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PRECEDENT - REPORT ON 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. Its significance in day-to-day legal practice may have declined with the rise in the quantity and pervasiveness of statute law. However, it still lies at the heart of the Australian legal system and the way Australian lawyers approach the resolution of many legal problems.

Advocates of a strict view of precedent claim that the consistency, continuity and predictability resulting from adherence to precedent is

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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.

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essential to the maintenance of public confidence in the rule of law and the work of the judiciary. On the other hand, one Australian judge, 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 rigid adherence to precedent. He even went so far as to suggest that it was an approach "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 practised in the courts and obeyed by those who are subject to its requirements.

THE INFLUENCE OF ENGLISH PRECEDENT

Possibly the most significant change to the application of precedent over the past thirty years in Australia has concerned the binding nature of English decisions in Australian courts. 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,

⁴ LK 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.

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decisions of the Privy Council were binding upon all courts, both federal and state, throughout Australia⁵.

In addition to the severance of formal legal and constitutional ties with the Privy Council 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 role of English precedent in the future development of Australian law.

Australian law now rests squarely upon the decisions of Australian lawmakers and courts and the expression, application and development of Australian precedent, with the High Court of Australia at the apex of the system.

DETERMINING PRECEDENT IN AUSTRALIA

The binding nature of the ratio decidendi: 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. As was noted by the High Court of Australia in *Garcia v National Australia Bank Ltd*⁶, the consequence of this approach to precedent is

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.

⁶ *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.

that the opinions of judges in dissent and all judicial remarks of a general character upon tangential or additional questions or issues (*“obiter dicta”*) will not become part of binding precedent.

Multiple concurring judgments: Determining the *ratio decidendi* of a judicial decision becomes a complex task when multiple concurring reasons are published by several judges in a single case. In such a case, the *ratio* must be drawn from the essential areas of agreement found within the reasons of the judges in the majority.

Lawyers of the common law tradition are often shocked that the civil law tradition does not generally 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. It is to meet these needs that multiple reasons are common in Australian, multi-member appellate courts.

Distinguishing between legal principles and orders: A distinction must be drawn between the legal principle for which the reasoning in a decision stands and the binding force of the order made in the case. When the High Court of Australia overrules a 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 whose legal principle has been overruled. The reasons for this were outlined in *Ruddock v Taylor*⁷:

“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 the final court of appeal in Australia, and also its position as a constitutional court, the High Court of Australia 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 in the nation's governance⁸.

Although the High Court of Australia has not established precise 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

⁷ *Ruddock v Taylor* (2005) 79 ALJR 1534, per Kirby J at [169]-[172].

⁸ *Attorney-General for New South Wales v Perpetual Trustees Company Ltd* (1952) 85 CLR 237, per Dixon J at 244.

decisions High Court Justices have used phrases describing the earlier decision as “manifestly wrong”⁹, “fundamentally wrong”¹⁰ or “plainly erroneous”¹¹ 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 expression.

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 caution¹².

The opposite applies to constitutional cases. In such cases the High Court of Australia has been much more inclined to re-examine past decisions. This is because of the entrenched nature of the constitutional decisions reached by the Court. Constitutional decisions

⁹ *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.

¹⁰ *McGinty v Western Australia* (1996) 186 CLR 140, per McHugh J at 235.

¹¹ *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, per Mason J at 13.

¹² *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.

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 Australia¹³. Further, judges of the High Court have recognized their primary and personal obligation as being to the Constitution itself, over and above strict adherence to a legal doctrine of precedent.

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 that¹⁴:

“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”.

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 obtain leave

¹³ In Australia, in 105 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.

¹⁴ *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.

from the 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. 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.

A contrary view has been expressed. In his dissenting reasons in *Evda Nominees Proprietary Ltd v Victoria* Justice Deane stated that¹⁵:

“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 own preference for the approach of Justice Deane in numerous cases. The procedural rule of leave effectively allows a majority of the Justices to “nip in the bud” propositions that the majority do not agree with, and effectively to deny others on the Court the full opportunity to consider argument, including on points of constitutional principle, that parties themselves wish to place before the Court.

¹⁵ *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311, per Deane J at 316.

PRECEDENT AND “JUDICIAL ACTIVISM”

The Australian debate concerning the application of precedent takes place in the context of a broader 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 legalism was expressed by Sir Owen Dixon on the occasion of his swearing in as Chief Justice of Australia¹⁶:

“... 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”.

However, the “judicial activist” or “judicial realist” accepts a wider role for judges in making the law. This approach acknowledges a greater ambit for judicial discretion and flexibility in a common law system by accepting that enduring community values and policy choices should be expressly acknowledged when judges are formulating legal rules. Examples of Australian decisions that have been criticized, as the product of so-called “judicial activism”, include the development of an

¹⁶ *Swearing in of Sir Owen Dixon as Chief Justice* (1951) 85 CLR xi, per Dixon CJ at xiv.

implied constitutional right to freedom of political communication¹⁷, 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 Australia¹⁸, 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 trial¹⁹.

This constant tension between continuity and change in Australia is reflected in debates about the appropriate application of precedent. In the *2003 Hamlyn Lectures*, I said²⁰:

“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

¹⁷ *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.

¹⁸ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1.

¹⁹ *Dietrich v The Queen* (1992) 177 CLR 292.

²⁰ M.D. Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (The Hamlyn Lectures, 55th Series).

The High Court of Australia has stated that where a *ratio decidendi* exists in the reasoning of one of its decisions, it is not permissible for 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 legal duty of obedience requires that it must be followed and applied²¹.

Whilst State Supreme Courts are 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. 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 courts²².

DEVELOPING TECHNOLOGIES AND THE USE OF PRECEDENT

²¹ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403, [17]; contrast 418, [57]-[59].

²² 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 outdated.

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

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. The challenge for lawyers and judges in common law countries 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

The impact of internet legal research tools can also 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 over thirty years 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*²³ 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. There are parallels between that case and the similar debates in the Supreme Court of the United States in *Atkins v Virginia*²⁴ and *Laurence v Texas*²⁵.

CONCLUSIONS: MESSY BUT IT WORKS

The doctrine of precedent continues to play an important role in the Australian legal system. In the vast majority of cases, particularly those decided in trial and intermediate courts, the application of precedent or of statute will ordinarily be decisive. There have, however, been changes in the use of precedent in Australia over the past two decades. The purpose of this paper has been to describe the most important of these.

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

²³ (2004) 219 CLR 562.

²⁴ 536 U.S. 304 (2002), at 316-321; contrast at 347-348, per Scalia J.

²⁵ 539 U.S. 558 (2003), at 576-577; contrast at 586, per Scalia J.

destabilizing; and the doctrine of precedent as obscure in practice and sometimes seemingly optional in application, at least in the higher courts²⁶. However, for those raised in this tradition, the principles work well, taken as a whole. They give a measure of 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 and therefore always in a process of evolution. It is in the nature of that form of society that the content of law should be transparent – exposed to debate and criticism, including amongst the citizens governed by it.

²⁶ SD Smith, *Law's Quandary* (Harvard, 2004) at 55.

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