THE RELEVANCE OF EUROPEAN COMMUNITY LAW IN AUSTRALIAN COURTS

BY MARTIN VRANKEN*

[*The internationalisation of the Australian economy contains a number of repercussions for the Australian legal system. This article examines the extent to which references to European, and in particular European Community, law can be found in Australian cases. The conclusion is that European Community law is used primarily (but not exclusively) in relation to aspects of commercial law. The author argues that it is beneficial for the Australian legal system to draw on European precedents and that reference to European Community law should continue to expand in the future.*]

INTRODUCTION

Traditionally, both users and makers of the law in Australia have displayed a fair degree of reluctance to look at European legal materials other than in a sporadic fashion. A variety of factors account for this lack of systematic reference to European law. The more 'foreign' a legal system is, the harder it is to make effective use of it.[1] The great divide between Australian law and Continental European law is that each qualifies for membership of a different legal family, *viz* the common law and the civil law. A second factor lies in the traditional unity of the common law, which tempers not only the urge but also the need to research the law beyond English law and its derivatives. By contrast, a proper appreciation of the civil law tends to be hampered by its own internal diversity. There is also the practical consideration of inadequate availability of civil law documentation in the English language. A final consideration in explaining the limited usefulness of European law, at least in the past, concerns the historically English focus of Australia's international trade, which increases the likelihood of adopting English standards in such areas as the law of international sales and arbitration.

In this article the above factors will be reviewed individually in order to determine whether, with the advent of the European Community and the establishment of a body of European Community law, they remain obstacles of the same magnitude. In the second part of the article, the extent to which Australian courts are actually prepared to consider European Community law in light of any change in these factors will be examined. The reason for singling out the judiciary is that courts constitute a core component of the common law legal order. Hence European Community law cannot be said to be truly relevant to the development of Australian law until the judiciary has recognised its relevance. Finally, a concluding part will contain an analysis of emerging trends and possible developments for the future.

* Licentiate in Law, Ph.D. (Leuven), LL.M. (Yale). Senior Lecturer in Law, Law School, The University of Melbourne.

[1] Kahn-Freund has authoritatively dealt with 'the problem of transplantation': Kahn-Freund, O., 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1.

1. *CURRENT RELEVANCE OF THE TRADITIONAL IMPEDIMENTS TO EUROPEAN LAW REFERENCES*

1.1 *The Civil Law/Common Law Contrast*

Comparative lawyers argue that the ultimate distinguishing feature of legal systems or, more broadly, legal families, is their style.[2] Zweigert and Kötz explain and discuss this rather vague notion of style by reference to five criteria: history; the mode of legal thinking; distinctive institutions; sources of law; and ideology.[3] The civil law and the common law represent the most important legal families in the Western World to date. As regards the style of their constituent legal orders, their particular approach to law arguably constitutes the ultimate difference between both families. David and Brierley in this regard use the classifications of 'open' and 'closed' legal systems. Briefly, the civil law approach to law is one of interpretation of pre-existing legal rules, whereas that of the common law is one of differentiation between cases in an attempt to formulate the legal rule to be applied to the case at hand.[4]

The starkness of this distinction has always been debatable. While the falsity of the perception that European courts do not make law is well documented,[5] it is the relative lack of reasoned judgement, especially in legal systems that adhere to the French model, that puzzles the common law observer.[6] Conversely, the scope and the drafting style of common law legislation has come under increased scrutiny.[7] The concept of legal families is not without its limitations, and rigidity must be avoided if it is to be of practical use.

It follows from this that the boundaries drawn between legal systems and legal disciplines may need revision from time to time, because no legal order is likely to remain unaltered in perpetuity. Developments of the early 1990s in Eastern Europe and in the former Soviet Union, for example, may result in the traditional label of 'socialist legal family' needing to be rethought. Similarly, the advent of the European Community in 1957 fundamentally altered the nature of the West European legal order. As a result it is now impossible to study the civil law without reference to European Community law.[8]

The further effect of the British membership of the European Community has been to blur the basic distinction between civil law and common law. Specifically, the original, exclusively civil law orientation of the European Community has

2 Zweigert, K. and Kötz, H., *An Introduction to Comparative Law* (2nd ed. 1987) vol. 1, 63. *Cf.* David, R. and Brierley, J.E.C., *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3rd ed. 1985) 17.

3 Zweigert and Kötz, *op. cit.* n.2, 69.

4 David and Brierley, *op. cit.* n.2, 360.

5 Vranken, M., 'Statutory Interpretation and Judicial Policy Making: Some Comparative Reflections' (1991) 12 *Statute Law Review* 31.

6 See *infra* '1.2.3 *Accessibility of European Legal Materials.*'

7 The invasion of statute law in areas previously dominated by the common law is hardly worth noting. Examples of changes in drafting style are the multi-layered approach adopted in the Patents Act 1990 (Cth), and the use of object clauses in New Zealand labour legislation: see the Labour Relations Act 1987 (N.Z.) (repealed) and the Employment Contracts Act 1991 (N.Z.).

8 Some would take the argument one step further and ask whether a European curriculum could one day substitute the national diversity of law schools in Europe. See Goode, R., 'The European Law School' (1993) 13 *Legal Studies* 1.

had to accommodate the common law background of some of its newer members.[9] This is particularly apparent in the style of the decisions of the European Court of Justice. Toth records that the emphasis is now on a greater logic in presentation.[10] The actual judgments may still seem 'terse'[11] to someone steeped in the common law, but their degree of reasoned detail clearly resembles German case law more closely than French case law. Besides, the opinion of the Advocate-General is always available as an invaluable aid to a proper understanding of both facts, the background law, and the issues at stake.[12] The quality of European Community legislation as well as European Community case law tends to be high, in that both are regularly based upon extensive comparative research of the legal situation in the various Member States.

1.2 *Importance of English Law for the Australian Legal Scene*

1.2.1 *The English Reflex*

Some commentators have argued that Australian courts and scholars should shed their habit of disproportionate reliance on English authority. Contract law has been singled out as an area of the law where the 'English reflex' continues to persist.[13] Other applications undoubtedly can be noted.[14] This is not to say that English law has been the exclusive reference point for overseas material in the Australian courts. Ample evidence is available to demonstrate the use of American, Canadian and even New Zealand authorities where deemed appropriate.[15] But even in peculiarly Australian areas of the law, the extent of reference to English authority is striking and, in some instances, continues to this day.

A case in point is labour law. The Australian legislature opted for a non-English approach to the resolution of industrial disputes as early as 1904 when the first Industrial Conciliation and Arbitration legislation was enacted by the Commonwealth of Australia. The emphasis of the legislation was on the compulsory arbitration of labour disputes in the public interest. Its essential features are currently embodied in the Industrial Relations Act 1988 (Cth). This system of labour law can be described as being unique in the world apart perhaps from New Zealand.[16] Specifically, the Australian legislature has chosen a model that is quite

[9] The United Kingdom, Ireland and Denmark joined the Community on 1 January 1973, followed by Greece in 1981, and by Spain and Portugal in 1986. Except for the two newest Member States, the legal systems of these countries either belong to the common law or are mixed.

[10] See the entries of European Court of Justice and European Court Reports in Toth, A.G., *The Oxford Encyclopaedia of European Community Law* (1990) vol.1, 218-9.

[11] Medhurst, D., *A Brief and Practical Guide to European Community Law* (1990) 32.

[12] Advocates-General have the same status as Judges. There are six in total. The practice is for one to come from each of the four big countries, including the U.K., and two to come from the other Member States. Their influence must not be underestimated.

[13] Ellinghaus, M.P., 'Towards an Australian Contract Law' in Ellinghaus, M.P., Bradbrook A.J., and Duggan A.J. (eds), *The Emergence of Australian Law* (1989) 44.

[14] In the area of tort law, for instance, Luntz has observed that even though Australian courts now sometimes display a willingness to question long-standing rules of the common law, there are limits to when a court will overturn a settled doctrine that emanates from England. See Luntz, H., 'Throwing Off the Chains. English Precedent and the Law of Torts in Australia' in Ellinghaus, Bradbrook and Duggan, *ibid.* 70-1.

[15] The cases to be discussed below in the context of their reference to European authority quite commonly consider court decisions in the various common law jurisdictions as well. *Cf.* von Nessen, P.E., 'The Use of American Precedents by the High Court of Australia, 1901-1987' (1992) 14 *Adelaide Law Review* 181.

different from the organisation of industrial relations in the United Kingdom. The difference is said to be 'all the more remarkable in view of the strength of British traditions in the growth of the political, social and economic organisation' of the colonies.[17] Nevertheless, the leading cases on Australian labour law are full of references to English authority.[18]

Notwithstanding this English reflex, the influence of English law on Australian law appears to be diminishing. Because of changes within Australian society at large, Australian courts feel more independent from their English ancestors. In their preface to *The Emergence of Australian Law*, Ellinghaus, Bradbrook and Duggan note that Australian law is in a state of accelerating transition, and that this process of transition inevitably has some nationalistic overtones.[19] Perhaps the most celebrated case in point is *Commercial Bank of Australia v. Amadio*[20] and the development of a doctrine of unconscionability beyond the acceptable limits under English law.[21] Outside the area of contract law, a distinctive Australian jurisprudence is emerging in the law of landlord and tenant,[22] intellectual property law,[23] matrimonial property law,[24] tort law,[25] and even criminal law.[26]

1.2.2 *Influence of European Community Law on English Law*

English law is no longer 'pure' because of, *inter alia*, the membership of the United Kingdom of the European Community since 1973.[27] Not surprisingly, perhaps, commercial law has been the main area affected. An example is company law. Even though European influences on the development of English company law predate that country's admission to membership,[28] the impact of European

16 The first industrial conciliation and arbitration legislation was adopted in New Zealand in 1894 — ten years before federal Australia.

17 The quote is borrowed from Woods, N.S., *Industrial Conciliation and Arbitration in New Zealand* (1963) 9. The ongoing reorganisation of Australian (and New Zealand) labour law may result in a move away from the compulsory conciliation and arbitration of labour disputes towards a system of collective bargaining as can be found in other western nations. For further details, see Vranken, M., 'Labour Law Models in Transition: *Nil Novi Sub Sole*?' in Blanpain, R. (ed.), *Arbeidsrecht: Theorie En Praktijk* (1993) (forthcoming).

18 A good example is *Gregory v. Philip Morris Ltd* (1987) 77 A.L.R. 79; (1988) 80 A.L.R. 455. The case addresses the relationship between awards and individual contracts of service. The reference to English authorities is particularly inappropriate in that union-negotiated collective bargains typically constitute legally enforceable documents in Australia whereas the reverse is true in England. See also McCallum, R.C., Pittard, M.J. and Smith, G.E., *Australian Labour Law Cases and Materials* (2nd ed. 1990); and Creighton, W.B., Ford, W.J. and Mitchell, R.J., *Labour Law Text and Materials* (2nd ed. 1993).

19 Ellinghaus, Bradbrook and Duggan, *op. cit.* n.13, IX-X.

20 (1983) 151 C.L.R. 447.

21 For a broader economics-of-law perspective, see Richardson, M., 'Contract Law and Distributive Justice Revisited' (1990) 10 *Legal Studies* 258.

22 Bradbrook, A.J., 'The Evolution of Australian Landlord and Tenant Law' in Ellinghaus, Bradbrook and Duggan, *op. cit.* n.13, 104.

23 Ricketson, S., *Australia and International Copyright Protection* in Ellinghaus, Bradbrook and Duggan, *op. cit.* n.13, 144.

24 Ingleby, R., *Australian Matrimonial Property Law: The Rise and Fall of Discretion* in Ellinghaus, Bradbrook and Duggan, *op. cit.* n.13, 176.

25 Luntz, H., *op. cit.* n.14, 70.

26 Lanham, D., *Murder Most Australian* in Ellinghaus, Bradbrook and Duggan, *op. cit.* n.13, 232.

27 Usher argues that the impact of European Community legislation has been considerable, and perhaps goes further than at first sight might be imagined: Usher, J.A., 'The Impact of E.E.C. Legislation on the United Kingdom Courts' (1989) 10 *Statute Law Review* 95, including the reference in footnote 80 of his article.

28 Farrar, J.H., Furey, N.E. and Hannigan, B.M., *Farrar's Company Law* (3rd ed. 1991) 25.

Community law has been considerable. The harmonisation of company law, in particular, triggered over a dozen proposals of Directives, many of which have been adopted.[29] The impact of European Community law is destined to continue to grow. A number of proposals exist to facilitate cross-frontier mergers.[30] And there is also the proposed establishment of a European company.[31]

The social dimension of the European Community has had some impact on English law as well. Important regulations have been made under articles 48 and 51 of the Treaty of Rome, concerning free movement of workers and social security of migrant workers respectively. Even more successful has been the use of the instrument of directives. Major applications include equal pay and equal treatment as well as the protection of workers' rights in instances of collective redundancies, transfer of undertakings, and bankruptcy.[32] Currently, the Community Charter on Fundamental Social Rights of Workers, adopted by all Member States except the United Kingdom, is 'spawning'[33] a number of European Community initiatives that will be difficult for English law to ignore forever.

The effect of European Community membership on English law goes beyond the formal transfer of legislative powers from London to Brussels and the binding nature of decisions of the European Court of Justice on British courts. Hepple and Fredman have observed that, above all, English lawyers had to familiarise themselves with laws and practices expressed in the Continental legal idiom.[34] Usher argues that membership of the European Community has contributed to a change in statutory interpretation techniques, even in areas which do not involve European Community law. Specifically, English judges have been using the teleological or purposive approach to interpretation since the mid 1980s. Revealingly, they also have started calling it by that name.[35]

1.2.3 *Accessibility of European Legal Materials*

Whatever difficulties may have existed in accessing European legal materials, they can by no means be reduced to a language issue alone. The rather different methods of interaction between the various actors in the law-making process of the civil law have, in the past, tended to discourage the active use of European legal materials by anyone operating within the common law system. Specifically, the formal primacy of statute law notwithstanding, judicial glosses upon the words of the legislation are of the utmost importance in the civil law. The necessity to familiarise oneself with methods of judicial interpretation from the Continent is reinforced where the legislation has adopted a principled approach to legislative drafting in the tradition of generality and abstractness, as demonstrated in the great civil codes. Unlike the common law, however, no systematic system for the reporting of cases exists. And even where any such reporting does take place,

29 See list in Farrar, Furey and Hannigan, *ibid.* 28.
30 *Ibid.* 734.
31 *Ibid.* 742.
32 Blanpain, R., *Labour Law and Industrial Relations of the European Community* (1991).
33 Hepple, B.A. and Fredman, S., 'Great Britain' in Blanpain, R. (ed.), *International Encyclopaedia for Labour Law and Industrial Relations* (1992) para.18.
34 *Ibid.*
35 Usher, J.A., *op. cit.* n.27, 108-9.

the sheer brevity of, for example, the reasoning of the French Court of Cassation constitutes a formidable obstacle to the reading of civil law cases. Academic scholarship, and especially legal commentaries in notes to important court decisions, play a pivotal role in making the civil law codes understandable.[36]

The advent of the European Community has brought about a silent revolution. As for court cases, the official vehicle for the systematic reporting of decisions by the European Court of Justice is the European Court Reports. The official publication of all European Community legislation, together with detailed '*travaux préparatoires*', takes place in the *Official Journal of the European Communities.* Since English is an official Community language, legislative materials (including pre-1973 documents) are readily accessible.[37] Regrettably, there is an increasing need to look beyond these two reporting venues. A seemingly unstoppable rise in the volume of the European Court Reports has contributed to the publication of certain (generally less important) cases in summary form only since 1989. Private collections, most notably the Common Market Law Reports, may provide an alternative reference source in these circumstances, although their main usefulness lies in their greater speed of reporting. Selective European Community case law can even be found in mainstream English reports.[38] As for European Community legislation, in general only regulations provide the detailed substance on any particular issue. Whenever the instrument of directives is used, drafting of the substantive law remains the responsibility of the national authorities.[39] The use of directives in preference to regulations is no longer confined to such traditional areas as labour law. As the subject matter of European Community law widens, the popularity of the directive as a device for law making is likely to increase. The *Official Journal* does not publish the implementing, national legislation. Even so, it does state the objectives of the various directives which, in turn, serve as guides to the interpretation of the internal law of the Member States.

1.2.4 *The Focus of Australia's International Trade*

The closest political and trading partner of Australia has historically been England, and there has been no immediate incentive to turn to Continental Europe for legal guidance. Logically, legal instruments that were important in international trade also tended to be adopted by reference to English law.[40] However,

[36] An illustration of the inter-play between the various 'actors' in the law-making process as regards the French law of tort can be found in Tomlinson, E.A., 'Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking' (1988) 48 *Louisiana Law Review* 1299. For an application to German contract law, See Dawson, J.P., 'Judicial Revision of Frustrated Contracts: Germany' (1983) 63 *Boston University Law Review* 1039.

[37] The *Official Journal* began in 1958 and was published in the languages of the original six Member States. A *Special Edition* of the *Journal* contains a translation into English of the European Community legislation in force when the United Kingdom joined. English translations of the decisions of the European Court of Justice, including the opinions of the Advocate-General, are available in the European Court Reports from 1954 onwards.

[38] Examples are *Australian Mining & Smelting Europe Ltd v. Commission of the European Communities* [1983] Q.B. 878 and *R v. Bouchereau* (1978) 1 Q.B. 732.

[39] Note, however, that some directives can be quite detailed.

[40] Examples are legislation in the areas of sale of goods and commercial arbitration. For a discussion see Sutton, K.C.T., *Sales and Consumer Law in Australia and New Zealand* (3rd ed. 1983) and Sharkey, J.J.A. and Dorter, J.B., *Commercial Arbitration* (1986).

there are indications of a shift in direction. Economically, a lot of attention is now being paid to Asia. In particular, Japan represents Australia's largest trading partner in goods. Interestingly, the European Community currently occupies second place. The Community is also Australia's largest partner in services, and provides about one quarter of Australia's net foreign investment.[41] Politically, annual ministerial consultations between the Commission of the European Community and Australia have been held since 1976, covering a wide range of bilateral and multilateral issues. In May 1990, the European Community and Australia agreed to enhance both the level and quality of their dialogue on foreign policy questions. The new consultative arrangements aim at improving access to the system of European Political Cooperation.[42] Regular contacts are also maintained between European, Australian and New Zealand parliamentarians. The European Parliament even has a special Committee for Relations with Australia and New Zealand.

These political and economic changes inevitably affect the legal scene in Australia. The move towards 'Australianisation' of the law and the need to borrow more broadly from abroad are not mutually exclusive. The sources of influence upon Australia's legal thinking today extend well beyond Britain. In essence, Australia is 'being caught up in international trends in the law,'[43] and these trends are most pronounced in the area of commercial law. Recent examples include the law of sales and arbitration. As regards the former, the 1980 United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention) came into effect in Australia on 1 April 1989. State legislation adopted earlier enabled implementation of the Convention.[44] As for the latter, the International Arbitration Amendment Act 1989 (Cth) embodies the 1985 Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL).

1.2.5 *Interim Conclusion*

In the first part of this article, four traditional obstacles to the use of European legal materials in Australia were reviewed. It has been shown that the significance of these factors has decreased in recent years. In part, an explanation can be found in the Australian legal system coming of age. In part, it is because of changes

[41] In 1991-92 total Australian exports to the European Community amounted to $A6.9 billion representing 12.6 percent of total exports, compared with 26 percent for Japan and 9.5 percent for the U.S.A. The European Community provided 20.4 percent of total imports in 1991-92, compared with 22.9 percent from the U.S.A. and 18.1 percent from Japan. Australia's exports of services to the Community in 1989-90 were $2.4 billion or 20.5 percent of total services, while imports from the European Community amounted to $4.6 billion or 28.8 percent of Australia's total imports for the same period. In 1991-92 the European Community provided around 24 percent of accumulated foreign investment in Australia ($A73 billion), compared with the U.S.A. (19 percent) and Japan (18 percent). The European Community is the second most important destination for Australian investment abroad ($A25.5 billion or 27 percent of the total): European Community Delegation to Australia and New Zealand, *The European Community Today and its Relations with Australia and New Zealand* (1992) 22.

[42] *Ibid.* 21. Contacts are at the level of Ministers and senior officials.

[43] Finn, P., 'Statutes and the Common Law' (1992) 22 *University of Western Australia Law Review* 7.

[44] See, *e.g.*, Sale of Goods (Vienna Convention) Act 1986 (N.S.W.) and Sale of Goods (Vienna Convention) Act 1987 (Vic.).

within the civil law — most notably the advent of the European Community.

The next part of the article consists of an examination of the extent to which Australian courts have adjusted their approach towards making, interpreting and applying the law because of the changes noted in the preceding part. The specific focus will be on references to European Community law — *i.e.*, legal developments at the supranational level as opposed to the internal law of the Member States.

2. *INFLUENCE OF EUROPEAN COMMUNITY LAW ON AUSTRALIAN LAW*

The analysis below is based upon a comprehensive search of computer data, and covers references to European Community law by the High Court, the Federal Court, and the Administrative Appeals Tribunal. Also searched were the New South Wales Law Reports, Victorian Reports, South Australian State Reports, the Tasmanian State Reports, the Tasmanian Reports, and the Western Australian Law Reports. The database did not include Queensland.[45] The results can be categorised under a variety of subject headings.

2.1 *Trade Practices Law*

The reference to European Community law in the Australian courts is most prominent in the field of commercial law. Most, if not all, instances of European Community law use in commercial cases involve the application or interpretation of the Trade Practices Act 1974 (Cth). In *Trade Practices Commission v. Ansett Transport Industries (Operations) Pty Ltd*,[46] Northrop J. decided to determine the question of market dominance for the purposes of s.50 of the Trade Practices Act by reference to a method similar to that adopted by the European Court of Justice in the then recent case of *United Brands Co. and United Brands Continental B.V. v. E.C. Commission.*[47] Australian cases on anti-trust law decided after the enactment of the Trade Practices Revision Act 1986 (Cth) quite commonly discuss three specific decisions of the European Court of Justice. Besides case 27/76 of *United Brands*,[48] they are case 85/76 of *Hoffman-La Roche v. E.C. Commission*,[49] and case 6/72 of *Europemballage Corporation & Continental Can Inc. v. E.C. Commission.*[50] All three are classical cases on European Community anti-trust law. A more direct explanation for their popularity in Australian court rooms, however, may be that they feature expressly in the Explanatory Memorandum that accompanies the 1986 Act.

The Trade Practices Revision Act amends s.46(1) slightly and adds a new s.46(3). The Explanatory Memorandum states that s.46(3) is designed to achieve an approach similar to that adopted by the European Court of Justice in determining market power for purposes of article 86 E.E.C.[51] The High Court in

45 Entries searched for were 'C.M.L.R.', 'E.C.R.', and 'european community'. The period covered was the 20th century.

46 (1978) 32 F.L.R. 305.

47 Interestingly, the reference used by his Honour was not to the unreported case itself. Rather, the reference cited was *The Times* 6 March 1978, and [1978] 3 *Current Law* 349.

48 [1978] European Court Reports 207; [1978] 3 Common Market Law Reports 83.

49 [1979] European Court Reports 461; [1979] 3 Common Market Law Reports 211.

50 [1973] European Court Reports 215; [1973] Common Market Law Reports 199.

51 Explanatory Memorandum, para.46.

Queensland Wire Industries Pty Ltd v. Broken Hill Pty Co. Ltd [52] refers to this aspect of the Explanatory Memorandum in support of its use of European Community case law as authority for the domestic legal scene.[53] In the result Mason C.J. and Wilson J. define the notions of relevant market and market power by reference to the case law of the European Court of Justice.[54]

The use made of European Community law by the High Court in *Queensland Wire* (as regards s.46 of the Trade Practices Act) may have strengthened the resolve of the Federal Court to do likewise with respect to ss4E and 50 of the Trade Practices Act in *Arnotts Limited v. Trade Practices Commission.*[55] In that case the Federal Court discusses the same three European Court of Justice cases as did the High Court in *Queensland Wire.* By way of additional justification for the authority of European case law, the Federal Court adds as follows:

> Some of the European cases provide assistance in the resolution of questions of market power and dominance. *Although they arise out of a different statute they apply similar economic concepts* .[56] (emphasis added)

Queensland Wire was applied and *Arnotts Limited* was referred to in *Trade Practices Commission v. BTR Nylex Limited.*[57] And the trend to refer to European case law is gathering momentum. The Federal Court has even begun to refer to unreported cases of the recently established Court of First Instance, as in *Broderbund Software Inc v. Computerm'ate Products (Australia) Pty Ltd.*[58] Once fully operational, the availability on CELEX[59] of both reported and unreported decisions of the European Court will greatly assist this development.

2.2 *Customs Tariffs and Anti-Dumping Law*

In *Rheem Australia Ltd v. Collector of Customs (N.S.W.),*[60] the Federal Court was confronted with a difficulty in categorizing imported goods for purposes of the Customs Tariff Act 1982 (Cth). In addressing this issue the Court sought the assistance of the approach of the European Court of Justice in *Baupla GmbH v. Oberfinanzdirektion Köln.*[61] The opinion of the Advocate-General was quoted from and his reasoning was said to be helpful in deciding the case.

A further aspect of commercial law not involving the Trade Practices Act was addressed by the Federal Court in *McDowell and Partners Pty Ltd v. Button.*[62]

52 (1989) 167 C.L.R. 177.
53 *Ibid.* 189.
54 *Ibid.* 188-90. Note also the reference to American and European scholarly writings by Toohey J. at 210-1.
55 (1990) 12 A.T.P.R. para.41-061; (1990) 97 A.L.R. 555; (1989-1990) 24 F.C.R. 313.
56 (1989-1990) 24 F.C.R. 313, 336 (emphasis added).
57 (1991) 13 A.T.P.R. 41-075.
58 (1992) 14 A.T.P.R. 41-155; (1991) 22 I.P.R. 215, 233, 243. The reference was to *Independent Television Publications Ltd v. Commission,* Court of First Instance of the European Community, 10 July 1991, unreported. The Court of First Instance was established in October 1989 in an attempt to ease the workload of the European Court of Justice. Its jurisdiction includes competition cases as well as actions for damages and staff cases.
59 CELEX stands for Communitatis Europeae Lex. It is the computerised interinstitutional documentation system of the Community. Having been created in 1966 and available to the public since 1981, the need to translate documents into nine Community languages continues to produce delays.
60 (1988) 78 A.L.R. 285.
61 [1975] European Court Reports 989.
62 (1983) 79 F.L.R. 166.

That case involved the interpretation of the Customs Tariff (Anti-Dumping) Act 1975 (Cth). The question before the Federal Court was whether sales at a loss are 'in the ordinary course of trade' for the purposes of the Act. The Court first noted that there did not appear to be any authority on that question. It then quoted at length from the opinion of the Advocate-General in case 113/77 of *N.T.N. Toyo Bearing Company Ltd v. E.C. Council.*[63] The Federal Court also referred to an article by Didier.[64] Together these two sources were used to support a finding that sales at a loss, without more, are not necessarily outside the ordinary course of trade; however, if such sales are persisted with, they may indicate otherwise.[65]

2.3 *Insurance Contracts Legislation*

Australian Law Reform Commission Reports constitute an indirect but important source of European Community law materials. They appear to give the reference to European law by Australian courts an extra element of respectability and justification. Thus they may be seen to perform a similar function to that of English cases or Explanatory Memoranda in referring to European Community law. A case in point is *Commercial Union Assurance Company of Australia Ltd v. Ferrcom Pty Ltd* in the Court of Appeal of New South Wales.[66] The case concerned the interpretation of s.54 of the Insurance Contracts Act 1984 (Cth). The insured had failed to give timely notification of a change which materially varied the facts and circumstances existing at the commencement of its policy with the insurer. But for the Act, this failure would, under the terms of the policy, have relieved the insurer entirely of its liability to the insured.

Kirby P. observed that s.54 appeared in a remedial statute designed to reform the pre-existing law of insurance and that, as a result, it should be construed to give effect to its remedial purpose. His Honour ruled that, in order to understand better the Act's purpose — *i.e.*, to elucidate the mischief perceived in the pre-existing law and to clarify ambiguities in the Act — it was permissible to have regard to the Report of the Australian Law Reform Commission.[67] The Report was accompanied by a draft Bill which, with minor modifications, became the Act. The Commission identified as the main problem of the remedies under pre-existing law the so-called disproportion between the loss to the insured (where the insurance contract was avoided) and the prejudice to the insurer (occasioned by the non-disclosure). The Commission next examined methods which had been adopted in various jurisdictions to cure the 'disproportion' in an equitable way. In this regard the Commission referred to the then draft E.E.C. Directive on The Coordination of Legislative, Statutory and Administrative Provisions Relating to Insurance Contracts. That Directive proposed the adoption of the principle of proportionality when non-disclosure was due to fault on the part of the insured.[68]

[63] [1979] European Court Reports 1185; [1979] 2 Common Market Law Reports 257.
[64] Didier, P., 'E.E.C. Anti-Dumping Rules and Practices' (1980) 17 *Common Market Law Review* 352.
[65] (1983) 79 F.L.R. 166, 179-80.
[66] (1991) 22 N.S.W.L.R. 389.
[67] Australian Law Reform Commission Report No.20, *Insurance Contracts* (1982). Section 15AB of the Acts Interpretation Act 1901 (Cth) (s.15AB was inserted in 1987) provides that material that may be considered in the interpretation of legislation includes Law Reform Commission reports.
[68] *Ibid.* 114.

Against this background the Commission reached the recommendation, which is reflected in s.54 of the Act, that where the insured's conduct might have caused or contributed to the loss, a causal connection approach should be preferred. Given the insured's superior knowledge concerning the circumstances of most losses, it should bear the burden of proof.

Kirby P. inferred from the above that the purpose of s.54 is to ensure that the insured secures no less protection than it would have secured but for its non-disclosure. But there is no need to grant more protection either. Here the non-disclosure was so material that the extent of prejudice to the insurer's interests was the difference between liability for loss and nil liability.

2.4 *Intellectual Property*

Ozi Soft Pty Ltd v. Wong[69] stands for an unsuccessful attempt to interpret s.37 of the Copyright Act 1968 (Cth) by reference to the Treaty of Rome. The case involved diskettes containing video games. These were manufactured outside Australia and purchased by the respondents in the United Kingdom with the authority and consent of the applicants, the copyright owners. No express restriction had been placed upon the respondents as regards the export of these items. Wong imported and sold the goods in Australia. Ozi Soft argued that, since no licence had been obtained, the Copyright Act had been breached. By contrast, the respondents submitted that a licence ought to be implied because of article 30 of the E.E.C. This provision of the Rome Treaty prohibits quantitative restrictions on imports or measures having equivalent effect. Specifically, it was argued that it would have been illegal under the Treaty of Rome for the copyright owners to have expressly imposed a limitation on exports. The Federal Court failed to see how this consideration could assist in the interpretation of the Copyright Act. His Honour said:

> Despite developing thought that it is or may be impermissible to impose restrictions upon the resale of goods because they infringe European Community law or [in the USA] the Sherman Anti-Trust legislation, the result surely cannot be that there is necessarily a licence by implication.[70]

By contrast, a passage from case 16/74 of *Centrafarm B.V. and Adriaan De Peijper v. Winthrop B.V.*[71] was quoted with approval by the Federal Court in *Fender Australia Pty Ltd v. Bevk.*[72] The latter case involved the importation and sale of new and second-hand guitars bearing a registered trade mark. The applicant alleged that the Trade Marks Act 1955 (Cth) had been infringed. The Federal Court refused to hold that the sale of imported second-hand guitars constituted use of the trade mark in the relevant sense. It quoted from the European Court of Justice who defined a trade mark right as follows:

> [T]he guarantee that the owner of the trade mark has the exclusive right to use that trade mark, for the purpose of putting products protected by the trade mark into circulation *for the first time*, and is therefore intended to protect him against competitors wishing to take advantage of [its] status

69 (1986-1988) 10 I.P.R. 520.
70 *Ibid.* 524.
71 [1974] European Court Reports 1183.
72 (1989-1990) 25 F.C.R. 161, 167.

and reputation ... by selling products illegally bearing [it].[73] (emphasis added by the Federal Court)

2.5 *Legal Professional Privilege*

Legal professional privilege is the only significant area of Australian law besides commercial law where references to European Community law can be found. Interestingly, in this category there have been copious references to the one leading European Court of Justice decision in *A. M. & S. Europe*.[74] Perhaps this can be attributed to the fact that the European Court decision was first cited in a High Court case — *Baker v. Campbell*[75] — which itself has been followed by the High Court and by the Federal Court in later cases. A further explanation may be that *A. M. & S. Europe* was cited in English law reports, thus making the case immediately apparent and accessible to anyone searching the English authorities on the same question.

2.5.1 *Baker v. Campbell*

The question for decision by the High Court was whether documents kept by a solicitor at his office could be made the subject of a search warrant issued under s.10 of the Crimes Act 1914 (Cth). It was clear that the documents would have been privileged from disclosure or production in the course of court proceedings. A majority of the High Court held that the doctrine of legal professional privilege was not confined to judicial and quasi-judicial proceedings.[76] Since the Crimes Act did not evince any intention to oust the privilege, the privilege applied to documents within the scope of the search warrant.

The majority in *Baker v. Campbell* acknowledged that the above broad interpretation of privilege 'does not lie well'[77] with the reasoning of the majority in *O'Reilly v. State Bank of Victoria Commissioners*.[78] Wilson J. reflected that, in the case at hand, the arguments of counsel ranged over a wide field and embraced Canadian and American decisions which had not received attention in earlier cases. Murphy J. added to this list the decision of the New Zealand Court of Appeal in *R. v. Uljee*.[79] The combined effect was 'a firm trend in common law countries against restriction of the privilege to judicial or quasi-judicial proceedings'.[80]

Interestingly, the High Court did not limit its review to the common law world. Wilson J. expressly refers to the decision in *A. M. & S. Europe*. The European Court of Justice is said to have undertaken a comprehensive review of the problem in that case. His Honour comments that it thus provides rich material for further reflection.[81] Deane J. expressly agrees and draws attention to the report by

[73] Interestingly, the Federal Court used this passage as cited in Cornish, W.R., *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (1981) 574.

[74] Case 155/79 in [1982] European Court Reports 1575; [1982] 2 Common Market Law Reports 264.

[75] (1983) 153 C.L.R. 52.

[76] Murphy, Wilson, Deane and Dawson JJ.; Gibbs C.J., Mason and Brennan JJ. (dissenting).

[77] *Ibid.* 118, *per* Deane J.

[78] (1983) 153 C.L.R. 1. In *O'Reilly* the High Court held that the privilege is a rule of evidence only. However, leave was given to re-argue that aspect of the case.

[79] (1982) 1 N.Z.L.R. 561.

[80] *Baker v. Campbell* (1983) 153 C.L.R. 52, 89, *per* Murphy J.

Advocate-General Slynn.[82] Dawson J. concludes that the view that legal professional privilege is based upon fundamental principle is not confined to common law countries.[83]

The case of *A. M. & S. Europe* involved an investigation by the European Community Commission into the competitive practices of *A. M. & S. Europe* at its premises in England. The investigation was carried out for the purpose of establishing whether the company had infringed Community anti-trust law, specifically articles 85 and 86 of the E.E.C. When requested by the Commission to produce certain documents for examination, the company disclosed some but claimed legal privilege in respect of the remainder.[84]

The European Court of Justice held that any person must be able, without constraints, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it. In particular, the confidentiality of written communications was held to be protected provided two conditions were met. These conditions were that the communications be for the purpose of the client's 'rights of defence,' and that they emanate from 'independent' counsel as opposed to in-house legal advisers. In the case at hand the European Court concluded that the privilege applied to the documents in question.

The case attracted the attention of the scholarly community.[85] Contributing to the wealth of reference materials was the fact that not one but two Advocates-General delivered an opinion on the matters before the European Court of Justice.[86] Since the case involved a British company, *A. M. & S. Europe* was also duly reported in the English law reports.[87]

The dissent in *Baker v. Campbell* did not reject European Community law as authority. Rather, the case law of the European Court of Justice was considered but its holding was interpreted differently. To Gibbs C.J. it seemed to have been critical in *A. M. & S. Europe* that some procedure should be available for the independent verification of claims of privilege. His Honour commented that, in 'moulding' the law of the Community, the European Court of Justice was able to provide such a procedure. Specifically, disputes as to the production of documents would ultimately be decided by the European Court of Justice itself. This strengthened his Honour's view that the Crimes Act did not provide any such procedure and that no room was left for a (judicial) extension of the doctrine of privilege.[88] Gibbs C.J. thought that the High Court could not take it upon itself to shape the

[81] *Ibid.* 93.
[82] *Ibid.* 118-9.
[83] *Ibid.* 126.
[84] The company also refused to allow an inspector of the Commission to look at the documents to check whether they were in effect privileged. The Commission in turn refused to accept that an independent third party be allowed to decide whether the documents should be disclosed.
[85] See the references in Kapteyn, P.J.G. and Verloren Van Themaat, P., *Introduction to the Law of the European Communities* (2nd ed. 1989) 573, footnote 492.
[86] Advocate-General Warner observed that in no country, other than France, does legislation confer on the authorities responsible for the administration of competition law powers of investigation enabling them to disregard the confidentiality of communications between lawyer and client: [1982] European Court Reports 1619. Advocate-General Slynn made some interesting observations about the usefulness of the comparative method for purposes of European Community law: [1982] European Court Reports 1642.
[87] [1983] 3 W.L.R. 17; [1983] 1 All E.R. 705; [1983] Q.B. 878.
[88] (1983) 153 C.L.R. 52, 71.

law in a vein similar to the judicial creativity practised by the European Court of Justice. Instead, legislative intervention was preferred to extend the doctrine. The dissents by Mason and Brennan JJ. provide reasoning to the same effect.[89]

2.5.2 *Recent cases*

Baker v. Campbell was applied by the Federal Court in *Commissioner of Taxation v. Citibank Limited.*[90] That case concerned the application of legal professional privilege in the context of s.263 of the Income Tax Assessment Act 1936 (Cth). It was held that the doctrine of privilege restricts the powers of the Commissioner of Taxation under s.263. Specifically the power to search and make copies of documents should be read as not referring to documents to which legal professional privilege attaches. At the state level, *Baker v. Campbell* and *A. M. & S. Europe* featured indirectly in *Mancorp Pty Ltd v. Baulderstone Ltd.*[91]

However, the Australian courts have not always followed *A. M. & S. Europe* unreservedly. Writing for the majority, Deane J. in *Baker v. Campbell* did not accept the restricted application of the privilege to documents made for the purpose of the client's rights of defence. Equally significant was the dismissal of the European Court's limitation of the privilege to communications involving independent lawyers and their clients by Gibbs C.J. in *Attorney-General (N.T.) v. Kearney*,[92] and by a majority of the High Court in *Waterford v. The Commonwealth of Australia.*[93] The central issue in the latter case was whether it was open to the Commonwealth to claim privilege with respect to legal advice obtained from within the Government. The High Court decided not to adopt the distinction between independent and dependent legal counsel. Mason and Wilson JJ. held that the decision of the European Court was not 'a ruling on the common law.'[94] Brennan J. disagreed. His Honour reasoned as follows:

> I find great weight in the view of the European Court of Justice that an independent lawyer is 'one who is not bound to his client by a relationship of employment': *A. M. & S. Europe v. Commission of the European Communities.* That view faces up to reality.[95]

In the result though, Brennan J. drew a distinction between salaried employees generally and counsel in the employment of the Crown, whom he regarded as sufficiently independent to remain within the scope of the privilege.

Deane J., dissenting in *Waterford*, also considered *A. M. & S. Europe* in determining whether or not privilege extends to salaried employees. Ultimately, his Honour was persuaded more by American authority and concluded that privilege can indeed extend that far.[96]

Waterford is indicative of a mature approach to the treatment of European

89 *Ibid.* 83-4, 105-6 respectively.
90 (1989) 20 F.C.R. 403.
91 (1991-1992) 57 S.A.S.R. 87.
92 (1985) 158 C.L.R. 500, 510.
93 (1987) 163 C.L.R. 54.
94 *Ibid.* 60. Mason and Wilson JJ. thus go along with the approach of Gibbs C.J. in *Kearney*. Dawson J., dissenting in *Waterford*, agrees: 95-6.
95 *Ibid.* 71-2. Brennan J. quotes from *Kearney* where it was said that the independence of legal counsel of the Crown is 'buttressed by the laws relating to the public service and sometimes by specific legislation: in other words, the relative security of tenure.'
96 *Ibid.* 79-81.

authorities in the Australian courts. European Court cases are not taken at face value but are analysed in terms of their reasoning and the way in which that reasoning may be applied in an Australian context.

2.6 *Immigration*

Luigi Pochi v. Minister for Immigration and Ethnic Affairs[97] involved the review of a ministerial decision to deport an Australian resident of long standing who had been convicted of a drug offence. It appeared that an earlier application for citizenship had been granted but the individual concerned had not been notified. The Administrative Appeals Tribunal observed that a conviction by itself does not necessarily lead to the making of a deportation order. Under s.12 of the Migration Act 1958 (Cth) a discretion is granted to the Minister. The tribunal referred to the European Court decision in *R v. Bouchereau*[98] which had been reported in the English case reports.[99] That case involved the interpretation of a European Community Directive affecting measures taken by Member States in deporting alien offenders. The Directive was said to require the national authorities to carry out a specific appraisal from the point of view of the interests inherent in protecting the requirements of public policy. That inquiry, so ran the argument of the European Court of Justice,[100] does not necessarily coincide with the appraisals which form the basis of a criminal conviction. The Administrative Appeals Tribunal decided that a similar approach to that of the European Court of Justice was called for. In the result the recommendation was that the deportation order be revoked.

CONCLUSIONS AND EVALUATION

Several observations can be made as regards trends emerging from the above survey of cases. First, the use made of European Community law in the Australian courts primarily concerns commercial law, in particular where the Australian statutes to be interpreted have been influenced by European Community legislation. This conclusion is perhaps not surprising, since the European Community itself is only now gradually moving away from an almost exclusively economic orientation in the past. It is anticipated that Australian references to European Community law will continue if not expand. A most recent confirmation of this apparent trend can be found in Australia's new product liability regime. Part VA of the Trade Practices Act on the liability of manufacturers and importers for defective goods adopts an even 'purer' European Community law approach of strict liability than the stance taken by the Australian and Victorian Law Reform Commissions in their background reports to the new legislation.[101] More gener-

97 No. 117 of 1978, unreported.
98 [1977] European Court Reports 1999.
99 [1978] Q.B. 732.
100 [1978] Q.B. 732, 759.
101 Trade Practices (Amendment) Act 1992 (Cth), passed on 24 June 1992 and in force since 9 July 1992. The new part VA derives from a European Product Liability Directive of 1985: Directive 85/374/E.E.C., O.J. 1985 L.210. The amendment is based upon the combined reports of the Australian Law Reform Commission (Report No.51) and the Victorian Law Reform Commission (Report No.27).

ally, law reform agencies are prepared to look beyond the common law and this observation is not insignificant. The consideration that the courts in turn are willing to refer to law reform reports increases the likelihood that any discussion of European Community material in these reports will come to the fore. The decision by the N.S.W. Court of Appeal in *Commercial Union Assurance of Australia v. Ferrcom*[102] is an illustration of this proposition as regards insurance contracts law.

It is pleasing to observe that the Australian courts have also been prepared to refer to European Community developments outside the strict commercial area, and at times they have even done so in the absence of a statutory basis. The clearest instance of this practice is the doctrine of legal professional privilege. In *Baker v. Campbell* the High Court interpreted s.10 of the Crimes Act by reference to the case law of the European Court of Justice regarding investigations by the European Community Commission.[103] Interestingly, no Explanatory Memorandum or Law Reform Commission report had earlier introduced this link between Australian and European Community law. Another case in point — this time in the area of immigration law — is *Luigi Pochi v. Minister for Immigration and Ethnic Affairs.*[104] Even so, the use of European Community law in the non-commercial law area remains rather patchy. Perhaps this is attributable to a tendency to consult Community law only indirectly *via* the English reports. Certainly, in both the legal professional privilege and the immigration law contexts, European cases were first cited by reference to the English law reports. Nevertheless, it is noteworthy that, once a trend of referring to Community law has started, Australian courts are prepared to extend and deepen their inquiry into European source material. The doctrine of legal professional privilege may once again serve as an illustration.[105] Another example is trade practices law where Australian courts have begun to refer to unreported decisions of the Court of First Instance.[106]

Both of the above-cited instances concern aspects of procedural law. But this need not imply that European Community law cannot apply to substantive legal areas. In principle, the scope for cross-fertilisation widens each time the Community formally decides to expand its interest field beyond economic integration. The Single European Act 1986 and (now ratified) the 1992 Maastricht Treaty on European Union introduce a range of non-commercial subject areas, from labour law and occupational health and safety to environmental and consumer protection.[107]

Arguably disappointing from a comparative law perspective is the lack of reference to European Community law developments in the context of constitutional law, notwithstanding the existence of parallels between the Community and Australia. The ultimate relevance of European Community law for Australia lies

102 *Supra* n.66 and accompanying text.
103 *Supra* n.75 and accompanying text.
104 *Supra* n.97 and accompanying text.
105 *Supra* '2.5.2 *Recent cases*' under '2.5 *Legal Professional Privilege*'.
106 *Supra* n.58 and accompanying text.
107 For an overview, see Vranken, M. and Richardson, M., 'Europe 1992: Past Present and Future of European Community Law' (1992) 14 *Adelaide Law Review* 219.

in the supra-national character of the Community. The European Community then represents a federal model 'in progress'. The on-going nature of this process of shaping the inter-relationship between the Community and its Member States over the last forty years or so offers insights to all who contemplate a re-thinking of the relationship between the Commonwealth and the States, both at a legislative level and — more significantly — at a judicial level.

A process of review of the Australian constitutional system is currently underway which seeks to take advantage of the various centenaries that occur during this decade, culminating in the centenary of the Constitution itself in 2001. It has been identified as a symbolic opportunity for thoughtful examination of the Australian system of government.[108] A Constitutional Centenary Conference identified key issues to be pursued. They encompass the distribution of legislative powers between the Commonwealth and the States, including the possibility of new forms or techniques of allocating power.[109] Macrory has argued that the tensions between national and Community interests within the European Community, as well as the procedures for resolving them, may facilitate a better understanding of a fully-fledged federal system of government.[110] There is no reason in principle why any lessons for Australia ought to be limited to the domain of environmental policy — the main subject of the Macrory paper.

Judicial cross-fertilization need not await the formal reform of the Australian Constitution. Admittedly, references to European Community law in Australian courts may be hampered by any differences in the formulation of the relationship between the Community and the States in the Treaty of Rome, on the one hand, and the relationship between the Commonwealth and the States in the Australian Constitution, on the other hand.[111] Be this as it may, there may be occasion where, in interpreting the constitution, Australian courts could benefit from a more forthright purposive approach adopted by their European Community counterpart.[112]

However, it should be noted that this inner dynamic has not been without its critics in Europe. A purposive interpretation of the Rome Treaty, together

[108] Clark, S., Crommelin, M. and Saunders, C. (eds), *The Constitution and the Environment* (1990) Preface.

[109] The Conference agreed to establish a Constitutional Centenary Foundation: *ibid.* 5.

[110] Macrory, R. 'The Implementation and Enforcement of European Community Environmental Laws — A New Form of Federation?' in Clark, Crommelin and Saunders, *op. cit.* n.108, 223.

[111] In principle, all power emanates from the States in both the Commonwealth and the Community. The transfer of state power to the higher echelon has been limited in both instances. However, the powers of the Commonwealth are specifically enumerated in the Constitution, whereas the text of the European Community Treaty adopts a much broader, functional approach to European integration. The latter approach is inspired by the Preamble to the effect that the Member States are '[d]etermined to lay the foundations of an ever closer union among the peoples of Europe'.

[112] Arguably, the result may not be all that different in that a centralist development has eventuated in both instances. The so-called doctrine of reserved powers (for the States) was rejected as early as 1920 in the *Engineers'* case: *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129. What this means in an environmental law context has recently been made clear in the Franklin Dam case: *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1. *Cf.*, however, the timid approach to the use of the labour power in *R v. Gough; ex parte Meat and Allied Trades Federation of Australia* (1969) 122 C.L.R. 237; *R v. Portus; ex parte City of Perth* (1973) 129 C.L.R. 312; *Re Federated Storemen and Packers Union of Australia; ex parte Wooldumpers (Victoria) Ltd* (1989) 166 C.L.R. 311. *Boyne Smelters Ltd; Ex parte Federation of Industrial Manufacturing and Engineer-*

with two amendments in 1986 and 1992,[113] have led to a reassessment of the relationship between the Community and its Member States. The current debate is held in terms of subsidiarity, now enshrined in the Maastricht Treaty.[114] What is being aimed at is a division of labour between both levels of government for the purposes of maximising efficiency.[115] In brief, the subsidiarity principle means that in exercising its jurisdiction the Community should only do what is best done at this level; otherwise decisions should be taken at a lower level.[116] Delors for the European Community Commission has stressed the common sense nature of the subsidiarity concept.[117] Specifically, he argues that subsidiarity does not concern the initial allocation of competence but rather the exercise thereof. Presumably, this means that subsidiarity should not be used to call into question any of the provisions of the European Community Treaty itself. Assuming this sensible interpretation is followed in the European Court of Justice as well — as seems likely[118] — the subsidiarity principle will be but a limited restriction on the purposive interpretation of the Treaty.[119] As such it may provide a useful tool in interpreting the division of labour between the States and the Commonwealth.

ing Employees of Australia (1993) 112 A.L.R. 359 has restored faith in the reinstatement jurisdiction of the Australian Industrial Relations Commission for now.

113 The dates refer to the signing of the Single European Act and the European Union Treaty, respectively.

114 The notion of subsidiarity was first used officially in respect of the Community's powers to regulate environmental issues: E.E.C. Treaty art.130, r.(4) inserted under S.E.A. art.25

115 The notion of subsidiarity has triggered prolific commentaries. For an English perspective, see Emiliou, N., 'Subsidiarity: An Effective Barrier Against "The Enterprises of Ambition"?' (1992) 17 *European Law Review* 383. For a philosophical and historical perspective, see Cass, D., 'The Word that Saves Maastricht?' (1992) 29 *Common Market Law Review* 1107. See also Toth, A., 'The Principle of Subsidiarity in the Maastricht Treaty' (1992) 29 *Common Market Law Review* 1079.

116 It appears common for power to gravitate towards the centre in national, federal systems. In any event this is what happened in Germany, the existence of an (unwritten) principle of subsidiarity in the Constitution (*Grundgesetz*) notwithstanding. Interestingly, the introduction of subsidiarity at the European level was — at least partially — at the instigation of the German *Länder*.

117 Delors, J., 'The Principle of Subsidiarity: Contribution to the Debate' in European Institute of Public Administration (ed.), *Subsidiarity: The Challenge of Change* (1991) 7. See also European Community Commission, *The Principle of Subsidiarity*, Communication of the Commission to the Council and the European Parliament, Brussels, 27 October 1992, S.E.C. (92) 1990 final.

118 The activist role of the European Court of Justice in promoting European integration is well documented. See generally the discussion and reference to case law in Vranken and Richardson, *op. cit.* n.107 and the reference to case law there.

119 The doctrine, if adopted in Australia, could never be used to review provisions of the Constitution themselves but only their application.