start in the High Court, leaving only one appeal open. Considering the NZ experience with only few cases reaching the Privy Council because of cost factors, giving up the appeal to London would be a good chance to rectify the situation, in order to allow two appeals in all cases.

Some nations such as Zimbabwe only allow one appeal. Zimbabwe's civil appeals go straight to the Supreme Court, leaving only criminal appeals against a sentence imposed by a magistrate to be heard in their High Court.[100] Most countries, however,[101] see the necessity of a two-tiered appeal system, in the interest of justice. According to the Royal Commission on the Courts:[102]

> [A] 2 tier appellate system is a significant advantage in that a second right of appeal is necessary to provide the opportunity for legal argument to develop and mature, with the issues being crystallised and refined.

The Law Commission on the other hand, justified their own proposal and stated that although a further hearing might improve the quality of argument and judgment, a third or fourth or fifth appeal would clarify the law even more. The Commission felt that there was a public and private interest in bringing litigation to a speedy end and pointed out that it took more than one case to clarify the law, as the law had been developed over long centuries, from case to case. The Law Commission further expressed concern about the cost to the litigant and the associated delays involved with a further appeal.[103]

Similar doubts were expressed by Sir Geoffrey Palmer when he asked:[104]

> [W]hat are the reasons for appeals and especially for a second appeal? There has to be careful justification, in terms of the interests of the litigants and of the state which provides the part of the relevant resources, for the delay and cost involved in further debating a matter which has already been subject to a careful process.

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[100] **Ellison Kahn** "The Zimbabwe Bench and Bar" (1982) 99 SALJ 298.

[101] eg Australia and Canada.

[102] Above N8, 83-84.

[103] Above N8, 84-86.

[104] Above N3, 3.

The Commission and Sir Geoffrey Palmer seemed most concerned about the cost and delay for the litigant. The Chief Justice as well has recently expressed some doubts about the validity of a second appeal:[105]

> An ideal system would have two appeals, the second no doubt only by leave, but I do not believe there is any absolute right to more than one appeal and surely the nature of the system must be adjusted to the size and resources of the particular community.

Each extra appeal will involve extra expenses and further delays in the already slow legal machinery of our current court structure. It is important to distinguish between the litigant's interest in pursuing a further appeal and the state's interest in limiting appeals in order to keep costs down. The Law Commission and Sir Geoffrey Palmer are also concerned about the uncertainty and the stress for the parties further appeals can cause.[106] The heart of the matter lies in the conception of justice. Justice should be the most prominent consideration in deciding the number of appeals. Arguments justifying a one-tier appeal structure take in consideration its cost effectiveness and its positive effect on the workload of the courts. But should money and time be the predominant factors determining the structure of our legal system, when people's lives, liberty and assets are involved? It is especially concerning that cases beginning in the High Court and dealing with most important and complex matters might have only one single appeal available. It does not make sense to allow less appeals for these more difficult cases.

The Law Commission mentioned the limited judicial resources as another reason for restricting the number of appeals. They claimed that in view of NZ's small legal profession, only a limited number of sufficiently experienced lawyers would be available to sit in our highest courts.[107] Chapter II of this research paper has already addressed this point and it will be raised again in connection with a Supreme Court of NZ.

The Law Commission had come to the conclusion:[108]

> In the end the most critical matter is that appeals in important matters should be able to be taken to the final court in our legal system and be given a full and fair hearing there. On that view (expressed to us for instance by the High Court Judges), the number of prior hearings or appeals is not seen as such a significant matter.

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[105] Above N27, 88.

[106] See above N103 and N104.

[107] Above N8, 86.

[108] Above N8, 87.

The incoming Minister of Justice in 1990 was not convinced by the conclusion of the Commission's report, concerning the number of appeals. The Minister announced that the right of appeal to the Board would only be discontinued, when a satisfactory second tier appeal system was established.[109]

Beyond the concerns regarding the amount of appeals, restructuring the existing court structure is the easiest and simplest solution to the problem of replacing appeals to the Privy Council.

III A SUPREME COURT FOR NZ

A Supreme Court above the Court of Appeal would ensure that all cases had the opportunity of a second appeal, when necessary. However this option, because of the anticipated costs and the restricted availability of judges, has been rejected by some academics in favour of a divisional Court of Appeal.[110] There is some merit in the proposal of a divisional Court of Appeal. The Court would be based on established structures and its implementation would most likely save costs and resources compared with other options. A closer look at this option is warranted.

A Divisional Court of Appeal

When Lord Goff of Chieveley, a Privy Councillor himself, visited NZ in 1993, he suggested the creation of a third-tier court. He pondered that the benefits of such a court would outweigh its disadvantages. In his view second-tier appellate courts could not always devote as much time to a case as third-tier courts, thus they would weaken the quality of argument. Lord Goff outlined a possible solution entailing the creation of a civil Court of Appeal. One Court of Appeal judge and two High Court judges would sit in the civil division and their decisions could be appealed to a full Court of Appeal.[111]

Dividing the Court of Appeal into sections could make sense if the NZ legal system will be further restructured along the lines suggested by the Law Commission. Depending on the criteria which determine when a divisional court's decision could be

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[109] Above N1, 52.

[110] For example **Philip A Joseph** "The Judicial Committee and the Bill of Rights" (1985) 2 CLR.

[111] Above N10, 1-2.

appealed to a full Court of Appeal, second appeals might become more readily available for more people and remain within a reasonable financial frame.

Philip A Joseph offered the following blueprint for reform of the current Court of Appeal, in 1985:[112]

> The permanent membership of the Court of Appeal would be increased to eight judges (nine if the Chief Justice were to remain ex officio member). This would permit two divisions composed of three judges each to sit concurrently or for a full court of five judges in cases of considerable or exceptional public importance to sit concurrently with a division of three [...] The actual membership of the divisions could be rotated as needs require. The trial judge in each case would certify (with or without application of the parties) whether a case was of sufficient importance to merit an appeal to a full court [...] Decisions of the full court would be binding on the Court of Appeal as ordinarily constituted by three judges, and the full court could overrule previous decisions of the latter [...] A permanent membership of the new Court of Appeal would be essential to guarantee the status of a court of last resort.

It is certainly not uncommon to have divisions within particular courts. Under the English Legal System, the High Court is divided into four sections (Divisional Courts, Chancery, Queens Bench and the Family Division), while the Court of Appeal is neatly split into the civil and criminal division. In NZ the Family Court emerged from the District Court, by virtue of the Family Courts Act in 1980.

The new aspect in the consideration of a divisional Court of Appeal in NZ, is the option of an appeal from a section of the Court to the full Court. Not only could the Court of Appeal but also the High Court be divided into sections. Some cases concerning important matters already have the option to be heard by either a single judge or a panel of two or three judges in the High Court.[113] From here, it is only a short step to allow appeals against the decisions of a single judge to a full bench in the High Court. Dividing the Court of Appeal or High Court into different sections is an interesting idea and an attractive alternative to the Privy Council.

B Supreme Court

Creating divisions in an existing court is one solution, creating an entirely new court is another. The creation of a Supreme Court of NZ deserves thorough debate, not only because it would institutionalise two appeals for everyone but also give NZ complete control over its own legal destiny. It would be a NZ solution to a NZ

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[112] Above N110, 294-295.

[113] Above N27, 89.

dilemma.

Many potential problems have been raised regarding this proposition. They include the already quoted arguments of insufficient legal talent, lack of independence in our judges, and the expense for the taxpayer. Extra resources would include more judges, chambers, appellate courtrooms and the increased expenditure on legal aid.[114]

Some writers such as Philip A Joseph dismissed the whole idea:[115]

> Little consideration need be given to a second New Zealand Court of Appeal. Not only would the increased accessibility of a second local appellate court unduly duplicate appeals and undermine the finality of litigation, but any beneficial effect second-tier appeals may ultimately have could be retained through a horizontally restructed Court of Appeal.

Other writers were worried about who would sit as the Justices of a Supreme Court.[116] Charles Cato suggested that, as a matter of protocol, the current members of the Court of Appeal should constitute the Supreme Court.[117] He saw replacements for the promoted Court of Appeal judges in the High Court and he further stated: "Certainly, where there is a demand and the talent is available, there is no good reason in principle for denying promotion of Judges from the District Court."[118] Cato also discussed the option of appointing academics to either the Supreme Court or the Court of Appeal to remedy the shortage of judges, his proposed changes could have provoked.[119]

Another option would be to combine NZ with for example Australian and English judges, in the Supreme Court. When Hong Kong reverts to China in 1997, resident Hong Kong judges as well as distinguished judges from other common law jurisdictions will constitute their Court of Final Appeal, which will replace the Privy Council.[120] Using foreign judges however, does not seem the Chief Justice's preferred solution. He considered the foreign judge's insufficient knowledge of NZ conditions and the impact on our sovereignty as the major disadvantages.[121]

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[114] Above N27, 89.

[115] Above N110, 293.

[116] For example see above N43.

[117] Above N43, 115.

[118] Above N43, 115.

[119] Above N43, 115.

[120] Above N16, 109.

[121] Above N27, 88.

Despite the considerable problems in the creation of a NZ Supreme Court, its establishment could finally complete the NZ legal system and make two appeals generally available.

IV CONCLUSION

Several options with their variations are available within NZ as alternatives to the Judicial Committee of the Privy Council. Either we must adjust our legal structure to accommodate final appeals or create a further division or court within the existing Justice System.

Chapter IV will examine if the answer could lie outside NZ in the form of a Supranational Court.

CHAPTER IV – SUPRANATIONAL COURT

I INTRODUCTION

The concept of a supranational court has been the most widely debated replacement option.[122] Over the last century the idea of an external court for NZ has taken various forms, ranging from a Trans-Tasman Court, a new Commonwealth Court, regional courts to a Pacific Court of Justice. Special problems arise with supranational courts including the question of Parliamentary Sovereignty, which is already one of the major difficulties with the Privy Council. Some writers have questioned the notion of replacing one external court with another one,[123] while other authors concede that a supranational court will be inevitable if the South Pacific region became a trading block.[124]

This chapter shall present an outline of the previous and the current model for a supranational court.

II TRANS-TASMAN COURT

In 1982, New Zealand and Australia signed the Closer Economic Relations Trade Agreement (CER). The agreement pursues the reduction and elimination of non-tariff and tariff trade barriers between the two countries.[125]

M D Kirby J, at the time Chairperson of the Australian Law Reform Commission, expressed concern about the CER's failure to establish an interjurisdictional commission or court to resolve future trans-national disputes.[126] The suggestion of a interjurisdictional court to settle trade disputes was well timed, as Australia was on the verge of abolishing appeals to the Privy Council:[127]

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[122] For example **M D Kirby J** "Closer Economic Relations–A Trans Tasman Court" (1983) LRFI and **David B Swinfen** *Imperial Appeal–The Debate on the Appeal to the Privy Council 1833-1986* (Manchester University Press, UK, 1987).

[123] eg **A M Finlay** "A Pacific Regional Court of Appeal" (1974) NZLJ.

[124] eg **M D Kirby J** "Closer Economic Relations–A Trans Tasman Court" (1983) LRFI, 19.

[125] Above N124, 18.

[126] A NZ Australian joint court had been suggested before. In 1871 the Victorian Royal Commission had proposed a joint court of final appeal for the two colonies. A draft Bill was approved at the Inter-Colonial Conference in 1881, but the idea was soon forgotten. See Above N16, 103.

[127] Above N124, 30.

> Confusion and disputes will inevitably arise requiring authoritative resolution by courts of law. The recognition of the utility of some form of interjurisdictional court to address these problems coincides exactly with the final moves in Australia to abolish Privy Council appeals and the active debate in New Zealand on the same topic.

M D Kirby J formulated the need for exchange control harmonisation, corporate tax and foreign investment laws. He further looked to the European Court of Justice as an example of an external court created in the first instance to resolve trans-national disputes, and he wondered why the CER agreement had not provided a similar mechanism.[128]

Several proposals were given by M D Kirby J, of how NZ and Australia could solve potential disputes arising from the CER agreement. He pondered on whether a Trans-Tasman Commercial Court with limited jurisdiction and specialist judges would be of assistance to the two countries, and he anticipated that his suggestion was not entirely compatible with the Australian constitution:[129]

> I do not believe that there could be any appeal from the High Court of Australia to an interjurisdictional court of appeal without amendment of the Australian Constitution. The record of such amendment in the history of Australian federation is discouraging.

Dual commissions were cited as another possibility, allowing judges of either country to sit occasionally in each other's courts. The Privy Council actually sets a precedent, because the Board invites judges from other Commonwealth countries, to sit with the Judicial Committee on an ad hoc basis.[130]

M D Kirby J also wondered if international arbitration was a suitable mechanism for bilateral disputes. He suggested either the erection of a specific body based on the CER agreement or the use of an existing international structure such as the South Pacific Forum. M D Kirby J concluded that the main advantage of international arbitration would be the avoidance of constitutional difficulties.[131]

1990 was a significant year for the CER, especially as far as trade dispute regulation was concerned. Steering committees in both countries produced a Memorandum of Understanding on the Harmonisation of Business Law as part of the CER agreement. The Memorandum contains aspects of intellectual property law, computer copyright

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[128] Above N124, 19.

[129] Above N124, 42.

[130] Above N124, 43-44.

[131] Above N124, 44-45.

and parallel importation[132] and it helped to fuel calls for a Trans-Tasman Competition Court as part of the legal system of both countries. The court should have been established by a Trans-Tasman Competition Treaty and any writ could have run in either country.[133]

The solution for Trans-Tasman disputes was finally found with the 1990 Statutory Amendments to the Judicature Act 1908. On the basis of reciprocal arrangements, both countries would admit cases concerning the CER in either of their national courts.

Section 56P(2) of the Judicature Act provides:

> (2) Without limiting subsection (1) of this section arrangements may be made –
> (a) To enable the High Court to sit in Australia in New Zealand proceedings in the courtrooms of the Federal Court or in other places in Australia:
> (b) To enable the Federal Court to sit in New Zealand in the courtrooms of the High Court or in other places in New Zealand:
> (c) To enable evidence to be given and the submissions of counsel to be made in New Zealand proceedings or in Australian proceedings by video link or telephone conference:
> (d) For the provision of registry facilities and Court staff.

Section 56D defines what Australian and NZ proceedings are. NZ proceedings refer to the relevant sections of the Commerce Act 1986 and Australian proceedings to the Australian Trade Practices Act 1974.

1992 saw the next important development towards the harmonisation of business law in NZ and Australia. The Reciprocal Enforcement of Judgments Amendment Act (REJA) was passed to reduce barriers between the two legal systems.[134] Its provisions contained the registration of foreign money judgments of superior and inferior courts, judgments in foreign currency and foreign non-money judgments such as injunctions.[135] The act was designed to facilitate closer economic ties and assist the harmonisation of business laws by the enforcement of a wide range of judgments and orders.[136]

But 1994 has seen the closer economic relationship between NZ and Australia in trouble. For the first time ever, special category visa for New Zealanders entering

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[132] **R G Hammond** "Australia New Zealand Closer Economic Relations Trade Agreement" (1990) NZRLR 228.

[133] **Warren Pengilley** "On Trans-Tasman banter and things CER" (1990) NZLJ 201.

[134] **David Goddard** "The Reciprocal Enforcement of Judgments Amendment Act 1992: A Half Step Towards CER" (1992) NZRLR 188.

[135] Above N134, 181-183.

[136] Above N134, 180.

Australia have been introduced.[137] One commentator thinks the move by the Australians, "calls in question any concern to harmonise our two legal systems except in the rather narrow commercial area."[138]

In October the Trans-Tasman single aviation market dispute surfaced. The agreement between Australia and NZ to allow Air New Zealand and Qantas to fly domestic routes within each country was stopped by the Australians one week before it should have come into force. The Australian Government justified their withdrawal by accusing the NZ Government of failure to fulfil all obligations under the Memorandum of Understanding.[139]

To build up a closer economic relationship between the two nations has proved difficult. Although NZ and Australia have established a structure to deal with trade disputes, further developments in the harmonisation of the two legal systems seem unlikely at this point in time.

III A PACIFIC COURT OF JUSTICE

A *The History of the Commonwealth Court*

Since the beginning of the century the Commonwealth has considered the possibility of either a Commonwealth Court or a system of regional courts to replace the Judicial Committee of the Privy Council.[140] David B Swinfen commented:[141]

> Their feeling was that the Judicial Committee had served a useful purpose in the past, and that there was a strong case, either for the continuation of its jurisdiction, or for its replacement by some more appropriate Commonwealth Court.

The first proposal for a Commonwealth Court came from Australia in the early 1900s.[142] In 1930 a decision was taken to create a tribunal to settle disputes between Commonwealth members. The tribunal was never used.[143]

Only in the early 1950s did a more realistic proposal for a Commonwealth Court

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137 **P J Downey** "Editorial: Closer–but not too close, mate" (1994) NZLJ 237.

138 Above N137, 238.

139 **Cathie Bell** "Williamson unlikely to go to Australia" *The Dominion*, Wellington, New Zealand, 1 November 1994, 1.

140 Above N41, 179.

141 Above N41, 178.

142 Above N41, 190.

143 Above N41, 190.

begin to emerge. The British Labour Member of Parliament Hector Hughes called for a Commonwealth Court.[144] The new court's role should have been the protection of the rule of law, human rights and the democratic freedom of the Commonwealth. Hughes also laid down some guidelines on the nature and composition of the new court:[145]

> The court should be wide in jurisdiction, representative in personnel, and as various in venue as the Commonwealth itself. It should include learned judges from all the Commonwealth nations, and it should sit, as required, in the capitals of the various sovereign nations which compose the Commonwealth.

Although Hughes' suggestion apparently did not create much interest, it had an influence on further proposals, coming especially from the Commonwealth countries most affected.[146] In 1960, a further attempt was made to set up a new court, the suggestion this time was formulated by Ceylon (Sri Lanka), at the Commonwealth Prime Ministers Conference in London.[147] Ceylon, in the process of becoming a republic but still wanting to retain a judicial link with the Commonwealth, advocated the creation of a totally new Commonwealth Court:[148]

> [A]n *ad hoc* Commonwealth Court, representing the independent members of the Commonwealth, and manned (sic) by distinguished judges from those countries. The Court should hold divisional sessions in the capitals of the member countries, while leaving it to the Judicial Committee to continue to hear colonial appeals.

The problems with this proposal were overwhelming. Member states anticipated coordination problems between the different countries, difficulties with the organisation of case lists meant to avoid long delays, problems with the court's localisation, with the selection mode for judges and with the potential resistance of those Commonwealth countries that had already abolished the Privy Council appeal. The proposal came to nothing.[149]

One final bid to create a Commonwealth Court occurred in Sydney at the Commonwealth and Empire Law Conference in 1965.[150] The new idea saw the Court

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[144] Above N41, 180-181.

[145] Above N41, 182.

[146] Above N41, 182.

[147] Above N41, 197.

[148] Above N41, 197.

[149] Above N41, 198.

[150] Above N41, 211-212.

being on circuit and formed from judges of the different member states:[151]

> Such a court could have three purposes – to deal with domestic litigation as a final court of appeal; to deal with disputes between Commonwealth countries; and, for the future, to provide for the enforcement of a Commonwealth Bill of Rights.

The response to this plan again was lukewarm, even though the British Lord Chancellor had announced that Britain, too, would send their final appeals to the new court, rather than to the traditional House of Lords.[152] Eventually the concept of a Commonwealth Court was dropped.[153]

These early proposals had in common the intention to abolish the Privy Council, only to replace it with a similar structure called by a slightly different name. It is not surprising that a Commonwealth Court never came to fruition. At the heart of the matter for those countries that instigated the different solutions,[154] was the concept of independence and Parliamentary Sovereignty.

The British, however, while partially recognising the need to abandon the Board, still wanted to retain uniformity in the law of the Commonwealth and a check on the development of the new independent states.[155] It would appear that the British favoured an accessible final appeal structure retaining the essential functions of the Privy Council for the Commonwealth states. The independent Commonwealth countries seemed more concerned about taking steps towards full independence and had lost all interest in what seemed cosmetic changes to their final appeal court. Although the British and the other Commonwealth members had tried to compromise on their different suggestions, no final decision could be found and ultimately no new Commonwealth Court was created. "The Commonwealth Court failed because it could not bridge the gap between the ideal of Commonwealth integrity and the reality of national diversity."[156]

A solely adjusted Privy Council does not appear to meet the judicial needs of either NZ or the other independent Commonwealth nations. The Commonwealth Court's history shows that a Supranational Court would need to adopt a different form,

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[151] Above N41, 212.

[152] Above N41, 179.

[153] Above N41, 216.

[154] For example Ceylon.

[155] Above N41, 217.

[156] Above N41, 218.

should it have any chance of succeeding.

B *A Pacific Regional Court of Appeal*

From the mid 60s to the 90s little initiative to replace the Privy Council with a Supranational Court was developed. The main exception was a regional Court of Appeal proposal by Sir Garfield Barwick, a former Chief Justice of Australia, in 1969.[157] Although Sir Barwick did not advocate another version of a Commonwealth Court, it was a similar concept:[158]

> The difficulties of using the Privy Council in London for the resolution of the region's legal problems I think are too great. What we have to do–and these suggestions are worth considering–is to see whether we cannot bend the Privy Council mechanism, which now exists and does not have to be renegotiated, to get out of it a regional activity. It would, of course, involve bringing the Privy Council to sit out of London.

He considered the idea of the Privy Council sitting in the Pacific region once a year, for the purpose of hearing all final appeals in this region.[159] The suggestion was too similar and too near in time to the previous Commonwealth Court ideas.

In addition, some writers began to question the need and the justification for a Pacific Court: "Is there anything more than a vague sentiment that it is good and noble for countries (and peoples) to unite in joint enterprises?"[160]

As every idea for a Supranational Court was failing, the whole notion was put aside and forgotten.[161] An entirely new concept not a variation of an old idea nor an old idea exported to this part of the world is needed, should any kind of regional court ever be successfully established. A Supranational Court for NZ required thorough planning for and by the nations of the region it would serve one day.

The last part of this chapter will consider a modern conception of a Supranational Court for NZ and the Asia-Pacific region.

C *Harmonising Asia-Pacific Law*

The concept of a Supranational Court only recently became relevant again as a result

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[157] **Sir Garfield Barwick** "A Regional Court of Appeal" (1969) NZLJ 319.

[158] Above N157, 321.

[159] Above N157, 321.

[160] Above N123, 495.

[161] Above N110, 292.

of closer trading links within the Asia-Pacific region.[162] If in a particular region of the world countries decide to trade closely together, the need for some form of regulation usually surfaces, at least to contend with dispute resolutions.[163] The CER agreement between NZ and Australia, although involving only two countries, still required the development of special court structures for legal problems concerning Trans-Tasman trade.[164] The larger the trading bloc, the more sophisticated its legal structure with much emphasis on the harmonisation of legislation and jurisdiction within the bloc.[165]

The author has noted some recent evidence of closer coordination of laws within the Asia-Pacific region. A motion explored the interest in a link of the CER agreement with the ASEAN (Association of Southeast Asian Nations) free trade agreement,[166] and the inaugural meeting of the ASEAN Regional Forum discussed proposals for a regional arms register, and a regional peacekeeping force, in which NZ would also participate.[167] On 15 November 1994 the 18 member states of the Asia-Pacific Economic Co-operation (APEC),[168] signed an agreement to allow free and open trade and investment in the region by the year 2020.[169] This agreement has the potential to create the world's largest free trade bloc.[170] It is foreseeable that sometime in the future the APEC might require a supranational court to decide trade disputes and later set legal guidelines for issues regarding for example economic, social, and human rights policy.

One immediate matter a supranational court in the region could fruitfully influence is the harmonisation of the law between the APEC countries. A conference on the "Harmonising of Asia-Pacific law" was hosted in Sydney, in November 94. The conference aimed to discuss the progress already made in the harmonisation of law

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162 For example see "Asia-Pacific free trade pact urged" *The Dominion*, Wellington, New Zealand, 31 August 1994, 2.

163 The **European Union** is a prime example, and the European Court of Justice has the jurisdiction to determine trade disputes.

164 Above N124.

165 Above N163.

166 See "Trade agreement link up to Asian countries" *The Dominion*, Wellington, 13 July 1994, 10.

167 See "Forum discusses ASEAN peacekeeping force" *The Dominion*, Wellington, 27 July 1994, 2.

168 NZ is a member along with Australia, the United States, Japan , China, and others.

169 "Highlights of APEC agreement" *The Evening Post*, Wellington, New Zealand, 16 November 1994, 21.

170 "Boost for free trade in Asia" *The Evening Post*, Wellington, New Zealand, 16 November 1994, 8.

within the Asia-Pacific region, to observe the same process in European law in the European Union and study its potential effects on the Asia-Pacific region. Further topics included aspects of Asia-Pacific trade law such as contract, taxation, banking, restrictions on foreign ownership and investment, cross-border white collar crime, environmental and broadcasting law, migration, indigenous law, and women's issues. Greater harmonisation in these areas was meant to be the main theme of the conference. It planned to discuss, as well, the possibility of a Pacific Court of Justice.[171] It appears that the latest model for a Supranational Court is on the drawing board. The combination of closer trading links within the Asia-Pacific region and the desire to harmonise the region's laws intimate a future regional supranational court. The European Court of Justice and its structure, though being much more than a trade court or final appeal court, gives a relevant example of a supranational court catering for a wide region of different national states. It is interesting to note how cases are brought before the ECJ, in order to understand how a Pacific Court of Justice could operate. Within the EU cases can be brought before the ECJ by one member state against another or against the European Commission.[172] The Commission, as well, can bring cases against a specific member state. But the most important aspect of the ECJ's jurisdiction are its preliminary rulings on the interpretation of the Treaties and on the validity and interpretation of acts performed by any of the institutions of the EU.[173] Any court or tribunal can request a ECJ preliminary ruling on these matters.[174] In 1957, when the ECJ was created by the Treaty of Rome,[175] its original main function was to regulate trade matters between the different member states regarding the free movement of goods[176] and competition law.[177] Today the ECJ gives rulings to the member states on a wide range of law, far beyond the regulation of trade, for exam-

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171 The Conference was held at the Sydney Marriott, on 18-20 November 1994. It was organised by the New South Wales Young Lawyers. See their handout "Expression of Interest Sought", **The Asia-Pacific Conference Committee**, Sydney, Australia, 1994.

172 The Commission ensures that the functions of the Treaties are respected. They detect breaches of EU law and they issue regulations and directives. The Commission is sometimes referred to as the Community Policeforce. See Article 155 and 189 of the TOR.

173 Article 177 of the TOR.

174 Above N173.

175 Article 164–188.

176 Article 9 of the TOR and Commission Directive 70/50.

177 Article 85 of the TOR.

ple on the free movement of workers[178] and equal pay and treatment.[179]

Considering the amazing development of the ECJ jurisdiction, it might now be possible to assume the ECJ could become an attractive model for a supranational court in the Asia-Pacific region, within the next 30-50 years, whose initial jurisdiction might be to hear any trade dispute arising among the member states of the free trade agreement signed in November 1994.

IV CONCLUSION

A world-wide trend away from political (eg East/West) blocs towards major trading blocs (eg EU/NAFTA/APEC) can be observed. In Europe, a common trading market has grown into an embryonic federation[180] with unique political and judicial structures. The EU's success will almost certainly influence the ways other countries and trading blocs might choose.

With New Zealand's intensified trade and interest in the Asia-Pacific region, an ultimate supranational appeal solution is thinkable. While there is still a long way to go before an Asia-Pacific Court of Justice might become reality, it would certainly be a complex and glamorous solution to many of the problems cited above.

All the other ideas of a supranational court in the Pacific region never really got off the drawing board and for some years the idea has rather floundered. An Asia-Pacific Court of Justice may be the most promising futuristic perspective for NZ.

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[178] Article 48 of the TOR and Council Regulation 1612/68. A relevant example of a ECJ case concerning the free movement of workers was ***R V Bouchereau*** [1977] 2 CMLR 800.

[179] Council Directive 75/117 and 76/207. ***Marshall v Southampton Area Health Authority*** [1986] 2 ALL ER 584, [1986] 1 CMLR 688 concerned the equality of treatment between men and women within the EU.

[180] A widely held theory. See for example **Tony Holland** "Conute and the single market" (1993) NLJ 209.

CHAPTER V - CONCLUSIONS

I EVALUATION

The aim of this research paper, set out in Chapter I, was to address the following five important questions concerning the future of the NZ legal system. The various chapters have looked into the relevant issues and the research has been evaluated referring to each question.

A *Should NZ continue to use the Privy Council in London as a final Court of Appeal?*

Although much material about the Privy Council right of appeal has been sighted, only limited evidence was found to support maintaining the Judicial Committee as our final court of appeal. The main arguments in favour of the Privy Council concern the cost savings for the state, the availability of top level British judiciary, some Maori leaders' lack of trust in the NZ Court of Appeal, and the general presumption the Board acted as a check on the NZ appellate courts.

The prevailing view in the researched sources, however, is to abolish the final appeal to London. The evidence for this school of thought lies in the small number of cases reaching the Privy Council due to the huge costs, in the inconsistency of remote foreign judges determining our jurisdiction, while NZ is heading slowly but steadily towards a republican future, in the distance between the two countries in terms of geographical location and legal structures (taking into account the further developments in the EU) and the now almost natural lack of understanding of many British law lords of NZ law, as this is more and more taking notice of Maori and Asian-Pacific issues.[181]

The research leads to the conclusion that many authors, experts, professionals and politicians perceive the right of appeal to the Privy Council as inconsistent with the dignity and the future of NZ. Significantly, even the NZ Government is taking steps towards abolishing appeals to the Privy Council. In the light of all the evidence, it can be legitimately stated, that NZ does not need to continue the use of the Judicial

[181] For the full argument see Chapter II.

Committee as our final court of appeal.

B *How can we replace the Judicial Committee, if the final appeal to London is terminated?*

One should not abolish an institution, such as the Board, before having carefully prepared its replacement. As discussed in Chapter I, because relatively little thought in NZ was put into an alternative to the Privy Council, our final appeals continue to be heard in London. Some options are available in and outside the borders of NZ and all require considerable further thought. It seems now a top priority to elaborate a judicial structure that is able to determine satisfactorily NZ final appeals.

C *Is it simply a question of adjusting the current NZ legal system to accommodate final appeals?*

Restructuring the existing courts is certainly one answer, whose advantages are that it saves costs and it is easy to implement, especially as some restructuring has been started in 1989. The main problem with this approach is the number of appeals. Different levels needed to be created within either the High Court or the Court of Appeal in order to make the restructuring of the existing court system a viable solution for final appeals.[182]

In the short term, the restructuring will most likely continue and it is not excluded that the Law Commission's concept could succeed to replace the Privy Council. The jurisdiction of the District Court has been substantially expanded. Plans to form a separate Government department for the courts are underway. However, a subtle balancing act may be required to adjust the existing legal system in a way that fulfils the wider community's justice expectations but prevents problems such as a backlog of cases in the District Court. The research leads to the conclusion that the adjustment of the current legal structure to accommodate final appeals will continue in the near future, but it may not become a long term answer for final appeals.

D *Could a Supreme Court of NZ or a Supranational Court deliver a satisfactory answer?*

One alternative to the restructuring of the existing courts is a NZ Supreme Court, but

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[182] See Chapter III.

the suggestion has received a widespread negative response (outlined in Chapter III). But a Supreme Court over and above the Court of Appeal would be a true NZ solution for NZ final appeals and might be reconsidered in the future, if NZ becomes a Republic.

The idea of a supranational court for NZ, as outlined in Chapter IV, has a long history. Many proposals were brought forward, but all have failed, mainly because they looked too similar to the old structure they were to replace, or they seemed to threaten the young nations' developing independence.

An Asia-Pacific Court of Justice (APCJ) is the most recent conception of a supranational court for our region. The increasing trading links, the APEC free trade agreement, the realisation that trading blocs usually require dispute mechanisms, and the steps already taken to harmonise Asian-Pacific law indicate, that the idea of a APCJ deserves further attention.[183] A court of this nature, initially just set up to regulate and determine trade disputes and related issues, is likely to see its jurisdiction expanded, with a potential to become a satisfactory alternative to the Privy Council as a supranational final appeal court for NZ and many other countries (considering the development of the European Court of Justice within the EU).

E How many appeals should our legal structure provide anyway?

The number of available appeals is another serious issue. Without the Privy Council the NZ court structure would offer two appeals for cases starting in the District Court but only one appeal for cases starting in the High Court. However, there are some options: The High Court or the Court of Appeal could be divided, a Supreme Court be created, or NZ could sent final appeals to a Supranational Court. In the interest of justice and for the development of the law, two appeals should always be available, even if this may cost the parties and the taxpayer more and cause unpleasant delays, before a final decision stands. Even though few litigants have the opportunity to present their case to the Board, it would nevertheless be unsatisfactory to discontinue final appeals to the Privy Council, without providing two appeals within the legal framework that serves the people of NZ.

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[183] See Chapter IV.

II A TIMETABLE FOR CHANGE

As outlined above, abolishing the right of appeal to the Privy Council and replacing the Board is a complicated task. It will take time. The current Law Society President Austin Forbes suggested two years as a reasonable time frame[184] and earlier in the year, Prime Minister Jim Bolger held that three or four years were adequate to complete the transition. The Prime Minister further thought that replacing the Judicial Committee could be achieved relatively easily.[185] Constitutional experts have named the year 2000 as a possible date.[186] If NZ has began to seriously consider a viable replacement for the Judicial Committee[187], it might be possible to establish a new final appeal structure by the year 2000.

III FINAL CONCLUSIONS

Three last concluding remarks:

- Further research should concentrate on structures able to replace the Privy Council.

- In the long term, the suggestion of an Asia-Pacific Court of Justice merits further examination, and it remains useful to observe the development of the EU in connection with the European Court of Justice, the latter giving an excellent example of how a modern supranational appeal structure could operate.

- The ideas of a divisional High Court or Court of Appeal and their implications on final appeals require further research, as they might be able to offer an intermediate solution.

Whatever option we will finally adopted, they will all have constitutional, legal and political consequences for us all.

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184 Above N20, 8.

185 See "PM to keep pushing for NZ republic" *The Dominion*, Wellington, New Zealand, 30 June 1994, 2.

186 See *The Dominion*, Wellington, New Zealand, 9 March 1994.

187 See above N6.

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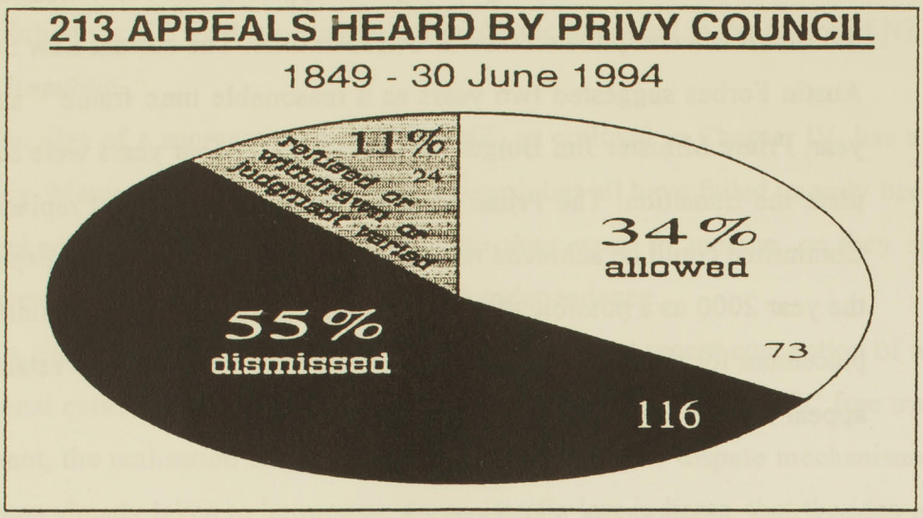
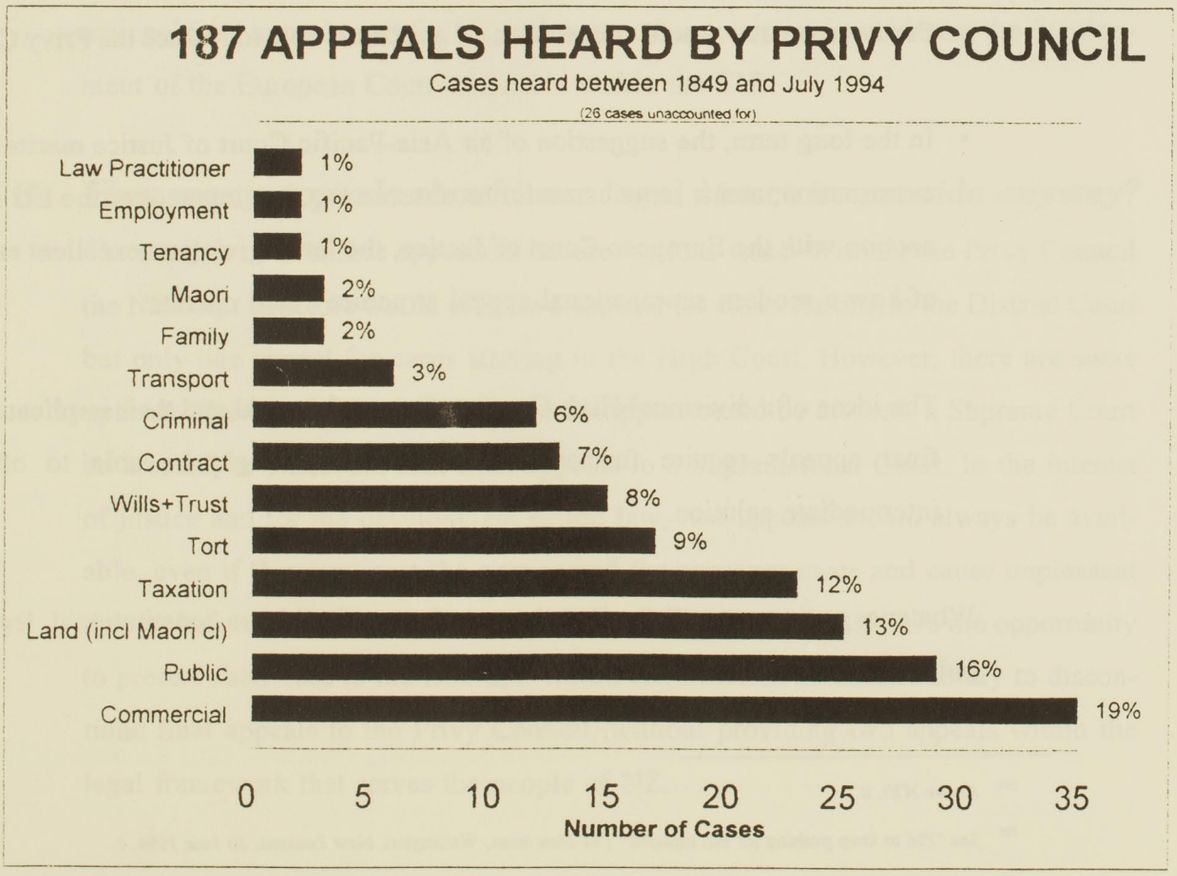


Sources for both Graphs:
New Zealand Law Commission and Registrar Court of Appeal



APPENDIX H

A Chronological List of Appeals from New Zealand Decided by the Judicial Committee of the Privy Council

The following list is based on the *New Zealand Privy Council Cases 1840-1932*, the *New Zealand Law Reports* and *The Weekly Law Reports*. For purposes of standardisation some changes have been made to the citations used in the Reports. No doubt there are gaps —for instance of unreported cases and in particular of unsuccessful petitions for leave.

The Queen v *Clarke* (1849-51) NZPCC 516. Prerogative of Crown —Land Claims Ordinance. Appeal allowed.

Bunny v *Hart* (1857) NZPCC 15. Bankruptcy —adjudication. Appeal withdrawn by consent.

Bunny v *The Judges of the Supreme Court of New Zealand*(1862) NZPCC 302. Law practitioner —suspension. Appeal dismissed.

Maclean v *MacAndrew* (1874) NZPCC 349. Cancellation of lease under Goldfields Act 1866, Otago Waste Lands Act 1866. Appeal dismissed.

Bell v *Receiver of Land Revenue of Southland* (1876) NZPCC 216. Application to purchase rural land —price. Appeal dismissed.

Pearson v *Spence* (1879) NZPCC 222. Application to purchase rural land —price. Appeal dismissed.

Daniell v *Sinclair* (1881) NZPCC 140. Reopening of accounts under mortgage. Appeal dismissed.

Rhodes v *Rhodes* (1882) NZPCC 708. Construction of will. Appeal allowed.

Ward v *National Bank of New Zealand Ltd* (1883) NZPCC 551. Guarantee —defence of release of co-surety without knowledge and consent. Appeal dismissed.

The Queen v *Williams* (1884) NZPCC 118. Crown suit — negligence. Appeal dismissed.

Plimmer v *Wellington City Corporation* (1884) NZPCC 250. Compensation for public taking of licensed land. Appeal allowed.

Shaw Savill & Albion Co Ltd v *Timaru Harbour Board*(1889-90) NZPCC 180. Liability of Habour Board for actions of harbourmaster as pilot. Appeal dismissed.

Donnelly v *Broughton* (1891) NZPCC 566. Validity of Maori will. Appeal dismissed.

Buckley (Attorney-General for New Zealand) v *Edwards* (1892) NZPCC 204. Power to appoint Supreme Court Judges. Appeal allowed.

Cameron v *Nystrom* (1893) NZPCC 436. Negligence — employer's liability. Appeal dismissed.

Ashbury v *Ellis* (1893) NZPCC 510. New Zealand Constitution — validity of Supreme Court Code rule authorising proceedings against defendant absent from New Zealand. Appeal dismissed.

Black v *Christchurch Finance Co Ltd* (1893) NZPCC 448. Negligence —liability of principal for agent. Appeal allowed.

Union Steam Ship Co Ltd v *Claridge* (1894) NZPCC 432. Negligence —employer's liability. Appeal dismissed.

Barre Johnston and Co v *Oldham* (1895) NZPCC 101. Contract — subcontractor's obligations. Appeal dismissed.

Annie Brown v *Attorney-General for New Zealand* (1897) NZPCC 106. Criminal law —party to offence —defence of marital control. Appeal dismissed.

Eccles v *Mills* (1897-8) NZPCC 240. Landlord and tenant —lessor's covenant. Appeal allowed.

Southland Frozen Meat & Product Export Co Ltd v *Nelson Bros Ltd* (1898) NZPCC 77. Contract —construction. Appeal dismissed.

Union Bank of Australia Ltd v *Murray-Aynsley* (1898) NZPCC 9. Bank —trust fund —knowledge of character of customer's account. Appeal allowed.

Barker v *Edger* (1898) NZPCC 422. Jurisdiction to rehear case under Native Land Court Act 1886. Appeal allowed in part and judgment varied accordingly.

Dilworth v *Commissioner of Stamps, Dilworth* v *Commissioner for Land & Income Tax* (1898) NZPCC 578. Tax —exemption from death duties, land tax. Appeals allowed

Coates (Receiver for Debenture-Holders of the New Zealand Midland Railway Co Ltd) v *R* (1900) NZPCC 651. Railways debentures —construction. Appeal dismissed.

Wasteneys v *Wasteneys* (1900) NZPCC 184. Deed of separation — provision for annuity. Appeal allowed. I

Fleming v *Bank of New Zealand* (1900) NZPCC 525. Principal and agent —agent's authority. Appeal allowed. I

Allan v *Morrison* (1900) NZPCC 560. Probate of lost will. Appeal dismissed.

Jellicoe v *Wellington District Law Society* (1900) NZPCC 310. Suspension of solicitor. Appeal dismissed.

Nireaha Tamaki v *Baker* (1900-01) NZPCC 371. Native Land Court —cognizance of Maori customary law. Appeal allowed.

Te Teira Te Paea v *Te Roera Tareha* (1901) NZPCC 399. Native lands —confiscation by Crown. Appeal dismissed.

Wellington City Corporation v *Johnston, Wellington City Corporation* v *Lloyd* (1902) NZPCC 644. Public works — compensation for taking. Appeals dismissed.

Commissioner of Trade and Customs v *R Bell & Co Ltd* (1902) NZPCC 146. False trade description —forfeiture by Customs. Appeal allowed.

Wallis v *Solicitor-General* (1902-03) NZPCC 23. Charitable trust. Appeal allowed.

Jackson v *Commissioner of Stamps* (1903) NZPCC 592. Tax — death duties (estate duty). Appeal dismissed.

Mitchell v *New Zealand Loan & Mercantile Agency Co Ltd, Ex parte Mitchell* (1903) NZPCC 495. Petition for special leave to appeal in forma pauperis. Leave refused.

D Henderson & Co Ltd (In liquidation) v *Daniell* (1904) NZPCC 48. Company law —arrangement with creditors. Appeal dismissed.

Smith v *McArthur* (1904) NZPCC 323. Licensing —polls and elections. Appeal allowed.

Lodder v *Slowey* (1904) NZPCC 60. Termination of contract— power of re-entry and seizure —quantum meruit. Appeal dismissed.

Wellington City Corporation v *Lower Hutt Borough* (1904) NZPCC 354. Municipal Corporations Act 1900 —contribution to cost of bridge. Appeal dismissed.

Heslop v *Minister of Mines* (1904) NZPCC 344. Compensation for lands injured by mining. Appeal dismissed.

Riddiford v *R* (1904-05) NZPCC 109. Surrender of lands to Crown —adverse possession. Appeal dismissed.

Assets Co Ltd v *Mere Roihi* (1904-05) NZPCC 275. Consolidated appeals —irregularities in Native Land Court proceedings —effect on registration under Land Transfer Act. Appeals allowed.

Graham v *Callaghan* (1905) NZPCC 330. Licensing laws —regulation of local elections. Appeal allowed.

New Zealand Loan & Merchantile Agency Co Ltd v *Reid* (1905) NZPCC 82. Contract —fraud. Appeal allowed.

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Clouston and Co Ltd v *Corry* (1905) NZPCC 336. Master and servant —wrongful dismissal. Appeal allowed.

Commissioner of Taxes v *Eastern Extension Australasia & China Telegraph Co Ltd* (1906) NZPCC 604. Income tax —profits from transmission of messages from New Zealand for part of route outside New Zealand. Appeal dismissed.

Ward Bros v *Valuer-General for New Zealand* (1907) NZPCC 174. Power of Supreme Court to control Valuer-General. Appeal dismissed.

Lyttleton Times Co Ltd v *Warners Ltd* (1907) NZPCC 470. Nuisance —construction of building resulting in noise. Appeal allowed.

R v *Badger, Ex Parte Badger* (1907) NZPCC 501. Criminal law —Petition for special leave to appeal. Leave refused.

Lovell and Christmas Ltd v *Commissioner of Taxes* (1907) NZPCC 611. Income tax —profits from goods sold on commission in London. Appeal allowed.

In re The Will of Wi Matua (deceased), Ex Parte Reardon & Te Pamoa (1908) NZPCC 522. Native Land Court Act 1894 —petitions for special leave to appeal from decision of Native Appellate Court. Leave refused.

Commissioner of Stamps v *Townend, In re Moore* (deceased) (1909) NZPCC 597. Tax —death duties (gift duty). Appeal dismissed.

Hamilton Gas Co Ltd v *Hamilton Borough* (1910) NZPCC 357. Purchase of gasworks and plant by Borough Council —price. Appeal allowed.

Greville v *Parker* (1910) NZPCC 262. Lease —option for renewal. Appeal allowed.

Allardice v *Allardice* (1911) NZPCC 156. Family protection. Appeal dismissed.

Massey v *New Zealand Times Co Ltd* (1912) NZPCC 503. Defamation —grounds for new trial. Appeal dismissed.

Samson v *Aitchison* (1912) NZPCC 441. Negligence —employer's liability. Appeal dismissed.

Manu Kapua v *Para Haimona* (1913) NZPCC 413. Native lands —title of "loyal inhabitants". Appeal dismissed.

Kauri Timber Co Ltd v *Commissioner of Taxes* (1913) NZPCC 636. Income tax —deduction of capital. Appeal dismissed.

Equitable Life Assurance Society of the United States v *Reed* (1914) NZPCC 190. Life insurance policy —surrender value. Appeal dismissed.

Union Steam Ship Co of New Zealand Ltd v *Wellington Harbour Board* (1915) NZPCC 176. Exemption from Harbour Board dues. Appeal dismissed.

Rutherford v *Acton-Adams* (1915) NZPCC 688. Vendor and purchaser —compensation for deficiency. Appeal dismissed.

R v *Broad* (1915) NZPCC 658. Railways —negligence —effect of statutory restriction on public right of way. Appeal dismissed.

Mangaone Oilfields Ltd v *Herman & Weger Manufacturing & Contracting Co Ltd* (1916) NZPCC 21. Building contract —construction. Appeal dismissed.

Ridd Milking Machine Co Ltd v *Simplex Milking Machine Co Ltd* (1916) NZPCC 478. Patent —infringement. Appeal dismissed.

Gillies v *Gane Milking Machine Co Ltd* (1916) NZPCC 490. Patent —infringement. Appeal dismissed.

McCaul v *Fraser* (1917) NZPCC 152. Family arrangement —trust to divide estate. Appeal dismissed.

Attorney-General for New Zealand v *Brown, In Re Knowles (deceased)* (1917) NZPCC 698. Construction of will. Appeal dismissed.

Marsh v *St Leger* (1918) NZPCC 232. Lands Act 1892 —construction of provisions regarding renewal and rental. Appeal dismissed.

Hineiti Rirerire Arani v *Public Trustee of New Zealand* (1919) NZPCC 1. Maori adoption. Appeals dismissed.

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Tarbutt v *Nicholson and Long* (1920) NZPCC 703. Construction of will. Appeal allowed.

Union Steam Ship Co of New Zealand Ltd v *Robin* (1920) NZPCC 131. Death by accident —amount recoverable by dependant. Appeal dismissed.

Gerrard v *Crowe* (1920) NZPCC 691. Riparian owners —right to erect embankment against flood. Appeal dismissed.

Thornes v *Brown* (1922) NZPCC 534. Exchange of land —negligence of agent acting for both parties. Appeal dismissed.

Ward and Co Ltd v *Commissioner of Taxes* (1922) NZPCC 625. Income tax —deductibility of money expended on propaganda for licensing poll. Appeal dismissed.

A Hatrick & Co Ltd v *R* (1922) NZPCC 159. Government railways—Minister's power to exact sorting-charges. Appeal allowed.

Snushall v *Kaikoura County* (1923) NZPCC 670. Control by County Council of "paper roads". Appeal dismissed.

Smallfield v *National Mutal Life Association of Australasia Ltd* (1923) NZPCC 197. Life insurance —truth of statements forming basis. Appeal allowed.

Auckland Harbour Board v *R* (1923) NZPCC 68. Constitutional law —authority for payment out of Consolidated Fund. Appeal dismissed.

Waimiha Sawmilling Co Ltd (in liquidation) v *Waione Timber Co Ltd* (1925) NZPCC 267. Land Transfer Act 1915 —unregistered interest. Appeal dismissed.

Peddle v *McDonald* (1925) NZPCC 138. Assignment of right to use tram line. Appeal dismissed.

Wright v *Morgan* (1926) NZPCC 678. Trusts —asssignment of option given under will to co-trustee. Judgment varied.

Bisset v *Wilkinson* (1926) NZPCC 93. Contract for sale of land —misrepresentation. Appeal allowed.

Gardiner v *Hirawanu* (1926) NZPCC 365. Native land -- covenant by lessee to cultivate. Appeal allowed.

Doughty v *Commissioner of Taxes* (1926-27) NZPCC 616. Income tax —value of partner's share on conversion of partnership into a company. Appeal allowed.

Crown Milling Co Ltd v *R* (1926-27) NZPCC 37. Commercial Trusts Act 1910. Appeal allowed.

Watson v *Haggitt* (1927) NZPCC 474. Construction of deed of partnership. Appeal dismissed.

Finch v *Commissioner of Stamp Duties* (1929) NZPCC 600. Tax —death duties (gift duty). Appeal allowed.

Wanganui Sash and Door Factory & Timber Co Ltd v *Maunder* (1929) NZPCC 484. Patent —infringement. Appeal allowed.

Burnard v *Lysnar* (1929) NZPCC 538. Principal and surety —validity of arrangement with creditor. Appeal allowed.

Scales v *Young* (1931) NZPCC 313. Licensing districts. Appeal dismissed.

Benson v *Kwong Chong* (1932) NZPCC 456. Negligence — function of jury. Appeal allowed.

Aspro Ltd v *Commissioner of Taxes* (1932) NZPCC 630. Income tax —deduction for sums voted as director's fees. Appeal dismissed.

New Plymouth Borough v *Taranaki Electric Power Board* [1933]NZLR 1128. Municipal Corporations Act 1920. Appeal dismissed.

Brooker v *Thomas Borthwick & Sons (Aust) Ltd* [1933] NZLR 1118. Workers compensation. Appeal allowed.

Gould v *Commissioner of Stamp Duties* [1934] NZLR 32. Tax —death duties. Appeal dismissed.

Lysnar v *National Bank of New Zealand Ltd* [1935] NZLR 129. Contract —formation. Appeal allowed.

Barton v *Moorhouse* [1935] NZLR 152. Construction of a private Act. Appeal allowed.

Trickett v *Queensland Insurance Co Ltd* [1936] NZLR 116. Motor vehicle insurance policy —construction. Appeal dismissed.

Public Trustee v *Lyon* [1936] NZLR 180. Life insurance. Appeal dismissed.

Attorney-General of New Zealand v *New Zealand Insurance Co Ltd* [1937] NZLR 33. Validity of will. Appeal dismissed.

Vincent v *Tauranga Electric Power Board* [1936] NZLR 1016. Breach of implied contract and statutory duty —limitation of action. Appeal dismissed.

Auckland City Corporation & Auckland Transport Board v *Alliance Assurance Co Ltd* [1937] NZLR 142. Local authority debentures —currency of payment. Appeal dismissed.

Macleay v *Treadwell, In re Macleay* (deceased) [1937] NZLR 230. Construction of will. Appeal allowed.

Mt Albert Borough v *Australasian Temperance & General Mutual Life Assurance Society Ltd* [1937] NZLR 1124. Local body loan —application of Victorian statute. Appeal dismissed.

De Bueger v *J Ballantyne and Co Ltd* [1938] NZLR 142. Contract —currency of payment —construction. Appeal allowed.

Wright v *New Zealand Farmers' Co-operative Association of Canterbury Ltd* [1939] NZLR 388. Mortgage —mortgagee's obligations on sale. Appeal dismissed.

Stewart v *Hancock* [1940] NZLR 424. Negligence —evidence. Appeal allowed.

Te Heuheu Tukino v *Aotea District Maori Land Board* [1941] NZLR 590. Legal effect of Treaty of Waitangi. Appeal dismissed.

Dillon v *Public Trustee, In re Dillon* [1941] NZLR 557. Family Protection Act 1908 —effect on distribution under a contract to make a will. Appeal allowed.

Guardian Trust & Executors Co of New Zealand Ltd v *Public Trustee* [1942] NZLR 294. Will —withdrawal of probate —liability of executor for payments made. Appeal dismissed.

Sidey v *Perpetual Trustees, Estate, & Agency Co of New Zealand Ltd* [1944] NZLR 891. Construction of will. Appeal allowed.

Auckland Electric Power Board v *Public Trustee* [1947] NZLR 279. Electric Supply Regulations 1935 —Electric Wiring Regulations 1935 —ultra vires. Appeal allowed.

Australian Provincial Assurance Association Ltd v *E T Taylor & Co Ltd* [1947] NZLR 793. Contract —formation. Appeal allowed.

National Mutual Life Association of Australia Ltd v *Attorney-General* [1956] NZLR 422. Government debentures —currency of payment. Appeal dismissed.

Ward v *Commissioner of Inland Revenue* [1956] NZLR 367. Death duties (estate duty). Appeal dismissed.

Commissioner of Stamp Duties v *New Zealand Insurance Co Ltd* [1956] NZLR 335. Death duties (estate duty). Appeal dismissed.

McKenna v *Porter Motors Ltd* [1956] NZLR 845. Tenancy — landlord's possession. Appeal dismissed.

Maori Trustee v *Ministry of Works, In re Whareroa 2E Bock* [1959] NZLR 7. Public works —compensation for land taken. Appeal dismissed.

Perkowski v *Wellington City Corporation* [1959] NZLR 1. Negligence —liability of local authority. Appeal dismissed.

Mouat v *Betts Motors Ltd* [1959] NZLR 15. Customs and price control restrictions on sale of imported car. Appeal dismissed.

Truth (New Zealand) Ltd v *Holloway* [1961] NZLR 22. Defamation —jury verdict. Appeal dismissed.

Lee v *Lee's Air Farming Ltd* [1961] NZLR 325. Company law —separate corporate personality —governing director's ability to become employee of company. Appeal allowed.

Australian Mutual Provident Society v *Commissioner of Inland Revenue* [1962] NZLR 449. Income tax —assessment. Appeal dismissed.

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Truth (NZ) Ltd v *Howey* [1963] NZLR 775. National Expenditure Adjustment Act 1932. Appeal dismissed.

Miller v *Minister of Mines* [1963] NZLR 560. Land transfer — mining privilege. Appeal dismissed.

Morgan v *Khyatt* [1964] NZLR 666. Nuisance —encroachment of roots. Appeal dismissed.

Attorney-General ex rel Lewis v *Lower Hutt City* [1965] NZLR 116. Municipal corporation's powers. Appeal dismissed.

Farrier-Waimak Ltd v *Bank of New Zealand* [1965] NZLR 426. Land transfer —respective priorities of mortgage and contractors' liens. Appeal allowed.

J M Construction Co Ltd v *Hutt Timber & Hardware Co Ltd* [1965] 1 WLR 797. Mutual trading —rebate as creditor. Appeal allowed.

Jeffs v *New Zealand Dairy Production & Marketing Board* [1967] NZLR 1057. Administrative law —powers of New Zealand Dairy Production and Marketing Board. Appeal allowed.

Frazer v *Walker* [1967] NZLR 1069. Land transfer registration —indefeasibility of title. Appeal dismissed.

Boots the Chemists (New Zealand) Ltd v *Chemists' Service Guild of New Zealand (Inc)* [1969] NZLR 78. Statutory limitations on persons owning or controlling pharmacy business. Appeal allowed and cross appeal dismissed.

Loan Investment Corporation of Australasia v *Bonner* [1970] NZLR 724. Contract —specific performance. Appeal dismissed.

Mangin v *Commissioner of Inland Revenue* [1971] NZLR 591. Income tax —interpretation. Appeal dismissed.

Commissioner of Inland Revenue v *Europa Oil (NZ) Ltd* [1971] NZLR 641. Income tax —deductions. Appeal allowed.

Commissioner of Inland Revenue v *Associated Motorists Petrol Co Ltd* [1971] NZLR 660. Income tax —assessable income. Appeal dismissed.

Bateman Television Ltd (in liquidation) v *Coleridge Finance Co Ltd* [1971] NZLR 929. Company law —hire purchase agreements. Appeal dismissed.

Duffield v *Police* [1974] 1 NZLR 416. Criminal law —petition for special leave to appeal. Leave refused.

Hansen v *Commissioner of Inland Revenue* [1973] 1 NZLR, 483. Income tax —assessable income. Appeal dismissed.

Furnell v *Whangarei High Schools Board* [1973] 2 NZLR 705. Administrative law —natural justice. Appeal dismissed.

New Zealand Netherlands Society "Oranje" Inc v *Kuys & The Windmill Post Ltd* [1973] 2 NZLR 163. Secretary of an association —fiduciary obligations. Appeal dismissed.

New Zealand Shipping Co Ltd v *A M Satterthwaite & Co Ltd*[1974] 1 NZLR 505. Shipping —contract between shipper and carrier —stevedore's rights. Appeal allowed.

Holden v *Commissioner of Inland Revenue*, *Menneery Commissioner of Inland Revenue* [1974] 2 NZLR 52. Income tax —assessable income. Appeals allowed.

Fahey v *M S D Speirs Ltd* [1975] 1 NZLR 240. Guarantee and indemnity —liability of surety. Appeal dismissed.

Nakhla v *R* [1975] 1 NZLR 393. Criminal law —Police Offences Act 1927. Appeal allowed.

Ashton v *Commissioner of Inland Revenue* [1975] 2 NZLR 717. Income tax —interpretation. Appeal dismissed.

McKewen v *R* [1977] 2 NZLR 95. Criminal law —petition for special leave to appeal. Leave refused.

Taylor v *Attorney-General* [1977] 2 NZLR 96. Criminal law —petition for special leave to appeal. Leave refused.

Europa Oil (NZ) Ltd v *Commissioner of Inland Revenue* [1976]1 NZLR 546. Income tax —assessable income. Appeal allowed and cross appeal dismissed.

Hannaford & Burton Ltd v *Polaroid Corporation* [1976] 2 NZLR 14. Trade mark —rectification of register. Appeal allowed.

Haldane v *Haldane* [1976] 2 NZLR 715. Matrimonial property. Appeal allowed.

Roulston v *R* [1977] 1 NZLR 365. Criminal law —petition for special leave to appeal and for legal aid. Leave refused.

Taupo Totara Timber Co Ltd v *Rowe* [1977] 2 NZLR 453. Company law —payment to retiring director. Appeal dismissed.

Goode v *Scott* [1977] 2 NZLR 466. Sale of land —Land Settlement Promotion and Land Acquisition Act 1952. Appeal dismissed.

Ross v *Henderson* [1977] 2 NZLR 458. Sale of land —Land Settlement Promotion and Land Acquisition Act 1952. Appeal dismissed.

Thomas v *R* [1978] 2 NZLR 1. Criminal law —petition for special leave to appeal —jurisdiction. Leave refused.

Dickens v *Neylon* [1978] 2 NZLR 35. Sale of land —waiver of contract deadline. Appeal dismissed.

Lilley v *Public Trustee* [1981] 1 NZLR 41. Will —testamentary promises. Appeal dismissed.

Reid v *Reid* [1982] 1 NZLR 147. Matrimonial property. Appeal and cross appeal dismissed.

Lesa v *Attorney-General* [1982] 1 NZLR 165. New Zealand citizenship. Appeal allowed.

Wiseman v *Canterbury Bye-Products Co Ltd* [1983] NZLR 184. Bylaw and rule-making power —Meat Act 1939. Appeal dismissed.

McDonald v *R* [1983] NZLR 252. Criminal law —murder —offer of immunity. Appeal dismissed.

Mahon v *Air New Zealand Ltd, Re Erebus Royal Commission* [1983] NZLR 662. Administrative law —powers of Royal Commissions of inquiry —judicial review. Appeal dismissed.

Lowe v *Commissioner of Inland Revenue* [1983] NZLR 416. Income tax —profit derived from land. Appeal dismissed.

Kaitamaki v *R* [1984] 1 NZLR 385. Criminal law —rape. Appeal dismissed.

Chiu v *Richardson* [1984] 1 NZLR 757. Criminal law —petition for special leave to appeal. Leave refused.

Hart v *O'Connor* [1985] 1 NZLR 159. Contract for sale of land —capacity and fairness. Appeal allowed.

Scancarriers A/S v *Aotearoa International Ltd* [1985] 1 NZLR 513. Contract —formation. Appeal allowed and cross appeal dismissed.

New Zealand Rugby Football Union Inc v *Finnigan* [1986] 1 NZLR 13. Powers of incorporated society —standing —petition for special leave to appeal. Leave refused.

Commissioner of Inland Revenue v *Challenge Corporation Ltd* [1986] 2 NZLR 513. Income tax —tax avoidance. Appeal allowed.

Christchurch Drainage Board v *Brown* [1987] 1 NZLR 720. Local authority—negligence. Appeal dismissed.

Rowling v *Takaro Properties Ltd (in receivership)* [1987] 2 NZLR 700. Ministerial negligence. Appeal allowed.

NZ Meat Indusry Association v *Accident Compensation Corporation* [1988] 1 NZLR 1. Accident compensation— employer levy—interpretation. Appeal dismissed.

Hovell v *R* (July 1988, not yet reported). Criminal law—petition for special leave to appeal. Leave refused.

Chase Securities Ltd v *G S H Finance Pty Ltd* (October 1988, not yet reported). Contract—share values. Appeal allowed.

The following figures—drawn from the above list—may be of interest. Where several appeals are dealt with in the same judgment, these are treated as one appeal for statistical purposes.

	Appeals allowed	Appeals dismissed	Other*	Total
1840-1899	8	15	2	25
1900-1909	12	14	3	29
1910-1919	2	16	0	18
1920-1929	10	9	1	20
1930-1939	6	11	0	17
1940-1949	5	2	0	7
1950-1959	0	7	0	7
1960-1969	5	7	0	12
1970-1979	7	13	5	25
1980-	6	9	3	18
	61	103	14	178

* Appeal withdrawn by consent, judgment varied, petition for special leave to appeal refused.

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Transcript of Faxlist: APPEALS HEARD BY PRIVY COUNCIL (handwritten notice: *This list may not be complete*)

PC NUMBER	PARTIES	DATE OF DECISION	RESULT
40/86	TAYLOR V ROTOWAX	30/3/87	REFUSED
46/88	VUJNOVICH	23/5/89	REFUSED
42/88	SAVILL V CHASE	31/10/88	REFUSED
43/88	BARBER V BARBER	4/5/89	REFUSED
6/89	SWEE V EQUITICORP	12/7/89	REFUSED
18/89	GREEN V BCNZ	18/789	REFUSED
13/89	MONEY V PLAYLE	27/7/89	REFUSED

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YEAR	FILED
1990	28
1991	29
1992	25
1993	19
1994	8 as at 30 June 1994

APPEALS HEARD BY THE PRIVY COUNCIL 1990 - 1994

1990			
40/89	KUWAIT ASIA V NATIONAL MUTUAL	21/5/90	ALLOWED
43/89	MEATES V WESTPAC	5/6/90	DISMISSED
51/89	ELDERS V BNZ (1)	18/6/90	DISMISSED
24/89	STEWART V WELCH	2/7/90	DISMISSED
39/89	CIR V DATABANK	23/7/90	DISMISSED
17/88	HOLT V HOLT	23/7/90	DISMISSED
19/90	REPUBLIC V NZI	25/7/90	DISMISSED
51/89	ELDERS V BNZ (2)	22/10/90	DISMISSED
15/90	APPLEFIELDS V APPLE & PEAR BOARD	3/12/90	ALLOWED
1991			
41/90	DFC V COFFEY	18/3/91	ALLOWED
46/90	BUTCHER V PETROCORP	18/3/91	ALLOWED
32/90	LLOYDS BANK V CIR	19/6/91	ALLOWED
7/91	NZ STOCK EXCHANGE V CIR	1/7/91	DISMISSED
14/91	SWEE V EQUITICORP	13/11/91	DISMISSED
26/91	EQC V WAITAKI	25/11/91	ALLOWED
1992			
	STRATHMORE V FRASER	18/5/92	SPECIAL LEAVE GRANTED
13/91	DOWNSVIEW V FIRST CITY	19/11/92	DISMISSED. -CROSS APPEAL ALLOWED
1993			
14/92	HADLEE V CIR	1/3/93	DISMISSED
28/92	DELOITTES V NML	10/6/93	ALLOWED
49/93	CLARK BOYCE V MOUAT	4/10/93	ALLOWED
50/92	RYDE HOLDING LTD V RAINBOW CORP LTD	15/11/93	ALLOWED IN PART
44/93	AG HONG KONG V REID	1/11/93	ALLOWED
58/92	CITIBANK V STAFFORD MALL	16/11/93	ALLOWED
14/93	NZ MAORI COUNCIL V ATTORNEY - GENERAL	13/12/93	DISMISSED
1994			
61/93	MERCURY ENERGY V ECNZ	28/2/94	DISMISSED
	MOSSMAN V BNZ	May 1994	DISMISSED
42/93	GOLDCORP	25 May 1994	ALLOWED
55/93	PREBBLE V TVNZ	27 June 1993	ALLOWED
25/93	TELECOM V CLEAR	Be heard at present	

APPENDIX II

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Drayton - Glesti, N. M.
The Privy Council, shall we keep it,
leave it or replace it?