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INTERNATIONAL ACADEMY OF COMPARATIVE LAW

CONFERENCE, UTRECHT, THE NETHERLANDS

10-16 JULY 2006

PRECEDENT IN AUSTRALIA

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The doctrine of precedent has been referred to as "the hallmark of the common law"[1]. It has been called "the cornerstone of a common law judicial system"[2] that is "woven into the essential fabric of each common law country's constitutional ethos"[3].

Advocates of a strict view of precedent claim that the consistency, continuity and predictability resulting from adherence to precedent is essential to the maintenance of public confidence in the rule of law and the work of the judiciary. They say that the doctrine ensures that like cases are treated alike and that they are rationally

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** Justice of the High Court of Australia.

1 The Hon. Sir Anthony Mason, "The Use and Abuse of Precedent" (1988) 4 *Australian Bar Review* 93, at 93.

2 B.V. Harris, "Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle" (2002) 118 *Law Quarterly Review* 408, at 412.

3 *Ibid*, at 412.

determined by the consistent application of legal principle rather than being dependant upon the individual predilections of the particular judge presiding over the matter.

It is natural for lawyers in a common law country such as Australia to be sympathetic to these notions. On the other hand, one Australian judge who viewed the doctrine of precedent as a servant and not the master of the legal system was not so uncritical. Justice Lionel Murphy, who served on the High Court of Australia, the nation's highest court, between 1975-1986, saw a risk of serious injustice in a blind adherence to precedent. He even went so far as to suggest that it was "eminently suitable for a nation overwhelmingly populated by sheep"[4].

Somewhere between the world of slavish obedience to past precedent and antagonism towards its rules, lies the real world of Australian law as it is practiced in the courts and obeyed by those who are subject to its requirements.

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[4] The Hon Justice Lionel Murphy, "The Responsibility of Judges", opening address for the First national Conference of Labor Lawyers, 29 June 1979, in G Evans (ed) *Law Politics and the Labor Movement*, Legal Service Bulletin, 1980 Clayton Victoria.

THE INFLUENCE OF ENGLISH PRECEDENT ON AUSTRALIAN LAW

For all legal systems based upon precedent, the doctrine provides a visible link between the past, present and future, and a constant reminder of a nation's legal history. It is no different in Australia.

Possibly the most significant change to the application of precedent over the past thirty years in Australia has related to the binding nature of English decisions in Australian courts. Reflecting on this change both reminds Australians of the influence of the British heritage on the development of Australian law and the changing nature of the relationship between the two countries.

Until the 1970s and 1980s the Judicial Committee of the Privy Council in London was the final court of appeal for Australians and at the apex of our legal system. As such, in respect of any legal principle essential to the case, decisions of the Privy Council were binding upon all courts, both federal and state, throughout Australia[5].

Before the end of Privy Council appeals from Australian courts, the latter historically placed great weight on decisions of both the

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5 *Skelton v Collins* (1966) 115 CLR 94, per Kitto J at 104; *Viro v The Queen* (1978) 141 CLR 88, per Gibbs J at 118.

House of Lords and the English Court of Appeal. This was so although these courts never formally formed part of the Australian judicial hierarchy. Thus, to the middle of the twentieth century, the High Court emphasised the desirability of general uniformity with the decisions of English courts[6]. Indeed, in *Piro v W Foster & Co Ltd* it was declared a "wise general rule of practice" for Australian courts to follow a ruling in a decision of the House of Lords in cases where there was conflict between previous decisions of the House of Lords and the High Court[7]. Even as late as 1975, in *Public Transport Commission (NSW) v J. Murray-More (NSW) Pty Ltd*, the High Court emphasised that such decisions should generally be followed where there was no conflicting High Court authority[8]. Underlying this general approach was the belief that[9]:

> "It is of the utmost importance that in all parts of the Empire where English law prevails the interpretation of that law by the courts should be as nearly as possible the same".

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6 *Webb v Federal Commissioner of Taxation* (1922) 30 CLR 450, per Isaacs J at 469; *Waghorn v Waghorn* (1942) 65 CLR 289.

7 *Piro v W Foster & Co Ltd* (1943) 68 CLR 313, per Latham CJ at 320.

8 *Public Transport Commissioner (NSW) v J. Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336.

9 *Trimble v Hill* (1879) 5 App. Cas. 342, at 345.

The practical reason for this approach was simple. The Privy Council Board was made up, almost exclusively, of Law Lords, most of whom had come from the English Court of Appeal. It was therefore natural that those courts would reflect the general thinking of the Law Lords. It was therefore prudent for Australian judges to follow their deliberations, even though not strictly bound by them, unless told otherwise by the Privy Council. This was a practical consideration. The common law courts are, above all, practical institutions.

From at the latest 1986 when the final appeals to the Privy Council from State courts ended in Australia, such strict adherence to English precedent began to lessen. A greater emphasis was then placed upon the development of Australian law by Australian legal authorities. An early indication of this movement towards greater reliance on Australian precedent was the refusal of Australia's Chief Justice Dixon in *Parker v The Queen* to follow a decision of the House of Lords that he viewed as being wrongly decided[10]:

> "Hitherto I have thought that we ought to follow decisions of the House of Lords at the expense of our own opinions in cases decided here, but having carefully studied *Smith's Case* I think we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I

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[10] *Parker v The Queen* (1963) 111 CLR 610, per Dixon CJ at 632.

> could never bring myself to accept ... I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we had long since laid it down in this Court and I think *Smith's Case* should not be used as authority in Australia at all".

The formal severance of judicial ties with England accelerated and completed this process. The enactment of the *Privy Council (Limitation of Appeals) Act 1968* (Cth), *Privy Council (Appeals from the High Court) Act 1975* (Cth) and *Australia Act 1986* (Cth) gradually limited appeals to the Privy Council in turn from Australian federal courts, the High Court and finally State courts. These statutes ultimately removed the Privy Council entirely from the Australian judicial hierarchy. Following the effective abolition of appeals from the High Court to the Privy Council in 1975[11], the High Court of Australia unanimously stated in *Viro v The Queen* that the Court would no longer consider itself bound by the rulings contained in decisions of the Privy Council[12].

This reasoning now applies to all Australian courts. As a consequence, Privy Council decisions after 1986 do not strictly bind any Australian court. Of course, such decisions should still be accorded considerable respect. They would be examined as the reasoning of any final appellate court is for the power of its

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[11] With the exception of the theoretical possibility of an *inter se* question being appealed to the Privy Council under the procedure provided for in section 74 of the *Constitution*.

[12] *Viro v The Queen* (1978) 141 CLR 88.

persuasiveness. This position was explained by the majority reasons of the High Court of Australia in *Cook v Cook*[13]:

> "The history of this county and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning".

It is clear, therefore, that the High Court is no longer bound by any Privy Council decision. Similarly, it is clear that since 1986 State appellate courts in Australia are no longer bound by Privy Council decisions. The status of Privy Council decisions before abolition, in relation to State appellate courts, has not, however, been so clearly determined.

It has been suggested that all Privy Council decisions ceased to bind all Australian courts once appeals to that court from Australia finally ended after 1986. Examples of this approach can be found in decisions such as *R v Judge Bland; Ex parte Director of Public Prosecutions*[14] and *Hawkins v Clayton t/a Clayton Utz*[15]. This

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[13] *Cook v Cook* (1986) 162 CLR 376, per Mason, Wilson, Deane and Dawson JJ at 390.

[14] *R v Judge Bland; Ex parte Director of Public Prosecutions* [1987] VR 225, per Nathan J at 234.

view, however, does not generally seem to have been uniformly adopted[16]. There has been no authoritative pronouncement by the High Court on this issue. A possible approach would be to view Privy Council decisions given before 1986, effectively then holding the same authority as a High Court decision before abolition of Privy Council appeals, as still binding. That is, the decision would continue to bind State appellate courts until it was overruled by the High Court of Australia[17]. However that may be, as a matter of practicality, this controversy is of little importance. As Privy Council decisions recede in time, they have less relevance to contemporary legislation and current legal concerns in Australia. Where they dealt with general principles of the common law, they would in many cases have been taken up and followed by High Court authority, directly applicable. Moreover, there were always important limitations on the Privy Council's authority to decide matters arising under the Australian Constitution[18].

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15 *Hawkins v Clayton t/a Clayton Utz* (1986) 5 NSWLR 109, per McHugh JA at 137-137.

16 *Rockwell Graphic Systems Ltd v Fremantle Terminals Ltd* (1991) 106 FLR 294, per Malcolm CJ at 301; A. MacAdam and J. Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998), at 113-119; T Blackshield, M Coper and G Williams (eds.), *The Oxford Companion to the High Court of Australia* (2001), at 551.

17 T Blackshield, M Coper and G Williams (eds.), *The Oxford Companion to the High Court of Australia* (2001), at 551.

18 Australian Constitution, s 74 – the Privy Council was expressly excluded from deciding questions arising under the Constitution on questions as to the respective powers of the federal and state parliaments.

In addition to the severance of formal legal and constitutional ties it has been suggested that the membership of the United Kingdom in the European Union, and the increasing influence of European Community law on the development of English law, will further diminish the direct role of English precedent in the future development of Australian law. Whether or not this proves to be true, it is certainly now the case that English judicial decisions are no longer strictly binding upon Australian courts for the legal rule that such decisions establish. So after nearly 200 years of Australian settlement, the Australian court system was finally cut loose from the umbilical cord to the English courts from which the Australian judiciary derived its early traditions and whose law became the foundation of the common law of Australia.

Australian law now rests squarely upon the decisions of Australian courts and the expression, application and development of Australian precedent, with the High Court of Australia at the apex of the Australian legal system. The significance of this development has been explained in *The Oxford Companion to the High Court of Australia*[19]:

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[19] T Blackshield, M Coper and G Williams (eds.), *The Oxford Companion to the High Court of Australia* (2001), at 563.

> "Together with other factors, the final abolition of Privy Council appeals has had a dramatic effect on the High Court's own jurisprudence. Many commentators have observed that abolition did more than formally make the High Court the final court of appeal for all Australian matters. It also contributed to the evolution of a new judicial mindset. Liberated first from correction by a higher court and then from competition in relation to appeals from state courts, the High Court became the true apex of the Australian hierarchy and undertook a new responsibility for shaping the laws of Australia".

The mindset certainly changed in the immediate aftermath of the end of Privy Council appeals after 1986. As chance would have it, in my then capacity as President of the New South Wales Court of Appeal, I presided in the last appeal from an Australian court to that distinguished tribunal[20]. In the way of these things, there is some indication in the decisions of the High Court of Australia in recent times of a return to closer attention to English judicial authority. Occasionally this causes difficulties for those who set upon that search. English authority has itself moved on since 1986, stimulated in part by growing involvement in the European Union and by the incorporation in the municipal law of the United Kingdom after 2000 of the European Convention on Human Rights, as expressed in the *Human Rights Act 1998* (UK).

DETERMINING PRECEDENT IN AUSTRALIA

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[20] *Austin v Keele* (1987) 10 NSWLR 283 (PC). The appeal was dismissed.

The binding nature of the ratio decidendi

It is important to recognize that it is not the entirety of a judicial decision that will bind lower courts, but rather the *ratio decidendi* as determined by the reasons of the judges in the majority, identified by reference to concurrence in the orders that become the orders of the court in question[21]. The *ratio decidendi* of a decision has been defined by Sir Rupert Cross as[22]:

> "... any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury".

As was noted by the High Court of Australia in *Garcia v National Australia Bank Ltd*, the consequence of this approach to precedent is that the opinions of judges in dissent and all judicial remarks (*"obiter dicta"*) of a general character upon tangential or additional questions or issues will not become part of binding precedent[23]. Such opinions and observations may, of course, be

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21 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, per Kirby J at 417; *D'Orta v Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755; (2005) 214 ALR 92, per Kirby J at [244]-[246].

22 R. Cross and J.W. Harris, *Precedent in English Law* (1991) (4th ed.), at 72.

23 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, per Kirby J at 417; *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303, per Mason CJ, Wilson, Dawson and Toohey JJ at 314.

given significant weight because of their persuasive reasoning. Depending on their source, they may be of considerable value to a court facing a problem referred to in such reasoning. The rules governing the application of precedent in later cases are quite specific in limiting the binding nature of a precedent to the *ratio decidendi* of that decision.

Multiple concurring judgments

Determining the *ratio decidendi* of a judicial decision becomes increasingly complex when multiple concurring reasons are published by several judges in a single case. In such a case, the *ratio* must be drawn from the areas of agreement found within the reasons of the judges in the majority. However, identifying a precisely formulated *ratio* in such cases can, in practice, prove immensely challenging.

Some appellate courts attempt to prevent this difficulty arising by encouraging the practice of issuing a single majority statement of reasons[24]. This has not been the general practice of the High Court of Australia. The majority of High Court decisions contain separate concurring reasons. Possibly the most infamous Australian example

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[24] Examples include the Privy Council and the United States Supreme Court. Originally, the Privy Council gave only one opinion and did not permit dissents. Even after this practice was changed, it was conventional, where there was dissent, for only a majority and dissenting opinion to be published.

highlighting the potential difficulty of isolating a binding *ratio* from multiple concurring judgments is *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[25]. During the subsequent case of *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* difficulties in reconciling the separate reasons led the Privy Council to declare that their Lordships had not been able to extract from *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* any single *ratio decidendi*[26].

This does not mean that such a case has no precedential authority. In cases where the divergent reasoning of the majority judges makes it impossible to extract a *ratio decidendi* the decision still remains authority for what it actually decided. Justice McHugh discussed this situation in *Re Tyler; Ex parte Foley*[27]:

> "In my opinion, the true rule is that a court, bound by a previous decision whose *ratio decidendi* is not discernible, is bound to apply that decision when the circumstances of the instant case 'are not reasonably distinguishable from those which gave rise to the decision'".

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25 *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529.

26 *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1, per 22.

27 *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, per McHugh J at 37-38; *Shaw v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 218 CLR 28, at 48, [50]; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755; (2005) 214 ALR 92, per McHugh J at [133].

A recent study by Professor Martin Davies has found that the High Court of Australia produced significantly more multiple concurring reasons than either the House of Lords or the United States Supreme Court during the period of study[28]. A closer examination of those decisions led Professor Davies to conclude that 41% of cases decided by the High Court during that period had no clearly identifiable majority *ratio*, compared to 20% of decisions from the House of Lords and 5% of decisions from the United States Supreme Court. This is a danger of separate concurring reasons. On the other hand, the existence of diverse reasoning sometimes responds to a time of transition in the law. Different reasons reflect different views about legal doctrine. Ultimately, the differences are resolved as one view gains the ascendancy.

Nevertheless, there are a number of consequences that may flow from this result. The first is the obvious practical difficulty that a court, subject to the applicable authority, will have in applying a binding precedent if it is unable to identify, with any degree of precision, what that precedent is. Secondly, the precedential value of multiple concurring judgments may not be as strong as that of a

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[28] M. Davies, "Common law liability of statutory authorities: *Crimmins v Stevedoring Industry Finance Committee*" (2000) 8 *Torts Law Journal* 133. The study considered judgments given by the High Court of Australia and the House of Lords in 1999, and the United States Supreme Court in 1998.

single majority judgment in which the majority judges set out their reasons in a united voice. As Professor Davies explains[29]:

> "To the extent that there is majority support for any particular view, it can only be found by a reader prepared to see areas of overlap in the phrasing used by the different judges. The boundaries of the concept commanding majority support are therefore much vaguer than if it were contained in a single statement concurred in by several judges. For that reason, the usefulness of the concept in subsequent cases is considerably diminished ... Because the process of drawing out common threads in multiple concurring judgments depends so heavily on interpretation and generalisation, it cannot yield a *ratio* that can clearly and authoritatively guide subsequent cases in the way that a single majority judgment can".

In some cases, separate reasons occur simply because honest and conscientious judges, expressing their true opinions, cannot agree on a common way of reasoning. Putting the best face on these realities there are some advantages in the publication of multiple and dissenting judicial opinions. Justice John Lockhart, in his article "The Doctrine of Precedent – Today and Tomorrow", highlighted some of these advantages[30]:

> "Arguments against single judgments of appellate courts are that they frequently represent compromises between conflicting views, and compromises do not always make for clarity. Dissenting opinions are often valuable and

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29 *Ibid*, at 147-148.

30 Mr. Justice Lockhart, "The Doctrine of Precedent – Today and Tomorrow" (1987) 3 *Australian Bar Review* 1, at 25.

undue suppression of dissenting opinion is undesirable. Unanimity of opinion is not necessarily the sign of a strong court and division of opinion amongst its members is not necessarily a sign of weakness".

Multiple concurring reasons may, at times, make the precise identification and application of binding precedent more challenging for judges revisiting the suggested legal principles in later cases. It should be recognized, nonetheless, that such reasons may have the corresponding benefit of highlighting different perspectives and approaches to complex legal issues. In this way they may make an important contribution to legal analysis and the future development of the law. Lawyers of the common law tradition are always shocked that some legal traditions in the civil law tradition do not allow the expression of honestly held dissenting opinions which they view essential to judicial independence. Moreover they are commonly left unconvinced by the very abbreviated and seemingly formulaic reasons of such courts in controversial cases, where the reasons hide the important policy concerns that common law reasoning identifies and discusses openly.

Cases decided by a statutory majority

Beyond multiple concurring reasons there are other High Court decisions that, because of their specific nature, will have doubtful precedential value. One example is a case decided by a so-called statutory majority. Section 23(2) of the *Judiciary Act 1903* (Cth) deals with the situation where the Court is evenly divided on a

matter. When the matter concerns an appeal, section 23(2)(a) deems the original decision being appealed to be affirmed. In a sense this follows not from the Act but simply because a majority cannot be mustered to overrule the judgment *a quo*. When the matter concerns the original jurisdiction of the High Court, section 23(2)(b) states that the decision of the Chief Justice, or of the senior Justice if the Chief Justice is absent, will prevail in the event of an even decision in the votes of the participating majority. The High Court has consistently confirmed that decisions of this nature, decided by a "statutory majority", will not be considered to be a binding precedent. This point has been made in cases such as *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth*[31], *Tasmania v Victoria*[32], *Milne v Federal Commissioner of Taxation*[33], and *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd*[34].

Refusal to grant special leave to appeal

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31 *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth* (1912) 15 CLR 182, per Griffith CJ at 234.

32 *Tasmania v Victoria* (1935) 52 CLR 157, per Dixon J at 183.

33 *Milne v Federal Commissioner of Taxation* (1976) 133 CLR 526, per Barwick CJ at 533.

34 *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 337, per Gibbs J at 354-355.

A second type of decision that may not constitute a binding precedent is a refusal by the High Court to grant special leave to appeal in a case where an application for such leave has been sought. There have been cases in which the short reasons given for refusing special leave have been treated by lower courts as binding precedent. Examples include *R v Travers*[35] and *R v Abbrederis*[36].

However whilst reasons given by two or more participating judges, who typically determine applications of this kind, refusing to grant special leave, may have significant persuasive value it is unlikely that they will constitute binding authority or precedent. Refusal of special leave to appeal is not regarded by the High Court itself as an automatic affirmation of the decision below. As Sir Anthony Mason, a past Chief Justice of Australia, observed[37]:

> "This is because the fate of the application may depend on any one or more of a number of reasons. The question sought to be argued may not be of public or general importance; it may raise no question of general principle; it may not be a suitable vehicle for the determination of such a question; the case may depend on its own facts. Despite this, the tendency has emerged again, largely as a result of the statutory requirement that the court state the ground for refusal of an application. In conformity with that requirement the court sometimes announces that the ground of its refusal

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35 *R v Travers* (1957) 58 SR (NSW) 85, at 106.

36 *R v Abbredaris* [1981] 1 NSWLR 530, at 534.

37 The Hon. Sir Anthony Mason, "The Use and Abuse of Precedent" (1988) 4 *Australian Bar Review* 93, at 96-97.

> is that "the decision below is correct", or that it "is not attended with sufficient doubt to justify the grant of special leave to appeal." I doubt whether the assignment of either of these grounds gives the refusal the value of binding precedent. The court is not sitting in appeal from the judgment below; it is merely exercising original jurisdiction in deciding whether it will hear an appeal. Although refusal on either of these grounds, but only on these grounds, may have persuasive value, it seems to lack binding quality".

Although a refusal to grant special leave may not mean that the High Court agrees with the reasoning of the court below, the lower court decision will still stand as a result of the refusal. It therefore retains its status as a legal precedent that has not been overruled by a court superior in the Judicature. It will continue to bind courts subject to the precedent of the intermediate court in question. It does not bind the High Court of Australia. Where overturned in a later case, that precedent will often take the High Court judges to the transcript of the reasoning that explains why special leave was earlier refused. In the ashes of that failure may lie the seeds of a later challenge to the legal principle at stake[38].

Distinguishing between legal principles and orders

A distinction must also be drawn between the legal principle for which the reasoning in a decision stands and the binding force of the order made in that case. When the High Court overrules a

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[38] See eg. *Mallard v The Queen* [2005] HCA 68.

previous legal decision of the Court the *ratio decidendi* of that decision will no longer be binding as a legal precedent. However, this will not affect the validity and effect of the actual orders and judgment that were made in the case that has been overruled. Those orders and that judgment, as a formal court disposition, will remain binding and effective as between the parties and as addressed to the world unless and until the orders and judgment are specifically set aside or permanently stayed. The reasons for this were outlined in *Ruddock v Taylor*[39]:

> "Any other consequence would be inconsistent with the function of a Chapter III [of the Australian Constitution] court to determine, finally and conclusively, matters brought before it. It would be a "recipe for chaos". Particularly so, because it will often be impossible to state with certainty that the reasons for overruling legal doctrine remove any lawful basis for the orders made in the earlier decisions. Before a party – or the community – is excused from compliance with the orders of this Court it is necessary for the Court to examine the question and itself set aside, or vary, any orders earlier made, if that course is justified. No person may decide for themselves to ignore orders of this Court or treat them as invalid so long as such orders remain in force".

THE BINDING NATURE OF DECISIONS OF THE HIGH COURT

Given its position as a final court of appeal in Australia, and also its position as a constitutional court, the High Court of Australia

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39 *Ruddock v Taylor* (2005) 79 ALJR 1534, per Kirby J at [169]-[172].

has rejected the proposition that it is strictly bound by legal holdings in its own past decisions. As noted by Justice Dixon in *Attorney General for New South Wales v Perpetual Trustee Company Ltd,* such a restrictive view would be inappropriate, given the responsibilities of the Court[40].

The capacity of the High Court of Australia to depart from its own decisions was vividly expressed by Justice Isaacs in *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia*[41]:

> "The oath of a Justice of this Court is 'to do right to all manner of people *according to law.*' Our sworn loyalty is to the law itself, and to the organic law of the *Constitution* first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right", (Original italics)

This principle has been consistently confirmed in subsequent cases such as *Attorney General for New South Wales v Perpetual*

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40 *Attorney-General for New South Wales v Perpetual Trustees Company Ltd* (1952) 85 CLR 237, per Dixon J at 244.

41 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, per Isaacs J at 278. See also Higgins J at 288.

Trustees Company Ltd[42], *Queensland v the Commonwealth*[43], and *Nguyen v Nguyen*[44].

Although the High Court has not established precise and definitive rules as to the circumstances in which a previous decision will be overruled, it is often said that it is not sufficient that a judge personally disagrees with the earlier decision. Instead, when overruling past decisions High Court Justices have consistently used phrases describing the earlier decision as "manifestly wrong"[45], "fundamentally wrong"[46] or "plainly erroneous"[47] to emphasise the exceptional nature of such an action. In practice, the difference between disagreement and strong disagreement may be little more than a difference in temperament and judicial feelings.

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42 *Attorney-General for New South Wales v Perpetual Trustees Company Ltd* (1952) 85 CLR 237, per Dixon J at 244.

43 *Queensland v The Commonwealth* (1977) 139 CLR 585, per Barwick CJ at 593-594, Stephen J at 602-603, Murphy J at 610 and Aickin J at 630-631.

44 *Nguyen v Nguyen* (1990) 169 CLR 245, per Dawson, Toohey and McHugh JJ at 269.

45 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, per Isaacs J at 278; *The Tramways Case [No. 1]* (1914) 18 CLR 54, per Griffith CJ at 58; *Cain v Malone* (1942) 66 CLR 10, per Latham CJ at 15; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, at 554.

46 *McGinty v Western Australia* (1996) 186 CLR 140, per McHugh J at 235.

47 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, per Mason J at 13.

In *The Commonwealth v Hospital Contribution Fund* Chief Justice Gibbs outlined four factors that he considered would justify departure by a later Court from a previous authority of the High Court of Australia:

1. The earlier decision did not rest on a principle carefully worked out in a significant series of cases;
2. There were differences in the reasons given by the majority judges in the earlier decision;
3. The earlier decision had achieved no useful result, but had instead led to considerable practical inconvenience; and
4. The earlier decision had not been independently acted or relied upon in a manner that militated against reconsidering that decision[48].

These factors have subsequently been referred to in decisions such as *John v Federal Commissioner of Taxation*[49], *Street v Queensland Bar Association*[50], and *Northern Territory v Mengel*[51].

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48 *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, per Gibbs CJ at 56-58 (with Stephen and Aickin JJ concurring on this point).

49 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ at 438-439.

50 *Street v Queensland Bar Association* (1989) 168 CLR 461, per Mason CJ at 489, Toohey J at 560, McHugh at 588.

51 *Northern Territory v Mengel* (1995) 185 CLR 307, per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ at 338.

However, whilst they remind a decision-maker of the types of considerations that should be kept in mind in unsettling the law by changing course, it cannot be pretended that any rigid rule is applied or strict formula obeyed. It depends on the circumstances of each case where the issue is raised.

The High Court of Australia has emphasised that previous decisions should only be overruled in exceptional circumstances and that the power to do so should be exercised with great caution[52]. Thus, it has been said that the decision to overrule a previous decision should be taken only[53]:

> "... after the most careful scrutiny of the precedent authority in question and after a full consideration of what may be the consequence of doing so".

This cautious approach is justified to protect the advantages that are derived from the consistent application of precedent and due to the recognition, explained by one judge, that[54]:

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52 *McGinty v Western Australia* (1996) 186 CLR 140, per McHugh J at 235; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, per McHugh J at 38-39; *H.C. Sleigh Ltd v South Australia* (1977) 136 CLR 475, per Mason J at 501; *Queensland v Commonwealth* (1977) 139 CLR 585, per Gibbs J at 599, Stephen J at 602-603, Aickin J at 620; *Hughes & Vale Pty Ltd v New South Wales* (1953) 87 CLR 49, per Kitto J at 102.

53 *Queensland v The Commonwealth* (1977) 139 CLR 585, per Stephen J at 602.

54 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, per Brennan J at 451.

> "... the overruling of a decision is in a sense a diminution of the Court's authority as well as an acknowledgment of Justices' past error. An overruling must therefore be an exceptional course to adopt".

The weight that is to be attached to past precedent may also be seen to vary to some extent depending on the nature of the case that is before the court, the importance and urgency of the problem and perhaps the personality of different judges facing a suggested demonstration that a precedent is out of date or works a serious injustice. Nevertheless, the High Court has expressed reluctance to overrule past decisions in areas where the strength of reliance interests means that[55]:

> "... departure from precedent would prejudice the security of transactions and vested rights. Take, for example, title to property and the rules and practices according to which business contracts are made. Likewise, changes in criminal law and practice which would prejudicially affect the rights of an accused person. So also with changes in administrative law that adversely affect arrangements made respecting personal liberty".

The opposite applies to constitutional cases. In such cases the High Court of Australia has been much more inclined to re-examine past decisions in constitutional matters. This is because of the

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[55] The Hon. Sir Anthony Mason, "The Use and Abuse of Precedent" (1988) 4 *Australian Bar Review* 93, at 106.

entrenched nature of the constitutional decisions reached by the Court. Constitutional decisions cannot be overruled by the legislature. So long as they stand, they may only be corrected in a future High Court challenge or by an amending constitutional referendum, the latter notoriously difficult to achieve in Australia[56].

Further to this, judges of the High Court have recognized their primary and personal obligation as being to the Constitution itself, over and above strict adherence to precedent. This point was emphasised by Chief Justice Barwick in *Queensland v The Commonwealth*[57]:

> "As to the first of these submissions, it is fundamental to the work of this Court, and to its function of determining, so far as it rests on judicial decision, the law of Australia appropriate to the times, that it should not be bound in point of precedent but only in point of conviction by its prior decisions. In the case of the *Constitution*, it is the duty, in my opinion, of each Justice, paying due regard to the opinions of other Justices past and present, to decide what in truth the *Constitution* provides. The area of constitutional law is pre-eminently an area where the paramount consideration is the maintenance of the *Constitutional* itself. Of course, the fact that a particular construction has long been accepted is a portent factor for consideration; but it has not hitherto been accepted as effective to prevent the members of the Court from

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[56] In Australia, in 104 years there have been 44 attempts by referendum to amend the Constitution, often to override a decision of the High Court. Only 8 such attempts have succeeded.

[57] *Queensland v The Commonwealth* (1977) 139 CLR 585, per Barwick CJ at 593-594. See also Stephen J at 602-603, Murphy J at 610 and Aickin J at 620-631.

departing from an earlier interpretation if convinced that it does not truly represent the *Constitution".*

Other cases reinforcing the idea that the primary duty of a High Court Justices is to apply the text of the Constitution rather than rulings in the judicial decisions evaluating the text include *Permanent Trustee Australia Ltd v Commissioner of State Revenue*[58], *Brownlee v The Queen*[59], *Cheng v The Queen*[60], *Stevens v Head*[61], *Buck v Bavone*[62] and *Victoria v The Commonwealth*[63].

These factors must be afforded even greater priority when the constitutional matter before the High Court involves the protection of individual human rights and fundamental freedoms. Justice Brennan acknowledged this consideration in *Street v Queensland Bar Association,* stating that[64]:

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58 *Permanent Trustee of Australia Ltd v Commissioner of State Revenue* (2004) 211 ALR 18, per Kirby J at 63.

59 *Brownlee v The Queen* (2001) 207 CLR 278, per Kirby J at 313-314.

60 *Cheng v The Queen* (2000) 203 CLR 248, per Kirby J at 324-325.

61 *Stevens v Head* (1993) 176 CLR 433, per Deane J at 461-462.

62 *Buck v Bavone* (1976) 135 CLR 110, per Murphy J at 137.

63 *Victoria v The Commonwealth* (1971) 122 CLR 353, per Barwick CJ at 378.

64 *Street v Queensland Bar Association* (1989) 168 CLR 461, per Brennan J at 518-519. See also Mason CJ at 489, Toohey J at 560, and McHugh J at 588.

> "The doctrine of *stare decisis* ... is least cogent in its application to those few provisions which are calculated to protect human rights and fundamental freedoms".

Further support for this approach may be found in *Newcrest Mining (WA) Ltd v Commonwealth*[65] and *Re Colina; Ex parte Torney*[66].

Again, however, this does not mean that past decisions have no relevance or that the doctrine of precedent will not be generally applied in constitutional adjudication. Although the High Court has consistently recognised that it is not *bound* by its previous decisions and that judges owe a primary duty to the Constitution, individual judges have repeatedly emphasised that the power to overrule rulings in past decisions should only be exercised with extreme *caution*[67]. For example, in *Queensland v The Commonwealth* Justice Gibbs considered himself bound by precedent, although in his view the previous authority had been wrongly decided. Whilst

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65 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, per Gummow J at 613.

66 *Re Colina; Ex parte Torney* (1999) 200 CLR 386, per Kirby J at 425.

67 *McGinty v Western Australia* (1996) 186 CLR 140, per McHugh J at 235; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, per McHugh J at 38-39; *Queensland v The Commonwealth* (1977) 139 CLR 585, per Gibbs J at 599, Stephen J at 602-603, Aickin J at 620; *H.C. Sleigh Ltd v South Australia* (1977) 136 CLR 475, per Mason J at 501; *Hughes & Vale Pty Ltd v New South Wales* (1953) 87 CLR 49, per Kitto J at 102.

acknowledging the statement (quoted above) of Justice Isaacs, in *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia,* Justice Gibbs added[68]:

> "But like most generalisations, this statement can be misleading. No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court".

REVIEWING PRECEDENT – SUPPOSED REQUIREMENT OF LEAVE

Whilst the High Court of Australia does not consider itself bound as a matter of precedential law by its previous authority the question has arisen as to whether it is necessary, procedurally, to receive leave from the High Court to re-argue the correctness of a precedent of the Court. In *Evda Nominees Proprietary Ltd v Victoria* Chief Justice Gibbs expressed the view that leave would be required, with the operations of the Court otherwise being reduced to uncertainty if it were permissible for counsel to keep challenging

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68 *Queensland v The Commonwealth* (1977) 139 CLR 585, per Gibbs J at 599.

settled rulings expressed in past authority with full argument. The majority in that decision ultimately agreed with this view, stating that[69]:

> "Although the Court is not bound by its own decisions, that does not mean that the court will hear full argument on every occasion when counsel wishes to contend that a previous case was wrongly decided".

This approach has been approved by various majorities in the Court in subsequent cases such as *Richardson v Forestry Commission*[70], *Trident General Insurance Co Ltd v McNeice Bros Pty Ltd*[71], *Gray v Motor Accident Commission*[72] and *Swain v Waverley Municipal Council*[73]. A general practice has ensued that leave is commonly sought before a challenge to past authority is ventured. Once leave is granted, the practice is generally for argument on the question to be adjourned if necessary to be heard by a Full Bench of all available Justices.

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69 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311

70 *Richardson v Forestry Commission* (1988) 164 CLR 261, per Dawson J at 322.

71 *Trident General Insurance Co Ltd v McNeice Bros Pty Ltd* (1988) 165 CLR 107, per Brennan J at 130.

72 *Gray v Motor Accident Commission* (1998) 196 CLR 1, per Gleeson CJ, McHugh, Gummow and Hayne JJ at 12.

73 *Swain v Waverley Municipal Council* (2005) 79 ALJR 565; (2005) 213 ALR 249, per Gummow J at [108].

The contrary view has also, however, been expressed. Thus, in his dissenting reasons in *Evda Nominees Proprietary Ltd v Victoria* Justice Deane stated that[74]:

> "In my view, counsel representing a party does not require the permission of the Court to present or to continue to present argument that is relevant to the decision in the case, including argument seeking to show that a previous decision of the Court is wrong and should not be followed".

I have expressed my preference for the approach of Justice Deane in numerous cases, including *Re Colina; Ex parte Torney*[75], *Permanent Trustee Australia Ltd v Commissioner of State Revenue*[76] and *Brownlee v The Queen*[77]. As I outlined in *Brownlee v The Queen* my adherence to this view stems from my belief that[78]:

> "It is a party's right to advance before this Court any argument that may assist the Court to reach the correct exposition of the meaning of the Constitution. It is incompatible with the constitutional function of the Court

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74 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311, per Deane J at 316.

75 *Re Colina; Ex parte Torney* (1999) 200 CLR 386, per Kirby J at 406-407.

76 *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 79 ALJR 146; (2004) 211 ALR 18, per Kirby J at [178]-[181].

77 *Brownlee v The Queen* (2001) 207 CLR 278, per Kirby J at 312-315.

78 *Ibid*, per Kirby J at 314.

> to impose on a party a procedural obstacle that might impede that party's submissions to the Court on such a subject".

Such a procedural rule effectively allows a majority of the Justices to "nip in the bud" constitutional propositions that the majority do not agree with, and effectively to deny others on the Court the full opportunity to consider argument on points of constitutional principle that parties themselves wish to place before the Court. This may have the effect of preventing the development of constitutional propositions that, whilst of the minority view at the time, may subsequently become important building blocks for future advances in constitutional understanding. Viewed in this light, it is my view that the practice of requiring leave is incompatible with the constitutional function of the Court.

Once again practicality intervened to solve this problem, at least in most cases. Because at least two of the present judges of the High Court of Australia do not agree on the leave requirement and because other judges are often curious about important constitutional questions, the normal practice, where leave is sought, is to hear argument and to reserve the question of whether leave is necessary and, if necessary, whether it should be given. The point is then decided in disposing of the substantive proceedings.

PRECEDENT AND "JUDICIAL ACTIVISM"

The debate concerning the application of precedent by the High Court of Australia takes place in the context of a broader Australian debate about the judicial method. That is, the debate between the merits of "strict and complete legalism" and "judicial restraint" versus what critics call "judicial activism" and defenders describe as proper "judicial creativity".

The doctrine of strict and complete legalism was expressed by Sir Owen Dixon on the occasion of his swearing in as Chief Justice of Australia[79]:

> "... close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safer guide to judicial decisions in great conflict than a strict and complete legalism".

For a long period this statement represented the accepted wisdom in most legal circles. It was the orthodox approach of the courts of Australia. An elaboration of this approach may be seen in Justice Kitto's reasons in *Rootes v Shelton*[80]:

> "I think it is a mistake to suppose that the case is concerned with 'changing social needs' or with 'a

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79 *Swearing in of Sir Owen Dixon as Chief Justice* (1951) 85 CLR xi, per Dixon CJ at xiv.

80 *Rootes v Shelton* (1967) 116 CLR 383, per Kitto J at 386-387.

> proposed new field of liability in negligence', or that it is to be decided by 'designing' a rule. And if I may be pardoned for saying so, to discuss the case in terms of 'judicial policy' and 'social expediency' is to introduce deleterious foreign matter into the water of the common law in which, after all, we have no more than riparian rights".

This approach emphasises judicial restraint and strict adherence to precedent, once a binding rule is found. It applies a methodology self-described as "strict logic and high technique" and favours only the barest incremental development of the law. Any other changes are to be left to Parliament. This is so despite the gathering evidence of parliamentary incapacity or unwillingness to address needs for law reforms and the undoubted part that judges in Australia and elsewhere in common law countries have played in expounding general legal principles and making choices over contested interpretations of statutes and the Constitution itself.

The "judicial activist" and "judicial realist" accepts a wider role for judges in making the law. This approach acknowledges a greater ambit for judicial discretion and flexibility by accepting that enduring community values and policy choices should be expressly acknowledged when judges are formulating legal rules. As such, so-called "judicial activists" do not necessarily see past precedent as providing a complete and mechanical answer to all legal problems. Instead, the law is viewed as a living instrument that necessarily adapts and evolves to reflect changing attitudes and times. For such judges, law must be developed to ensure that the ultimate aim of justice is achieved in each case.

The term "judicial activism" was widely used in Australia in the early 1990s, during the period when Chief Justice Mason presided in the High Court. Certainly, it was normally intended as a criticism of some of the most significant decisions that emerged from the Court during that period. Examples of decisions that have been criticized, as the product of so-called "judicial activism", include the development of an implied constitutional right to freedom of political communication[81], the reversal of the accepted doctrine of *terra nullius* and acceptance of the continued existence of rights to native title in the Aboriginal peoples of Australia[82], and the acceptance of the effective right of an indigent person to legal representation in a trial for a serious criminal offence as an essential element of the right to a fair trial[83]. These decisions, and others, were attacked as the products of "judicial activism". On the other hand, the decisions had many supporters who asserted that such developments of the law were precisely what judges of the common law tradition had been doing, and were expected to do, when legal principles were seen as

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81 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

82 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1.

83 *Dietrich v The Queen* (1992) 177 CLR 292.

out of touch with commonsense and community or other bare notions of justice and human rights.

One of the primary criticisms aimed at "judicial activism" is that it ignores established judicial precedent. However, this is not, at least usually, the case. Past decisions are always an important resource for modern judges, representing as they do the collective wisdom of judges through the ages. The "judicial activist" and "judicial realist" recognises that past precedent is but one of a number of valid factors that must be weighed and considered by a judge and that the mechanical application of precedent will not always provide an appropriate solution to modern day problems. Courts make precedents and when they are shown to be unjust or outmoded, courts can unmake, develop or re-express the governing rule. In most cases if the re-expression is unstable or unpopular, parliament can override it and even, if it chooses, restore the pre-existing law.

This constant tension between continuity and change in Australia is reflected in debates about the appropriate application of precedent. Sir Anthony Mason observed[84]:

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[84] Sir Anthony Mason, "Future Directions in Australian Law" (1987) 13 *Monash University Law Review* 149, at 159-160.

> "The application of *stare decisis* is a matter critical to the evolution of the law. In an era of rapid social change, as we move away from legal formalism, the influence of precedent becomes more contentious ... Underlying the operation of *stare decisis* is the tension between the need for continuity and certainty and the need for adaptability. In resolving this tension the court must make a judgment about the appropriate limits of the law-making functions of a non-elected judiciary. Such a judgment calls for an evaluation of the community consensus or underlying philosophy as to the proper balance between the legislature and the judiciary as lawmakers".

In practice, the difference between judicial activism and judicial restraint in Australia is usually one of degree. All judges accept that precedent has an important role to play in the Australian legal system and cannot simply be ignored. It is the application of the doctrine of precedent in particular cases, and its limitations and boundaries, that remains the subject of real and worthwhile debate. I made this point in the *2003 Hamlyn Lectures*[85]:

> "Somewhere between the spectre of a judge pursuing political ideas of his or her own from the judicial seat irrespective of the letter of the law, and the unrealistic mechanic deified by the strict formalists, lies a place in which real judges perform their duties: neither wholly mechanical nor excessively creative".

THE APPLICATION OF PRECEDENT IN STATE SUPREME COURTS

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[85] M.D. Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (The Hamlyn Lectures, 55th Series), 25 November 2003. Shortened version available at: <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_25nov.html>

The application of precedent is generally a more straight-forward proposition in the lower courts. Justice K. M. Hayne of the High Court of Australia has emphasised this point[86]:

> "Sight must never be lost of the critical fact that there are very few cases indeed in which, having found the facts, precedent will not then bind the judge to a particular outcome. Lord Devlin suggested that this was so in 90% of cases. But I suggest that this is a considerable underestimate in all but the High Court. The judge who sits at first instance seldom encounters cases in which statute or precedent does not provide a binding answer (notwithstanding the great number of first instance judgments that find their way into the law reports). Indeed, as statutes come to play an even larger part in matters going to litigation, the occasion for consideration of the common law is still rarer. Judicial reticence requires the judge to recognise precedent will bind in all but the exceptional case".

The High Court has stated that where a *ratio decidendi* exists in the reasoning of one of its decisions, it is not competent to any other Australian court, whether in an appeal or at trial, to ignore, doubt or qualify the rule so stated. The rule may be analysed and elaborations suggested. But the duty of obedience requires that it must be applied[87]. This assertion of fidelity to precedents established by the High Court of Australia is normally taken for granted. It generally works well in practice. It still leaves space for

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86 K.M. Hayne, "Letting Justice Be Done Without the Heavens Falling" (2001) 27 *Monash University Law Review* 12, at 17.

87 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403, [17]; contrast 418, [57]-[59].

intermediate appellate courts in Australia (and occasionally trial judges) to push the boundaries of legal doctrine where there is no relevant High Court precedent or where the past rule does not precisely apply to the case in hand.

Whilst State Supreme Courts are therefore bound by authoritative rulings on legal questions appearing in majority decisions of the High Court differing views have been presented as to whether they will be bound by their own decisions. In *Nguyen v Nguyen* Justices Dawson, Toohey and McHugh stated that the extent to which the Full Court of a Supreme Court of a State regards itself as free to depart from its own previous decisions should be a matter of practice for the Court to determine for itself. In reaching this conclusion the judges noted[88]:

> "... [N]ow that appeals in the High Court are by special leave only, the appeal courts of the Supreme Courts of the States and of the Federal Court are in many instances courts of last resort for all practical purposes ... In these circumstances, it would seem inappropriate that the appeal courts of the Supreme Courts and of the Federal Court should regard themselves as strictly bound by their own previous decisions. In cases where an appeal is not available or is not taken to this Court, rigid adherence to precedent is likely on occasions to perpetuate error without, as experience has shown, significantly increasing the corresponding advantage of certainty".

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88 *Nguyen v Nguyen* (1990) 169 CLR 245, per Dawson, Toohey and McHugh JJ at 269-270.

The majority of intermediate appellate courts in Australia reserve to themselves the right to reconsider their own earlier decisions, although they will normally not do so unless satisfied that the earlier decision was manifestly wrong. This appears to be the accepted position of the Federal Court of Australia and the majority of State appellate courts[89].

DEVELOPING TECHNOLOGIES AND THE USE OF PRECEDENT

One development which has had an enormous, and yet largely ignored, effect on the use of precedent is the internet. The proliferation of legal databases on the internet has had a significant impact on the conduct of legal research. Millions of precedents are now available at a click of a button.

Today, any individual with access to the internet can, from anywhere in the world, access any decision handed down by the High Court of Australia. The truly inquisitive can even gain entry to full transcripts of the hearings that are held within the Court. Decisions are normally available within hours of being handed down

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89 See *Nguyen v Nguyen* (1990) 169 CLR 245, per Dawson, Toohey and McHugh JJ at 268-269. The only State in which there appears to be any doubt is Western Australia, as see in *Transport Trading and Agency Co of WA Ltd v Smith* (1906) 8 WAR 33. However, that decision, and the creation of a new Court of Appeal for Western Australia, makes the former approach appear as the breath of a bygone age when law was seen as unchanging and less dynamic.

and are free of charge. The same is true of transcripts of hearings and argument. Decisions from courts and tribunals across the world are now more readily available than at any previous time in history. In addition to this, the increasing sophistication of legal search engines and data-bases makes it easier than ever to wade through the millions of available authorities to find necessary material on precise points of law with comparative ease. Legal research has truly been revolutionised by the use of internet-based research tools.

The internet revolution presents new challenges for lawyers and judges. There is an obvious distinction between quantity and quality. The old rule that legal authority should only be cited with care is even more relevant in the electronic age. New technologies allow us quickly and easily to locate huge volumes of materials relating to almost any legal topic. The application of legal reasoning and analysis so as to employ only the most relevant and significant materials remains, however, the exclusive domain of the human mind. Thinking, analyzing and reasoning, with a will to do justice, are still the exclusive domain of human beings although what the future may bring, in the form of artificial intelligence, it still uncertain.

Precedent is an important legal tool. Emerging technologies have certainly made it more easily accessible. The challenge for lawyers and judges is how to best use the increasing accessibility of precedent to strengthen legal analysis and the just development of

the law, without being swamped by the sheer quantity of legal information that is now at our finger-tips.

THE GROWING USE OF INTERNATIONAL PRECEDENTS

A further effect of internet-based research tools has been to make international legal materials more accessible. Legal precedents from around the world can now be readily accessed by anybody with access to the internet. Physical distances are increasingly irrelevant. The ever-increasing availability of both comparative and international legal materials is having an impact on the way that Australian lawyers approach current legal issues and problems.

The effect of internet legal research tools can be illustrated by reference to the widening range of comparative materials being employed by advocates appearing before Australian courts. The sources of comparative materials is gradually widening beyond traditional references to English law. In the period of my judicial service it has extended to new sources from jurisdictions across the world.

The use of international legal materials is a contentious issue in Australia, particularly in the context of using such materials in constitutional interpretation and in relation to basic human rights. The recent decision of the High Court of Australia in *Al-Kateb v Godwin* provides a clear example of the different opinions on this

issue. The opposing viewpoints in this debate were expressed through the reasons of Justice McHugh and myself[90]. There are parallels between that case and the similar debates in the Supreme Court of the United States in *Atkins v Virginia*[91] and *Laurence v Texas*[92].

My own view, stated on many occasions, is that international law is a legitimate and often important influence on the development of the common law and constitutional law[93]. This is particularly the case when dealing with issues of human rights and fundamental freedoms. Certainly it must be emphasised that precedents from other jurisdictions will never be binding in the legal sense upon Australian courts. The value of such materials lies, instead, purely in the persuasiveness of the legal reasoning and analysis that they

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90 *Al-Kateb v Godwin* (2004) 219 CLR 562.

91 *Atkins v Virginia,* 536 U.S. 304 (2002), at 316-321; contrast at 347-348, per Scalia J.

92 *Laurence v Texas,* 539 U.S. 558 (2003), at 576-577; contrast at 586, per Scalia J.

93 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, per Kirby J at 417-419; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, per Kirby J at 657-8; M.D. Kirby, "International Law – The Impact on National Constitutions" (7th Annual Grotius Lecture), *Lecture delivered to the Annual Meeting of the American Society of International Law, Washington D.C,* 30 March, 2005; M.D. Kirby, "Take Heart – International law comes, ever comes", *Speech given at the Conference on International Law – The Challenge of Conflict,* 27 February 2004; M.D. Kirby, "The Impact of International Human Rights Norms: A Law Undergoing Evolution" (1995) 25 *University of Western Australia Law Review* 130.

contain. They can provide important insights into common problems. They can prove an invaluable resource that expands and enhances judicial thinking. In any event, they are part of the legal context within which municipal decisions are now made. They are bound to impinge on our reality. In the law, as in life, context is vital to understanding.

There are obvious limits to the use that can be made of international materials. Municipal judges are, ultimately, bound to uphold the national Constitution from which they derive their authority[94]. Whilst international legal materials may prove to be illuminating and persuasive such materials cannot be given preference over the clear requirements of national law, and particularly the law of a national Constitution. Provided, however, that these limits are respected there is no reason for international precedents not to be considered as a potentially rich and useful resource that will enhance the development of the law and assist judicial reasoning using traditional common law techniques.

CONCLUSIONS: MESSY BUT IT WORKS

The doctrine of precedent continues to play a central role in the Australian legal system. In the vast majority of cases,

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[94] *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, at 424-426, [269]-[173].

particularly those decided in trial and intermediate courts, the application of precedent will be decisive. There have, however, been changes in the use of precedent in Australia over the past two decades. The most obvious change has been the gradual abolition of the role of the Privy Council as a source of binding precedent for Australian courts and the confirmation of the High Court of Australia as the final court of appeal for all Australian matters.

In the coming years, developments such as developing technologies and the expanding role of international law will continue to have an impact upon the way in which Australian judges and lawyers employ the doctrine of precedent.

In applying the doctrine of precedent it is necessary to ensure that a balance is struck between certainty and flexibility. Whilst legal consistency and predictability are important aims, self-evidently it is important to ensure both that the interests of justice are served as far as possible in each individual case and that the law continues to develop to meet changing community needs and expectations. The doctrine of precedent as it works in practice in Australia continues to play an important role as a mechanism that assists in the task of balancing these conflicting goals.

I realize that lawyers of the civil law tradition, and some common law lawyers, regard the discursive reasoning of common law courts as messy; the presence of dissenting opinions as

destabilizing; and the doctrine of precedent as obscure in practice and sometimes seemingly optional in application, at least in the higher courts. However, for those raised in this tradition, the principles work well, taken as a whole. They give stability and predictability to the law without inflexibility. They mean that the broad contours of legal doctrine are known or knowable. And if there is uncertainty, dissent and debate at the edges, that is so because law is an attribute of the system of government in a generally free and democratic society. It is in the nature of that form of society that the content of law should be transparent – exposed to debate and criticism amongst the citizens governed by it.

This is the role of the judges – especially in the final court. To chart the contours. To debate the edges. To keep the best of the past. To re-express the judge-made law and to explain the statute law where necessary. And at all times to engage in a candid and public conversation about what they are doing, with judicial colleagues, with the legal profession and with civil society. This is what the judiciary of Australia endeavours to do.