NOTES FOR ANGLO-AUSTRALIAN LAWYERS SOCIETY, NEW SOUTH WALES BRANCH, BREAKFAST SEMINAR

1. It is a great pleasure to be back in Sydney. There is no city in the world which my wife and I prefer visiting. But it's also a professional pleasure to be here. In the seventh Lehane lecture the day before yesterday, I emphasised how important it was above all now that the "common law world judiciary needs to look at and learn from other common law jurisdictions. Not only do common law jurisdictions have much to learn from each other, but in an increasingly global and competitive world, where most legal systems are civilian, the common law jurisdictions need to ensure a degree of coherence and consistency in their case-law in order to present a credible and effective legal system." And I quoted from a very recent judgment of the UK Supreme Court where I had made that point that it was "highly desirable for all common law jurisdictions to learn from each other"[1]. I can't believe that I've just quoted myself quoting myself. Clearly I have developed a very severe case of judgitis.

2. Nonetheless, the point is an important one. It is especially significant for judges in the UK now that we are both benefitting from and suffering from European law, particularly through reading and implementing or distinguishing (or sometimes even ignoring) decisions of the European Court of Human Rights in Strasbourg and the European Union Court in Luxembourg. The influence of European law on the common law is not, however, new. In medieval times, it was Norman law which introduced jury trial, and the writ, and it was Continental ecclesiastical law which

[1] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, para 45

introduced discovery. So too n the late 18th century it was to European *lex mercatoria* that Lord Mansfield looked in order to refashion English commercial law. And there is something circular in the process; British lawyers were very prominent in the drafting of the European Convention on Human Rights, drawing, for instance, on Magna Carta for article 6, the right to a fair trial, and now we are being influenced by the Strasbourg court's interpretation of the Convention.

3. And I wouldn't want you to think that the influence is all one way. I believe that many aspects of our common law jurisprudence is much admired in many European countries and has had an effect on European judges. The value of precedent is increasingly appreciated by both the Luxembourg and the Strasbourg courts

4. The last time I visited the Luxembourg court (the EU court) I watched two cases being argued in the morning and then had lunch with a number of the Luxembourg judges (they are good on lunch in Luxembourg). They all said, and I think they really meant it, that the UK counsel were undoubtedly the best advocates they had from any of the thirty-odd jurisdictions in the EU. The discussion then turned to the hearings that morning I commented on how they must have found it frustrating not to talk, and ask questions, during counsel's submissions (limited to about 20 minutes) which were uninspiringly read out in a fairly droning voice. The judges expressed some surprise about this, and it transpires that in most European countries it is thought inappropriate to interrupt advocates and ask them questions. Indeed, as I understand it, in some countries (Portugal for example) it is a disciplinary offence for a judge to interrupt an advocate (do I hear the shuffling of feet as some of you leave to apply for Portuguese visas?) When I told them what went on in our courts,

particularly with talkative inquisitive judges, such as myself, they were amazed and faintly shocked. I rather shook them by asking whether the fact that we kept the barristers on their toes by testing their contentions in oral argument might explain why they were the best advocates in Europe.

5. The quizzing of advocates continues in the UK Supreme Court, you will be unsurprised to hear. Otherwise, we continue along the same road as the Law Lords subject to some changes. Apart from being in our own pretty good building, which gives us a clearer identity, both internally and externally as it were, I think that the most obvious effect of our move from the House of Lords is much greater visibility. It's not merely that people know who we are. We have around 80,000 visitors a year, who can get easy access to the building and the courts – totally unlike the House of Lords. We stream our hearings on Sky, and we broadcast summaries of our judgments, as well as having full press releases. I think that our deliberations and discussions amongst ourselves are more relaxed and friendly. In the Lords, we used not to discuss a case until after it was over. Now we regularly discuss a case ahead of the hearing. In the Lords there were rarely many post-hearing discussions; now we have quite a lot – sometimes face-to-face, sometimes by email. We have significantly more joint judgments. And we seem to be doing more cases. In 2013, we gave 81 judgments, whereas we only gave 62 in our last year in the House of Lords.

6. One feature of our judgments, which was adopted in the early 1990s and is now unthinkingly accepted by judges and practitioners alike as standard practice, would, I understand, cause some raised eyebrows here. In the UK Supreme Court, as in most other courts of England and Wales, we normally circulate the draft judgments, on a

confidential basis, to the advocates primarily for them to suggest small corrections ahead of formal handing down. (This does not happen in cases involving price-sensitive aspects or, unless the litigant in person agrees to the draft going to the other side's counsel and not to him). In the Supreme Court, we circulate drafts to advocates on Thursday on the basis that they will get their comments to us the immediately following Monday, and we then hand down the immediately following Wednesday. The purpose is to correct typos, small errors of fact, the way we refer to the parties, etc. It normally works very well. The more slipshod judges such as myself are saved a few blushes, because the judgment as handed down is much less likely to require amendments.

7. But sometimes, counsel come back with larger complaints. This term in the UK Supreme Court, we have had such complaints on at least five occasions. Four were objections that the point on which we were proposing to decide the case had not been argued. We accepted two of those complaints, and permitted the parties to advance further written arguments on the point; I must admit that we did not change our minds, but we did make significant alterations to the drafts as a result. The other two such complaints were rejected. The fifth complaint was that one party's argument had not been properly understood, and we accepted that and rewrote part of the judgment (my judgment, I regret to say).

8. However, the whole practice depends on the advocates restraining themselves. If it transpired that in almost every case the losing side treated the circulation of draft judgments as an opportunity to have another go at persuading the court, I think we

would have to stop the practice – or threaten counsel with contempt proceedings if they abused the system in this way.

9. In terms of the actual caseload of the Supreme Court, the effect of the introduction of the Human Rights Convention into UK law, which took effect nearly fourteen years ago now, continues to have a substantial effect on our work. Research shows that up to 40% of our work is human rights, public law or quasi-constitutional, which means that the remaining 60% is not. As a former Chancery practitioner and Judge, I am pleased to say that we have given judgment in nine cases raising significant equity issues over the past fourteen months, not including tax and IP cases. However, the Convention has had a real effect on our work. Initially, I think that it has had a detrimental effect on the common law. As the HRA came into force, Judges and lawyers were like children with a new toy. As we became fascinated with the new toy, the old toy, the common law, was left in the cupboard. Cases which could have been argued and decided on common law principles were argued and decided exclusively on Convention issues. To say that the Common law was at risk of dying in England for lack of neglect would be absurd, but its development was being stunted somewhat by the intense focussing on human rights whenever they could even arguably be brought into play.

10. Recently, however, the Judges have been engaged on the exercise of bringing the common law back to centre stage – not to the exclusion of human rights, but on the basis that it has at least as important a role as human rights when it comes to the development and application of law in the courts of the UK. The most dramatic and recent exemplar of the rediscovery of the development of the common law is perhaps

the UK Supreme Court's decision earlier this year in *Kennedy v Charity Commissioners*[2]. A journalist wished to see the results of a charity commission inquiry into the affairs of a charity run by a controversial politician, George Galloway, and based the claim on article 10, on the basis that freedom of expression extended to a claim by a journalist, or another member of the public who wished to see such documents. We considered the claim, at least as based in this way, to be over-optimistic (although there was limited support for it in a couple of Strasbourg court cases). However, we sent the claim back to the trial judge on the basis that we thought that there was a stronger case based on common law, despite the fact that counsel had effectively declined to argue his case on that basis, despite being invited to do so.

11. Another interesting point is the contrast between the common law approach to executive decisions and the Convention approach. A common law judge is very reluctant to involve himself in the merits of such a decision. It can only be quashed if it is irrational or if it is procedurally flawed – eg if an irrelevant factor has been taken into account or a relevant factor has been ignored. Where it is claimed that an executive decision infringes a right under the Convention, the Court's function is very different: it positively has to focus on the merits and carry out its own balancing exercise. Obviously, the court does not ignore the fact that the executive branch is the primary decision-maker and is often much better able to form a view. As Lord Reed put it in a recent case, "the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of

[2] [2014] UKSC 20, [2014] 2 WLR 808

the primary decision maker, will depend upon the context, and will in part reflect national traditions and institutional culture"[3]. I think that the traditional JR approach and the Convention approach are beginning to influence each other, with some possibly beneficial cross-fertilisation.

12. A further feature of the Convention is the way in which we Judges are seeking to incorporate the Convention into the law. In the context of privacy, for example, the House of Lords initially held that, despite Article 8 of the Convention which recognises the right to respect for privacy, there was no freestanding right to privacy[4] in English law. However, only a year later, the House recognised a right to privacy[5], albeit not as a freestanding right, but by what Lord Phillips referred to as "shoe-horning"[6] the right into the common law principle of confidentiality, thereby expanding that principle beyond all recognition. So too, we have accommodated the requirement of respect for the home (another aspect of article 8) into possession proceedings brought by public bodies. We have done this by saying that judges have to consider whether an order for possession would be proportionate, while emphasising that it would only be in very rare circumstances that it would be right to consider refusing such an order or even delaying it for a few months.

[3] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2013] 3 WLR 179, para 71

[4] *Wainwright v Home Office* [2004] 2 AC 406

[5] *Campbell v MGN Ltd* [2004] 457

[6] *Douglas v Hello! Magazine (No 5)* [2006] QB 125, para 53

13. So far as statutes, primary legislation, are concerned, the HRA gives us two powers. The first is to declare that a statute is incompatible with the Convention: it is then a matter for Parliament what to do. Up to now, they have always amended the statute appropriately save on one matter – prisoners' votes. The other power in relation to primary legislation, which is actually more remarkable but less publicised is the duty to try and interpret statutes so that they comply with the Convention. This power/duty to interpret statutes has been treated by the courts as going much further than ordinary construction. In fact, some might say that it's more like demolition and reconstruction.

14. Possibly the most striking recent case involving the Convention and statutes concerned assisted suicide which we decided six weeks ago. Any assisting of suicide is illegal under the Suicide Act 1961 which decriminalised suicide. The argument we had to consider in the *Nicklinson* case[7] was that this blanket ban infringed the right to self-determination of those who had suffered catastrophic events and were almost completely paralysed but could communicate – eg via an eye-blink computer – and had a firm, independent wish to die, but needed help to do so. The Strasbourg court, faced with a variety of different approaches across member states had ducked the issue, holding it was a matter for member states. All nine of us in the Supreme Court agreed that this did not mean that we could similarly duck the point and say it was for parliament. However, four of us were very sceptical whether it would ever be appropriate to grant a declaration of incompatibility. Two of us went the other way

[7] *R (on the application of Nicklinson) v Secretary of State* [2014] UKSC 38

and would have granted a declaration there and then. Three of us (including me) thought we should not grant a declaration at that stage for two reasons but fired a warning shot in the sense of saying that if Parliament did not change the law we might grant a declaration. The two reasons were procedural (the case had not been properly advanced on the issue below in our view) and principled (parliament should be given the opportunity to consider our judgments and debate the issue first).

15. Our attitude to the Strasbourg is changing, I think. We have been prepared to tell the court when we thought it was wrong on common law issues, but I think we may have been too ready to treat it as if it was a senior UK court whose decisions were binding on us. It is a civilian court under enormous pressure, which sits in chambers far more often than in banc, and whose judgments are often written by staffers, and this is apparent from the number of inconsistent decisions on a number of issues which we have had to decide. I think we therefore should be probably rather more ready than we have been to form our own views on many of the Convention issues which come before us, even where the Strasbourg court appears to have expressed a view on the point in a judgment, particularly where it is a one-off judgment of a chamber. As UK judges get more used to the Human Rights jurisdiction and to dealing with the Strasbourg court, it is unsurprising, and indeed right that we get more confident about forming our own views and find ourselves to be more ready to be less deferential to Strasbourg.

16. You read a lot about the Strasbourg court of Human Rights in our UK press, but you hear much less about the Luxembourg court of the European Union. That's probably because Human Rights involve issues of a more emotional or immediate

nature, such as hunting foxes, immigration and asylum, and prisoners' votes. But the Luxembourg court decisions have to be applied by English and Welsh courts even though it may involve us disregarding a statute – a revolutionary notion for a UK judge. In theory perhaps not so revolutionary because it is what we are required to do by parliament speaking through a statute, namely the European Communities Act 1972. However, that is often overlooked.

17. Access to the two courts is achieved in a very different way. An individual can complain that her human rights are being infringed direct to the Strasbourg court. However any such application can only be made once that person has "exhausted" her domestic remedies – ie taken her case as far as she can through the UK courts. The Luxembourg court on the other hand, can only be accessed by a domestic court referring a point of EU law to the Luxembourg court. So, even if both parties want a point referred or do not want a point referred, their wishes are not necessarily implemented. This is all the more true as the final domestic court (normally the Supreme Court in the UK) is in principle obliged to refer an issue if (i) it is necessary to resolve it to determine the dispute between the parties, and (ii) the answer to the issue is not plain – is not *acte clair*. The Luxembourg court's official position is that in any case of uncertainty we should refer, but, due to its very heavy load, its unofficial position tends to encourage national courts to be brave. I believe that the UK courts have managed to strike a happy medium.

18. The Luxembourg court's jurisdiction has increased as successive European treaties have widened the areas over which the European Commission, Ministers and Parliament have a say. Sometimes, it seems to us that the Luxembourg court goes

further than it should in rewriting rather than interpreting European Directives and Regulations. The Supreme Court expressed its concern about this in a recent case[8], not merely because we felt that by were making law rather than interpreting it, the Luxembourg court as wrong in principle, but also because such a course (i) would discourage states from signing up to Directives and Regulations as they would be worried that their meaning would be changed by the court, and (ii) would ensure a mass of references to the already over-worked court because national courts could never be sure how a provision would be interpreted.

19. The absence of a constitution means that UK judges cannot easily refuse to follow a Strasbourg or Luxembourg court decision on the ground that it would involve infringing our constitution, as the German courts are able to do. Some may think that this provides support for the argument that the UK should move towards adopting a constitution. As it is, however, there is a recent decision of the Supreme Court on EU law (so the Luxembourg court not the Strasbourg court) which suggests that the absence of a written constitution may not always prevent us from relying on our fundamental constitutional conventions. In a case concerned with the question whether a high speed train proposal conflicted with EU environmental laws[9], we had to consider the suggestion that, in order to see if a statute conflicted with those laws, the courts might have to assess the quality of the debate in Parliament on the statute. The Supreme Court made it clear that it would have severe reservations about

[8] R (*HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] 1 WLR 324

[9] The *HS2* case – see footnote 7

following any such suggestion in the light of section 9 of the Bill of Rights and the well-established principle that the courts do not poke their nose into parliamentary business.

20. Apart from the European-induced changes, there is another new role for the court, namely its duty to decide whether the assemblies or parliaments of Scotland, Wales and Northern Ireland are acting within the powers accorded to them by the Westminster Parliament. For instance, we recently had an appeal from Scotland raising the question whether the act providing for the imminent referendum was invalid as it did not allow prisoners to vote. The argument, which we have rejected (for reasons to be given later) was that the act providing for the referendum did not comply with the requirements of a protocol to the Convention, and should therefore be quashed. We have also had three cases concerning the powers of the Welsh Assembly in the past two years. We could not make the same ruling about a statute from Westminster, because we cannot quash primary legislation, but legislation emanating from Edinburgh, Cardiff and Belfast does not have that privileged status.

21. All this may be a sign that the Supreme Court is, in a very British way, wandering towards becoming something of a constitutional court, rather than what other countries would do, namely marching towards becoming a constitutional court. However, one never knows what is round the corner.

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Sydney