# COMMONWEALTH DIGEST

This Digest is intended to provide lawyers with a key to those questions and Ministerial Statements in the Commonwealth Parliament in which they are most likely to be interested, and it is, of course, selective. It covers the period 21 February to 8 November 1967, and is compiled from the published debates of the Parliament of the Commonwealth of Australia.

The page references to Parliamentary Debates ("S.Deb." and "H.R. Deb.") are to the published debates of the Senate and the House of Representatives, for the first Session of the Twenty-sixth Parliament, first and second periods.

**Australian Capital Territory**

On 3 May, the Minister for the Interior made a Ministerial Statement on the progress of his investigations into the government and administration of the Territory, giving particular attention to the question of self-government for the Territory.[1] H.R. Deb. 1648.

**Cheques**

On 19 April, the Attorney-General, in reply to a question upon notice, outlined progress made towards a draft bill for a proposed Cheques Act as recommended by the government committee appointed to review the Bills of Exchange Act 1909-1958 (Cth). H.R. Deb. 1467.

**Civil Aviation**

On 7 September, the Minister for Civil Aviation, in reply to a question upon notice, gave information of State activity as regards legislation complementary to the Crimes (Aircraft) Act 1963 (Cth) and uniform legislation to cover surface damage caused by aircraft. H.R. Deb. 1018.

On 26 October, the Minister representing the Minister for Civil Aviation in the Senate, in reply to a question upon notice, set out in detail the legal situation regulating insurance cover for persons travelling on commercial airlines in Australia. S. Deb. 1695.

**Committee of Attorneys-General**

On 31 October, the Attorney-General, in reply to a question upon notice, outlined the progress made by the Standing Committee of Commonwealth and State Attorneys-General towards securing uniform laws in various matters including company law, trade practices, evidence, domicile. H.R. Deb. 2504.

**Copyright**

On 1 November, the Attorney-General, in reply to a question upon notice, listed the amendments to the Copyright Bill 1967 which were

[1] In April 1968 the Minister, in a letter to the Territory Advisory Council, stated in detail the Government's view on self-government for the Territory. See *Canberra Times* 23 April 1968.

necessary before Australia could become a party to various international Copyright Conventions. H.R. Deb. 2608.

On 1 November, the Attorney-General, in reply to a question upon notice, defined what copyright was applicable in respect of transcripts of proceedings of royal commissions established by the Commonwealth Government. H.R. Deb. 2610.

**Electoral Redistribution**

On 22 August, the Minister for the Interior, in answer to a question without notice, reiterated the Government's intention to hold a redistribution of seats in the House of Representatives during the life of the current Parliament and outlined a tentative schedule for the process of redistribution. H.R. Deb. 263.

**High Court**

On 26 October, the Attorney-General, in reply to a question upon notice, gave statistics of High Court appeals during 1966 and listed the number of taxation and industrial property matters heard by the Court during that year. H.R. Deb. 2399.

**International Conventions, Treaties**

On 5 April, the Minister for Education and Science tabled the texts of seven treaties to which Australia had become a party by signature. S. Deb. 534.

On 3 October, the Minister for External Affairs, in reply to a question upon notice, listed in detail the commitments undertaken or proposed to be undertaken by Australia through international conventions or conferences. H.R. Deb. 1631.

**Law Reform**

On 8 March, the Attorney-General, in answer to a question without notice, stated that the preparation of a new criminal code for the Australian Capital Territory was under consideration and that the question of reforms relating to homosexual practices and abortion would be included in the examination of any proposed code. H.R. Deb. 457.

On 19 May, the Attorney-General, in reply to a question upon notice, outlined progress made towards law reform legislation relating to statutory interpretation, cheques, criminal law, legal aid. H.R. Deb. 2474.

**Legal Aid**

On 22 August, the Attorney-General, in answer to a question without notice, indicated that the Government was currently working towards the introduction of a more modern form of legal aid in the Territories. H.R. Deb. 266.

**Legal Costs**

On 19 September, the Attorney-General, in reply to a question upon notice, gave details of legal costs incurred in undefended divorce cases and listed the scale of fees payable to witnesses and jurors attending the courts in criminal matters. H.R. Deb. 1088.

**Maritime Conventions**

On 28 September, the Minister for Shipping and Transport, in reply to a question upon notice, gave details of progress made in the legislative implementation of various maritime conventions. H.R. Deb. 1551.

**Matrimonial Law**

On 19 September, the Attorney-General, in answer to a question without notice, stated that the Committee of Attorneys-General was examining the problem of divorce evidence, in particular whether the gathering of such evidence could result in invasion of the privacy of the home. H.R. Deb. 1033.

On 5 October, the Minister representing the Attorney-General in the Senate, in answer to a question without notice, defended the provisions of the Matrimonial Causes Act 1959-1967 (Cth) which give to a court a discretion to prohibit publication of names and other personal details of parties or witnesses in proceedings under the Act. S. Deb. 1182-1183.

**Nationality**

On 15 March, the Minister for Immigration, in answer to a question without notice, explained how nationality laws would affect the liability of migrants to military service in their country of origin. H.R. Deb. 660-661.

**Off Shore Petroleum**

On 28 February, the Minister for National Development made a Ministerial Statement in which he reviewed the background to, and the legal situation covering the agreement reached between the Commonwealth and Victoria in regard to the disposal of natural gas which had been discovered in off shore areas adjacent to south-eastern Victoria. H.R. Deb. 162.

On 12 April, the Minister for National Development, in answer to a question without notice, indicated that the Commonwealth and the States had reached agreement on a common code for the exploitation of off shore oil and gas and gave brief details of the proposed legislation to effectuate the agreement. H.R. Deb. 1145-1146.

On 20 September, the Minister for National Development, in answer to a question without notice, stated that the Government's policy was

to seek agreement, rather than litigate about property in off shore oil, and pointed to the legal difficulties encountered in the United States of America as justification for the policy. H.R. Deb. 1102-1103.

**Outer Space**

On 12 April, the Minister for External Affairs, in answer to a question without notice, outlined progress made towards international ratification of the treaty dealing with the peaceful uses of outer space adopted by the Geneva Assembly of the United Nations in 1966. H.R. Deb. 1140.

**Privy Council**

On 6 September, the Attorney-General made a Ministerial Statement announcing the Government's intention to limit appeals from the High Court to the Privy Council in federal matters.[2] H.R. Deb. 834.

On 28 September, the Attorney-General, in reply to a question upon notice, gave figures of appeals to the Privy Council from the State Supreme Courts over the preceding ten years. H.R. Deb. 1551.

**Referendum**

On 23 February, the Prime Minister made a Ministerial Statement announcing the Government's intention to proceed with proposals to amend the Constitution. The proposals related to first, removing the constitutional requirement that there be a nexus between the number of members in both Houses of the Commonwealth Parliament,[3] and second, removing the provision preventing Aboriginal natives from being counted when the population was reckoned,[4] together with a further amendment[5] enabling the Parliament to make laws with respect to the Aboriginal race.[6] H.R. Deb. 113.

**Space Vehicles**

On 9 March, the Minister for External Affairs, in reply to a question upon notice, outlined the international agreements applicable to Australia relating to space vehicles. H.R. Deb. 587.

**Strata Titles**

On 19 September, the Attorney-General, in answer to a question without notice, stated that proposed legislation to deal with strata titles in the Australian Capital Territory was still under active consideration. H.R. Deb. 1031.

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[2] The Bill to implement this proposal was debated in the Parliament in March-April 1968.

[3] Section 24 of the Constitution.

[4] Section 127 of the Constitution.

[5] Section 51 (xxvi.) of the Constitution.

[6] The referendum was held on 27 May 1967. The nexus proposal failed to obtain the necessary majority but both amendments relating to the Aboriginal race were approved.

**Superior Court**

On 18 May, the Attorney-General made a Ministerial Statement announcing the Government's decision to establish a new federal court to be called the Commonwealth Superior Court, and outlined its proposed jurisdiction.[7] H.R. Deb. 2335.

**Taxation**

On 9 March, the Minister representing the Treasurer in the Senate, in reply to a question upon notice, stated that the Government was examining proposals to provide financial assistance to taxpayers defending matters in the High Court as a result of appeals made by the Commissioner of Taxation against a decision of a Board of Review. S. Deb. 378.

On 4 May, the Treasurer made a Ministerial Statement explaining the Government's decision to introduce a withholding tax on interest paid to persons who were not residents of Australia. H.R. Deb. 1742.

**Territorial Waters**

On 21 September, the Minister for National Development, in answer to a question without notice, discussed the possible extension of Australia's three-mile limit to twelve miles and stated that it had not been legally resolved whether the Halibut oil field was in international, Australian or Victorian waters. H.R. Deb. 1180.

On 31 October, the Attorney-General made a Ministerial Statement informing the House of the Government's decision to make adjustments to the baselines from which the breadth of the three-mile belt of territorial sea would in future be measured. H.R. Deb. 2444.

**Territories**

On 4 May, the Minister for Territories made a Ministerial Statement setting out the result of discussions on the form of government for the Northern Territory. H.R. Deb. 1797.

On 26 October, the Minister for Territories made a Ministerial Statement on the future constitutional development of Papua and New Guinea. H.R. Deb. 2308.

On 1 November, the Minister for Territories made a Ministerial Statement announcing the Government's decision to grant full voting rights to the member representing the Northern Territory in the House of Representatives. H.R. Deb. 2561.

**Trade Practices**

On 5 April, the Attorney-General, in answer to a question without notice, outlined the situation in respect of complementary State legislation to the Trade Practices Act 1965-1967 (Cth), stating that the Government would, if necessary, be content with the Act operating solely under the powers of the Commonwealth Parliament. H.R. Deb. 906-907.

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[7] See (1964) 1 *F. L. Rev.* 1.

**"Voyager" Inquiry**

On 16 May, the Attorney-General made a Ministerial Statement announcing the Government's decision that there was no justification for any further inquiry into the loss of H.M.A.S. "Voyager". He stated that the report of the "Voyager" Royal Commission, presided over by Mr Justice Spicer, had been thoroughly debated in the Parliament and there was no new material evidence which warranted the re-opening of the inquiry. H.R. Deb. 2143.

After the Attorney-General's Statement had been debated in the House, the Prime Minister, in Ministerial Statements on 18 and 19 May, announced that the Government had decided there would be a further inquiry into the loss of H.M.A.S. "Voyager" and gave details of the terms of reference of the proposed inquiry.[8] H.R. Deb. 2309, H.R. Deb. 2438.

**War Criminals**

On 4 April, the Minister for External Affairs, in reply to a question upon notice, stated that efforts were still being made by international authorities to bring war criminals to trial before the expiration of the German law of limitations in 1969, and that proceedings initiated before the expiration of the limitation period could be brought to trial within fifteen years or more, depending on the nature of the crime. H.R. Deb. 895-896.

A. CORK
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[8] The report of the second inquiry was made available on 26 February 1968.

# CASE NOTES

## CONWAY v. RIMMER[1]

*Discovery—Production of documents—Privilege—Crown privilege.*

In April 1963 Michael Conway became a probationary police constable in the Cheshire constabulary. The period of probation was to be two years. During the probation period reports were made on his conduct and suitability for permanent appointment. It was not a practice to show these reports to the probationer.

Conway was nearing the end of his probationary period when on 13 April 1965, he was dismissed from the force by Superintendent Rimmer. The reason given to Conway for his dismissal was that he was unlikely to become an efficient police officer.

In December 1964 another probationer named Jones lost an electric torch worth about 15 shillings, a piece of equipment each probationer was required to buy for his own use. Each probationer kept his torch in his box in the parade-room and because the torches were alike each probationer scratched an identifying mark on his torch. Unknown to Conway, Jones looked in Conway's box and took out a torch. Jones claimed that he unscrewed the torch and saw that it had his [Jones'] number scratched inside the base cap. He put the torch back into Conway's box and reported to his superiors.

The matter was investigated by Superintendent Rimmer. Conway asserted that the torch was his and in support of his contention drew attention to marks on the batteries and external serrations on the top of the torch, markings he claimed he put on the torch to indicate his ownership. Three weeks later, on 11 January 1965, Rimmer accused Conway of stealing the torch and told him that there had been adverse reports against him. Rimmer suggested that Conway resign. Conway refused to resign and still protesting his ownership of the torch he was suspended from duty.

Superintendent Rimmer prepared a report which he submitted to the chief constable with a view to its being sent to the Director of Public Prosecutions for advice as to whether Conway should be charged with the theft of the torch.

Conway was committed for trial and the case was heard on 6 April 1965. After hearing the evidence for the prosecution, which included evidence by Superintendent Rimmer (who seems to have made a poor showing), the jury stopped the case and returned a verdict of not guilty.

Conway returned to duty but a week later Superintendent Rimmer sent for him and told him he was dismissed from the force. Dismissal

[1] [1968] 2 W.L.R. 998 (House of Lords). The House consisted of Lord Reid, Lord Morris of Borth-y-Gest, Lord Hodson, Lord Pearce and Lord Upjohn.

prevented Conway finding employment in any other police force in England, a career he had wished to follow since childhood.

On 22 June 1965, Conway issued a writ against Superintendent Rimmer, who had gone before the magistrates and charged Conway with stealing Jones' torch, claiming damages for malicious prosecution. The action has not yet come to trial because when discovery of documents was sought the existence of the report to the chief constable regarding the torch and four probationary reports on Conway were found to exist. Reports by persons unnamed had been made on Conway on 1 January 1964, 21 July 1964 and 9 April 1965. A report by a District Police Training Centre had been made on 8 May 1964. Production of these five documents was withheld on the ground of Crown privilege.

Production of the documents was refused by reason of an affidavit by the Home Secretary which stated in paragraph 2 :

> I personally examined and carefully considered all the said documents and I formed the view that those numbered 38 ; 39 ; 40 and 48 fell within a class of documents comprising confidential reports by police officers to chief officers of police relating to the conduct, efficiency and fitness for employment of individual police officers under their command and that the said document numbered 47 fell within a class of documents comprising reports by police officers to their superiors concerning investigations into the commission of crime. In my opinion the production of documents of each such class would be injurious to the public interest.

The plaintiff's solicitors, having been informed that Crown privilege was claimed for the documents, took the matter before the District Registrar who delivered a reasoned judgment which referred to and considered recent decisions in the Court of Appeal.[2] The decision of the District Registrar was that the defendant should produce all five documents for inspection by the plaintiff.[3]

The Attorney-General took an appeal to Browne J. in chambers who allowed the appeal, " with regret " but " without hesitation ".[4] The plaintiff appealed to the Court of Appeal where it was held by Davies and Russell L.JJ., Lord Denning M.R. dissenting, that the certificate of the Minister was in all cases conclusive in preventing the production of a document. It was immaterial if the objection was based on the ground that it belonged to a particular class of documents or on the basis of the contents of the document. It was further held that the courts in England, as distinct from Scotland and the Commonwealth, had no power to inspect any document of either category if it was subject to a claim of Crown privilege.[5]

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[2] *Merricks v. Nott-Bower* [1965] 1 Q.B. 57; *In re Grosvenor Hotel, London (No. 2)* [1965] Ch. 1210; *Wednesbury Corporation v. Ministry of Housing and Local Government* [1965] 1 W.L.R. 261.

[3] *Conway v. Rimmer* [1967] 1 W.L.R. 1031, 1033-1034.

[4] *Ibid.* 1034.

[5] *Loc. cit.*

The plaintiff appealed to the House of Lords and by unanimous decision the House, consisting of Lords Reid, Morris of Borth-y-Gest, Hodson, Pearce and Upjohn, decided that a residual power remained in the courts to order inspection and production of documents on which a Minister of State had claimed Crown privilege.[6] The decision in *Duncan v. Cammell, Laird and Company Limited*,[7] for long the cause of criticism and disquiet,[8] when subject to the scrutiny of the House from which it emanated, was found to no longer represent the law of England.

Lord Upjohn distinguished the case under consideration from *Duncan's* case, the other law Lords chose to reconsider the doctrine in the latter. The approach taken by their Lordships, other than Lord Upjohn, was in accord with the major change in the doctrine of precedent which was outlined in the statement by Lord Gardiner L.C. in the House of Lords on 26 July 1966.[9] This decision is the boldest departure from a previous decision since the statement was made.

When he made the statement Lord Gardiner concluded: "This announcement is not intended to affect the use of precedent elsewhere than in this House".[10] Lord Denning in his dissenting judgment in the Court of Appeal said: "The doctrine of precedent has been transformed . . . . This is the very case in which to throw off the fetters."[11] The House of Lords judicially affirmed Lord Gardiner's final remarks and rejected Lord Denning's attempt to allow the Court of Appeal also to take upon itself a reformative function. Lord Morris, conscious of the limits of the Lord Chancellor's statement on the change in the rules of precedent and the need to restrict any change within definite limits said :

> My Lords, it seems to me that that decision [*Duncan*] was binding upon the Court of Appeal in the present case. Your Lordships have, however, a freedom which was not possessed by the Court of Appeal. Though precedent is an indispensable foundation upon which to decide what is the law, there may be times when a departure from precedent is in the interests of justice and the proper development of the law. I have come to the conclusion that it is now right to depart from the decision in *Duncan's* case.[12]

In departing from *Duncan's* case their Lordships in varying degrees of approbation approved the decision in *Robinson v. State of South Australia* [*No.* 2].[13] Lord Reid stated that: "This case [*Robinson*] was of course dealt with in *Duncan's* case but not, I venture to think, in a very satisfactory way".[14]

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[6] *The Times*, 29 February 1968.
[7] [1942] A.C. 624.
[8] *Ellis v. Home Office* [1953] 2 Q.B. 135; *Broome v. Broome* [1955] P. 190.
[9] Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234.
[10] *Loc. cit.*
[11] [1967] 1 W.L.R. 1031, 1037.
[12] [1968] 2 W.L.R. 998, 1020.
[13] [1931] A.C. 704.
[14] [1968] 2 W.L.R. 998, 1011.

Lord Hodson went so far as to say:

> In *Robinson's* case inspection was ordered with a view to production if the court so ordered. I respectfully agree with the decision in that case and am of opinion that the line there taken should be followed.[15]

Lord Pearce looking at the dissimilarity between the English and Commonwealth common law caused by the conflicting decisions in *Robinson's* case and *Duncan's* case said: " In my view, *Robinson's* case represents the more correct approach ".[16]

The express approval of *Robinson's* case closes one of the widest gaps that existed between the common law of England and that of the Commonwealth. The disparity that existed between the common law of England and Scotland following the decision in *The Corporation of the City of Glasgow v. The Central Land Board*[17] was of concern to Lord Reid who could not see any rational justification for the law on Crown privilege being any different in the two countries. Lord Morris was concerned with the law in England being out of accord with the law in most parts of the Commonwealth. The decision in *Conway v. Rimmer* was influenced, *inter alia*, by the commendable desire for common law unity and their Lordships looking beyond decisions made within the structure of the English courts.

The basic principle applied to cases prior to *Conway v. Rimmer* where the Crown claimed privilege from production of documents was found in the following passage in Lord Simon's speech in the case of *Duncan v. Cammell, Laird and Company Limited* :

> The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.[18]

Lord Simon did, however, put a limit on the withholding of documents by a Minister, a limit which, because of the prohibition on the courts looking at the documents, rested on the integrity of the Minister. At the end of his judgment Lord Simon said that a Minister:

> ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.[19]

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[15] *Ibid.* 1037-1038.
[16] *Ibid.* 1041.
[17] [1956] S.C. (H.L.) 1.
[18] [1942] A.C. 624, 636.
[19] *Ibid.* 642.

Lord Reid could not put the relatively minor matter of a routine report on a minor police officer on the level of the examples cited by Lord Simon. He could not reconcile Lord Simon's requirement for the document to be " necessary for the proper functioning of the public service " with the statement made in the affidavit by the Home Secretary that the reports should be protected merely because they fell into a class which if revealed would be " injurious to the public interest ". Lord Reid could not regard the reports on which privilege had been claimed as necessary for the proper functioning of the public service, and in the light of a statement which was to serve as a direction, or at least a guide, for Ministers who swear affidavits regarding Crown privilege of documents, made by Lord Kilmuir L.C. in the House of Lords,[20] he came to the conclusion:

> The Minister who withholds production of a " class " document has no duty to consider the degree of public interest involved in a particular case by frustrating in that way the due administration of justice. . . . I cannot think that it is satisfactory that there should be no means at all of weighing, in any civil case, the public interest involved in withholding the document against the public interest that it should be produced.[21]

Lord Reid, showing an awareness of the criticism levelled against the executive in their frequent recourse to the claim of privilege said toward the end of his judgment:

> we must have regard to the need, shown by 25 years' experience since *Duncan's* case, that the courts should balance the public interest in the proper administration of justice against the public interest in withholding any evidence which a Minister considers ought to be withheld.
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> I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice.[22]

Lord Pearce found it difficult to lay down with precision how far the court should accept the view of the executive on what was a privileged document and said: " Certainly the rigidity of approach which crystallised in *Duncan's* case is very undesirable. And it has led to unsatisfactory results."[23] All their Lordships decided that *Duncan's* case was stated too broadly, yet the decision on the facts was correct.

What guidelines then were laid down by the House of Lords for the future assessment of the admissibility of a claim for Crown privilege of a document ? The clearest statement of future criteria was made by Lord Pearce:

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[20] 197 H.L. Deb. 741 ff. (6 June 1956) ; later slightly amended by a further statement by Lord Kilmuir L.C., 237 H.L. Deb. 1191 (8 March 1962).

[21] [1968] 2 W.L.R. 998, 1007.

[22] *Ibid.* 1014-1015.

[23] *Ibid.* 1042.

> In my opinion, the court should consider whether the document is relevant and important in a reasonable action so that one may fairly say that the public interest in justice requires its disclosure. It must consider whether the disclosure will cause harm administratively either because of the undesirability of publishing the particular contents or because of the undesirability of making public a particular class of documents (of which I have given examples above) or for any other valid reason. It must give due weight to any representations of the Minister which set out the undesirability of disclosure and explain the reasons. If these do not make the matter clear enough, the court should itself call for and inspect the documents before coming to a decision. If part of a document is innocuous but part is of such a nature that its disclosure would be undesirable, it should seal up the latter part and order discovery of the rest, provided that this will not give a distorted or misleading impression. In all these matters it must consider the public interest as a whole, giving due weight both to the administration of the executive and to the administration of justice.[24]

A limitation on the court was, however, put forward by Lord Reid. He said: " But it is important that the Minister should have a right to appeal before the document is produced ".[25]

The need for the ability to appeal before producing the documents was shown in *Ex parte Attorney-General (New South Wales); Re Cook*[26] where a magistrate, after giving an order against a claim to privilege by the Crown, refused a short adjournment until later in the same day, thus preventing an application for a common law order *nisi* for *certiorari* to be made before the documents in question were ordered to be produced. The documents were inspected and used in cross-examination of police witnesses. The Court of Appeal, Jacobs and Holmes JJ.A., Wallace P. dissenting, later found that the claim of privilege should be upheld. The magistrate by his precipitate action had destroyed what was found to be a valid claim to privilege.

In the case under review three Lords decided to inspect all five documents, Lord Pearce ordered inspection of the four probation reports and the production of the report to the chief constable, Lord Upjohn, although of the opinion that the four probation reports should be produced and the chief constable's report inspected, for convenience ordered the five documents be inspected by the Court.[27]

The order by Lord Pearce was no doubt tempered by the knowledge that the defendant had sought to get the plaintiff's grant of legal aid revoked on the ground that " prior to the criminal proceedings the papers had been sent to the Director of Public Prosecutions and process applied for on his advice ".[28] This showed that the defendant's solicitors saw

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[24] *Ibid.* 1045.

[25] *Ibid.* 1016.

[26] (1967) 86 W.N. (Pt 2), (N.S.W.) 222, 232.

[27] Subsequently the Court ordered production of all five documents.

[28] [1967] 1 W.L.R. 1031, 1041.

the significance of the report to the chief constable and that they relied on the papers to deprive Conway of legal assistance.

Their Lordships could see no objection to looking at the documents in private, an objection raised and followed in *Beatson v. Skene*[29] and *Duncan's* case. Lord Morris said:

> The power of the court must also include a power to examine documents privately, a power, I think, which in practice should be sparingly exercised but one which could operate as a safeguard for the executive in cases where a court is inclined to make an order for production, though an objection is being pressed.[30]

Lord Pearce cited five cases since 1888 where inspection had been ordered to be conducted by the court in private.[31] Lord Upjohn pointed out that when considering a claim for privilege the court was not considering the *lis* between the parties where all documents should be open to both sides but an entirely different *lis*, one of whether the public interest in withholding the document outweighed the public interest that all relevant documents should be disclosed in litigation.

Before ordering the production or inspection of documents Lord Upjohn felt that if a judge was not satisfied about the Crown's claim for privilege that the court:

> may, of course, require further and better affidavits by the Minister and may direct the Minister to attend for cross-examination by any party to the litigation before he [the judge] inspects the document.[32]

The threat of being called to the witness box and cross-examined may well have the effect of suppressing excessive zeal by Ministers in claiming Crown privilege. In New South Wales, however, it is not necessary for the claim to privilege to be on oath,[33] and it would seem that a Minister of State would not be subject to this control.

None of their Lordships placed any importance on the Attorney-General's argument that allowing the production of documents would impede the candour of public servants. Lord Morris dismissed the argument as follows :

> Would the knowledge that there was a remote chance of possible enforced production really affect candour? If there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer of the report would be encouraged

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[29] (1860) 5 H. & N. 838.

[30] [1968] 2 W.L.R. 998, 1031.

[31] *Hennessy v. Wright* (1888) 21 Q.B.D. 509 ; *Asiatic Petroleum Company Ltd v. Anglo-Persian Oil Co. Ltd* [1916] 1 K.B. 822; *Spigelmann v. Hocken* (1933) 50 T.L.R. 87; *Robinson v. State of South Australia [No.* 2] [1931] A.C. 704; *Queensland Pine Co. Ltd v. Commonwealth of Australia* [1920] St. R. Qd. 121.

[32] [1968] 2 W.L.R. 998, 1052.

[33] *Ex parte Attorney-General* ; *Re Cook* (1967) 86 W.N. (Pt 2), (N.S.W.) 222.

> rather than frustrated. The law is ample in its protection of those who are honest in recording opinions which they are under a duty to express.[34]

Wallace P. in *Ex parte Attorney-General; Re Cook*[35] took a similar attitude which unfortunately was not shared by his brother judges. It is hoped that this decision will assist in removing the shadow of *Duncan v. Cammell Laird* from the common law of New South Wales. In narrowly interpreting and restricting the application of *Ex parte Brown; Re Tunstall and Another*,[36] Jacobs and Holmes JJ.A. in *Ex parte Attorney-General; Re Cook*[37] gave a decision inconsistent with recent developments in every common law jurisdiction, but consistent with the continuing influence of *Duncan's* case. The House of Lords' decision in *Conway v. Rimmer* is completely in accord with the dissenting judgment of Wallace P. in *Re Cook*.

Two interesting matters, apart from Crown privilege, arose in the course of the judgments in *Conway v. Rimmer*. One is the acceptance of evidence of a House of Lords debate as opposed to a House of Lords judgment. An explanatory statement by the Lord Chancellor in his executive and political capacity relating to his Government's policy regarding the claiming of Crown privilege for documents was accepted as evidence by the House.[38] Lord Reid commenting on this matter said:

> When counsel proposed to read this statement your Lordships had doubts, which I shared, as to its admissibility. But we did permit it to be read, and, as the argument proceeded, its importance emerged.[39]

The importance which became obvious in argument was not shown in the judgments, and, pending the printing of counsels' arguments in the reports the admissibility of this policy statement must remain a rare and unexplained departure from the rule of interpretation that parliamentary debates are not admitted in evidence.

The second matter of interest is the statements by Lords Reid, Morris, Pearce and Upjohn that acknowledged that *Duncan's* case was influenced by the war then proceeding and that the judgment must be read in the light of the times. Lord Reid went further and analysed the political situation surrounding many earlier decisions.[40] The most emphasis on the war prevailing when *Duncan's* case was decided was made by Lord Pearce :

> In theory any general legal definition of the balance between individual justice in one scale and the safety and well-being of the state in the other scale, should be unaffected by the dangerous times

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[34] [1968] 2 W.L.R. 998, 1019.

[35] (1967) 86 W.N. (Pt 2) (N.S.W.) 222, 227.

[36] (1966) 67 S.R. (N.S.W.) 1.

[37] (1967) 86 W.N. (Pt 2) (N.S.W.) 222.

[38] *Supra* n. 20.

[39] [1968] 2 W.L.R. 998, 1006.

[40] Lord Lyndhurst's judgment in *Smith v. The East India Company* (1841) 1 Ph. 50 ; Pollock C.B. in *Beatson v. Skene* (1860) 5 H. & N. 838.

> in which it is uttered. But in practice the flame of individual right and justice must burn more palely when it is ringed by the more dramatic light of bombed buildings. And the human mind cannot but be affected subconsciously, even in generality of definition, by such a contrast since it is certainly a matter which ought to influence the particular decision in the case.[41]

This acknowledgement of the political and social climate of the times affecting the terms in which a judgment is expressed is welcome and may well open up new fields of argument in attempting to distinguish past cases before the English courts, and possibly Australian courts.

Lord Upjohn's arguments in distinguishing *Duncan v. Cammell Laird* are of interest in that they may well have been the way the entire House would have reasoned but for the recent modification of the rules of precedent. His Lordship advanced three main arguments. First, as the House misunderstood the law of Scotland the matter of Crown privilege should be reconsidered *de novo*. Secondly, the observations of Lord Simon were not intended to be binding in every case because the claim of privilege was supported on the contents of the documents and therefore the remarks on "class" documents were *obiter*. Also the documents in this case would not fall within the class of documents Lord Simon had in mind if his remarks on " class " documents were applicable. Thirdly, the observations of judges must be read in the light of the general circumstances at the time and the particular document before the court.

The decision of Lord Upjohn will be welcomed by many learned writers who postulated means of arguing around the decision in *Duncan v. Cammell Laird*, and the decision of the House will be welcomed by all persons who view with concern the encroachment of individual liberties and freedoms by the executive.

B. MORRIS

## THE COMMONWEALTH OF AUSTRALIA v. RHIND[1]

*Removal of causes—Federal jurisdiction in State courts—The Crown and statutes—Shield of the Crown—Commonwealth-State relations.*

The Commonwealth initiated an ejectment action in the Supreme Court of New South Wales in respect of its own land within that State. At first instance the defendant tenant raised two defences:

(a) the notice to quit was invalid because it was signed by a delegate of the Minister for the Interior whereas section 60 of the Lands Acquisition Act 1955-1957 (Cth) required the Attorney-General or his delegate to sign;

(b) alternatively, section 2A of the Landlord and Tenant Act 1899-1964 (N.S.W.) barred the action because the rent in respect of the premises was less than twelve guineas.

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[41] [1968] 2 W.L.R. 998, 1040-1041.

[1] (1966) 40 A.L.J.R. 407. High Court of Australia; Barwick C.J., McTiernan, Taylor, Menzies and Owen JJ. (McTiernan J. agreed with the reasons of Barwick C.J.).