

AUSTRALIAN BAR REVIEW

PRECEDENT LAW, PRACTICE & TRENDS IN AUSTRALIA*

The Hon Justice Michael Kirby AC CMG**

The author surveys the current operation of the doctrine of precedent in Australia. He describes the changes introduced following the abolition of Privy Council appeals and the consequential alteration in the authority of English judicial decisions. He outlines of the principles for deriving the binding rule established by a judicial decision and relevant areas of uncertainty. He reviews the doctrine of precedent as it applies to the High Court of Australia itself, including the contested procedural rule requiring leave to permit a past holding of the Court to be re-opened and overruled. He describes the debates over "judicial activism" and the rules observed by intermediate courts as to the reopening of their past authority. The article concludes with discussion of the developments that will potentially have an effect upon the operation of the doctrine of precedent: the advent of the internet; the connected increasing use of international judicial authority; and the explosion of statute law for which precedent is often a less important tool than in identifying the common law.

The doctrine of precedent has been described in this Journal as "the hallmark of the common law"¹. It has been called "the cornerstone of a common law judicial system"², something "woven into the essential

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** Justice of the High Court of Australia.

¹ A F 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.

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fabric of each common law country's constitutional ethos"³. Its significance in day-to-day legal practice may have declined, as I will suggest, with the rise in the quantity and importance of statute law. However, it still lies at the heart of the Australian legal system and the way in which Australian lawyers approach the resolution of many legal problems.

Advocates of a strict view of the doctrine of precedent claim that the consistency, continuity and predictability resulting from adherence to binding precedent is essential to the maintenance of public confidence in the law and the efficient discharge by the judiciary of its functions, performed in a lawful and predictable manner. On the other hand, Justice Lionel Murphy, saw a risk of serious injustice in too rigid an 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 precedent in contemporary Australian law as it is practised in the courts and obeyed by those who are subject to its requirements.

³ *Ibid*, at 412.

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.

THE INFLUENCE OF ENGLISH PRECEDENT

The most significant formal change to the application of precedent over the past thirty years in Australia derives from the changing status of English judicial decisions in Australian courts⁵. Until the 1970s and 1980s the Judicial Committee of the Privy Council was the final court of appeal for Australia in most areas of the law. It operated at the apex of the Australian legal system⁶. As such, in respect of any legal principle essential to the case, the rules established by decisions of the Privy Council were binding upon all courts, federal, State and Territory, throughout Australia⁷.

This position changed because of the severance of formal legal and constitutional ties with the Privy Council⁸. The membership by the

⁵ As late as 1975, the High Court of Australia emphasised the desirability of following even non-binding English judicial authority. See *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 341, 352. cf *Piro v W Foster & Co Ltd* (1943) 68 CLR 313 at 320; *Trimble v Hill* (1879) 5 App Cas 342 at 345. But see *Parker v The Queen* (1963) 111 CLR 610 at 632 per Dixon CJ.

⁶ Australian Constitution, s 74.

⁷ *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.

⁸ Achieved successively by the *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth) and the *Australia Acts 1986* (Aust & UK), s 11(1). See *Viro v The Queen* (1978) 141 CLR 88; *Kirmani v Captain Cook Cruises Pty Ltd [No 2]*; *ex parte Attorney-General (Qld)* (1985) 159 CLR 461 at 464-465 and *Cook v Cook* (1986) 162 CLR 376 at 390.

United Kingdom of the Council of Europe and the European Union, and the increasing influence of European law on the development of English law, are bound to diminish further the role of English precedent in the future development of Australian law. This process can already be seen in the diminished citation of English legal decisions in the High Court and other Australian courts. The increasing influence on United Kingdom cases of the European Convention on Human Rights and Fundamental Freedoms, since the commencement of the *Human Rights Act* 1998 (UK) in 2000, makes the invocation of English judicial case law more problematic, because of the new and different starting points now provided by this important legal development⁹.

Australian law now depends, virtually exclusively¹⁰, upon the decisions of Australian lawmakers and courts and the expression, application and development of Australian precedent, with the High Court of Australia as the uncontested apex of the nation's judicial system and hence as the primary source of binding legal precedent applicable throughout the country.

As to the *Australia Acts* 1986 (UK) see *Attorney-General (WA) v Marquet* (2002) 217 CLR 545 at 612-616 [202]-[213].

⁹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 251-252 [115].

¹⁰ Compare *R v Judge Bland; ex parte DPP (Vic)* [1987] VR 225 at 234; *Hawkins v Clayton t/as Clayton Utz* (1986) 5 NSWLR 109 at 137 per McHugh JA; *Rockwell Graphic Systems Ltd v Fremantle Terminals Ltd* (1991) 106 FLR 294 at 301; and T Blackshield, M Coper and G Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001), at 551 ("Precedent").

DETERMINING PRECEDENT IN AUSTRALIA

The binding nature of the ratio decidendi: Lower courts in Australia are not bound by everything that is said in a judicial decision or by all of the judicial observations of a higher court. Rather, it is the *ratio decidendi* of the decision that binds¹¹, as determined by analysis of the reasons of the judges in the majority. As I noted in *Garcia v National Australia Bank Ltd*¹², the consequence of this approach for the ascertainment of binding precedent is that the opinions of judges in dissent and all judicial remarks of a general character upon tangential, additional or inessential questions or issues (“*obiter dicta*”), even if included in the reasons of judges who form part of the majority in the decision, will not become part of binding precedent.

Multiple concurring judgments: Determining the *ratio decidendi* of a judicial decision becomes a more complex task when multiple concurring reasons are published by several judges for joining in the court's orders in a given case. In such a case, the *ratio* must be derived

¹¹ R Cross and J W Harris, *Precedent in English Law*, (4th ed, 1991), at 72. Cf A MacAdam and J Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998) at 41 [3.17].

¹² *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-418 [56]; *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303, per Mason CJ, Wilson, Dawson and Toohey JJ at 314; *D’Orta Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 79-80 [244]-[246].

from the essential areas of agreement legally necessary to the decision, found within the reasons of the judges in the majority. Sometimes, as the Privy Council observed of a High Court decision, this can be a doubtful or even impossible exercise¹³.

Lawyers of the common law tradition are often shocked that the civil law tradition does not generally allow the expression of dissenting opinions in appellate courts. Most common law practitioners view this facility as essential to judicial independence. Moreover they are commonly left unconvinced by the very brief and seemingly formulaic reasons of courts of civil law jurisdictions in controversial cases, where such reasons appear to conceal the important policy concerns that common law reasoning identifies and commonly discusses openly¹⁴. Multiple reasons are common in Australian multi-member appellate courts¹⁵. This is why it is necessary to have clear rules for ascertaining any binding rule contained in a superior court's decision. Ascertaining the binding rule is a technical task. However, it is surprising to discover that the basic rules by which this must be done are often misunderstood or even unknown. Furthermore, even today, some such rules are

¹³ Referring to *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 in *Candlewood Navigation Corporation v Mitsui OSK Lines* [1986] AC 1 at 22.

¹⁴ J Lockhart, "The Doctrine of Precedent - Today and Tomorrow", (1987) 3 *Australian Bar Review* 1 at 25.

¹⁵ M Davies, "Common law liability of statutory authorities: *Crimmins v Stevedoring Industry Finance Committee*", (2000) 8 *Torts Law Journal* 133 at 147-148.

uncertain of content or application¹⁶. Sometimes questions arise peculiar to a jurisdiction's statutory or constitutional setting. Thus, in Australia, questions have arisen as to the binding quality of decisions reached by a so-called "statutory majority"¹⁷ of the High Court¹⁸ (not binding) and special leave dispositions¹⁹.

¹⁶ See discussion: *Re Tyler; ex parte Foley* (1994) 181 CLR 18 at 37-38; *D'Orta Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 46 [133] per McHugh J.

¹⁷ *Judiciary Act* 1903 (Cth), s 23(2)(b).

¹⁸ *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth* (1912) 15 CLR 182 at 234; *Tasmania v Victoria* (1935) 52 CLR 157 at 183; *Milne v Federal Commissioner of Taxation* (1976) 133 CLR 526 at 533; *Federal Commissioner of Taxation v St Helen Farm (ACT) Pty Ltd* (1981) 146 CLR 336 at 354-355.

¹⁹ *R v Travers* (1957) 58 SR (NSW) 85 at 106; cf A f Mason, "The Use and Abuse of Precedent", (1988) 4 *Australian Bar Review* 93 at 96-97.

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 actual order made in the case. When the High Court of Australia overrules a previous decision of the Court, the *ratio decidendi* of that decision will no longer be binding as a legal precedent. However, this will not, of itself, 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 differentiation were outlined in *Ruddock v Taylor*²⁰:

“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 now 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 contained in its own past decisions. As noted by Justice Dixon in *Attorney General for New South Wales v Perpetual Trustee Company*

²⁰ *Ruddock v Taylor* (2005) 222 CLR 612 at 647 [129], 658-659 [169]-[172].

Ltd, such a restrictive view would be inappropriate, given the responsibilities of the Court, as envisaged by the Constitution²¹.

Although the High Court has not established exact rules as to the circumstances in which a previous decision will be overruled²², it is often said that it is not sufficient that a judge should personally disagree with the principle expressed in an earlier decision. Instead, when overruling past decisions High Court, the Justices have frequently used phrases describing the earlier decision as “manifestly wrong”²³, “fundamentally wrong”²⁴ or “plainly erroneous”²⁵ to emphasise the exceptional nature of such an action. However, in practice, the difference between disagreement and strong disagreement may be little more than a difference in judicial temperament and expression.

²¹ *Attorney-General for New South Wales v Perpetual Trustees Company Ltd* (1952) 85 CLR 237, per Dixon J at 244.

²² B Horrigan, "Towards a Jurisprudence of High Court Overruling" (1992) 66 ALJ 199.

²³ *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.

²⁴ *McGinty v Western Australia* (1996) 186 CLR 140 at 235 per McHugh J.

²⁵ *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, per Mason J at 13.

The High Court of Australia has stated that previous decisions should only be overruled in exceptional circumstances and that the power to do so should be exercised with caution²⁶. Yet, the same rule does not necessarily apply to constitutional cases. In such cases the High Court has been much more inclined to re-examine its past decisions. This is because of the 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 altered, overturned or varied in a future High Court challenge or by an amending constitutional referendum, the latter notoriously difficult to achieve in Australia²⁷. Further, judges of the High Court have recognized their primary and personal obligation to the Constitution itself, over and above strict adherence to a legal doctrine of precedent that is not itself expressly mandated by the constitutional text²⁸.

²⁶ *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. Sleight 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.

²⁷ 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. T Blackshield and G Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002), 1301.

²⁸ *Australian Agricultural Co v FEDFA* (1913) 17 CLR 261 at 278, 288; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 55 [76]; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at 452-453 [179]; *New South Wales v The Commonwealth* (2006) 231 ALR 1 at 215 [748]-[753].

These factors should be afforded an 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*²⁹, stating that:

“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 from the Court to re-argue the correctness of a previous holding of the Court. In *Evda Nominees Proprietary Ltd v Victoria*³⁰, Chief Justice Gibbs expressed the view that leave was required. The majority of the High Court concurred. A general practice has developed that leave is commonly sought before a challenge to past authority is ventured. Once leave is granted, the practice generally followed is for argument on the question to be adjourned, if necessary, to be heard by a Full Bench of all available Justices.

²⁹ (1989) 168 CLR 461 J at 518-519. See also per Mason CJ at 489, Toohey J at 560, and McHugh J at 588.

³⁰ (1984) 154 CLR 311.

A contrary view has been expressed. In his dissenting reasons in *Evda Nominees Proprietary Ltd v Victoria*³¹ Justice Deane stated that:

“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 cases³². The procedural rule purporting to require 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 important points of constitutional principle, that parties themselves may wish to place before the Court. Because there is no unanimity on this supposed requirement at present, the parties commonly ask for leave but are generally allowed, in practice, to develop their arguments so as to avoid forcing the issue to a ruling in which the present differences of opinion on the procedural issue would open up the debate on the substantive issue in any event.

³¹ (1984) 154 CLR 311, per Deane J at 316.

³² See eg *Brownlee v The Queen* (2001) 207 CLR 278 at 314-315 [106]-[108].

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. This is the debate between the merits of “strict and complete legalism” and “judicial restraint” as against what critics call “judicial activism” and defenders describe as proper “judicial creativity”³³.

The doctrine of strict legalism was expressed by Sir Owen Dixon on the occasion of his swearing in as Chief Justice of Australia in well-known words³⁴:

“... 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

³³ M D Kirby, "Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty" (2006) 30 *Melbourne University Law Review* 576.

³⁴ *Swearing in of Sir Owen Dixon as Chief Justice* (1951) 85 CLR xi, per Dixon CJ at xiv.

rules. Examples of Australian decisions that have been criticized³⁵, as the product of so-called “judicial activism”, include the development of an implied constitutional right to freedom of political communication³⁶, 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 Australia³⁷, 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 trial³⁸.

This constant tension between continuity and change the law is reflected in debates about the appropriate application of precedent. In the *2003 Hamlyn Lectures*, I said, in words to which I adhere³⁹:

“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

³⁵ See eg J D Heydon, "Judicial Activism and the Death of the Rule of Law", (2003) 23 *Australian Bar Review* 110; J Gava, "The Rise of the Hero Judge", (2001) 24 *University of New South Wales Law Journal* 747 at 748.

³⁶ *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.

³⁷ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1.

³⁸ *Dietrich v The Queen* (1992) 177 CLR 292.

³⁹ M.D. Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (The Hamlyn Lectures, 55th Series) (2004).

mechanic deified by the strict formalists, lies a place in which real judges perform their duties: neither wholly mechanical nor excessively creative”.

It is probably fair to conclude that the High Court of Australia is less rigid in its approach to the application of the principle of *stare decisis* that it was in earlier times⁴⁰. The reasons for this change are complex and identifying all of them would be beyond the scope of this note. They would include the removal of appeals to the Privy Council; the special principles observed in constitutional cases; the greater willingness to re-examine old precedents and to seek coherence in common law doctrine for Australia⁴¹; and the advent of judges impatient with formalism and minimalism and concerned to ensure, so far as possible, the justice of legal rules according to contemporary values. If this means that such judges will be accused of "getting in touch with their feelings"⁴², they will just have to wear the sobriquet.

THE APPLICATION OF PRECEDENT IN STATE SUPREME COURTS

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

⁴⁰ J L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed*, (Carolina Academic Press, 2006), 73-79.

⁴¹ eg *Burnie Port Authority v General Jones Pty Ltd* (1984) 179 CLR 520; *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

⁴² J L Pierce, above n 40, 156.

trial, to ignore, doubt or qualify the rule so stated. The rule may be analysed and, where thought appropriate, elaborations suggested or distinctions upheld. But the legal duty of obedience requires that it must be followed and applied⁴³.

Whilst State Supreme Courts are bound by authoritative rulings on legal questions appearing in majority opinions of the High Court differing views have been stated as to whether such courts 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 courts⁴⁴.

DEVELOPING TECHNOLOGIES AND PRECEDENT

One development which has had an enormous effect on the use of precedent in Australia, yet one that is often ignored is the creation of

⁴³ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403, [17]; contrast 418, [57]-[59].

⁴⁴ See *Nguyen v Nguyen* (1990) 169 CLR 245, per Dawson, Toohey and McHugh JJ at 268-269. The only State in which there appeared to be any doubt was Western Australia, see *Transport Trading and Agency Co of WA Ltd v Smith* (1906) 8 WAR 33. However, the isolation of that decision, and the creation of a new Court of Appeal for Western Australia, makes the former approach seem outdated and out of line with the common Australian practice.

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 touch of a keyboard.

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 contemporary 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. Discernment and the exercise of judgment in the selection of specially useful judicial reasons from courts outside the governing hierarchy are essential lest the use of such precedents be debased and the user criticised for "cherry picking" amongst judicial authority until a favourable case turns up⁴⁵.

THE GROWING USE OF INTERNATIONAL PRECEDENTS

The impact of internet legal research tools can be illustrated by reference to the widening range of comparative law materials being employed by advocates appearing before Australian courts. The

⁴⁵ This is a criticism voiced by Judge Richard Posner, see R Posner, "Could I Interest You in Some Foreign Law? No Thanks, We Already Have Our Own Laws", [2004], August, *Legal Affairs* 40.

sources of comparative materials is gradually widening in Australia beyond traditional references to English law. During my judicial service over thirty years, it has extended to new sources from jurisdictions across the world⁴⁶.

The use of international legal materials is sometimes a contentious issue in Australia, particularly in the context of using such materials in constitutional interpretation and in relation to basic human rights. The decision of the High Court of Australia in *Al-Kateb v Godwin*⁴⁷ provides a clear example of the different judicial attitudes to this issue. The opposing viewpoints in this debate were expressed through the reasons respectively 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*⁴⁸ and *Lawrence v Texas*⁴⁹.

THE SHIFT TO STATUTE LAW

⁴⁶ See eg use of foreign decisions, including from civil law jurisdictions, in the reasoning of the High Court on the international question of so-called wrongful birth: *Cattanach v Melchior* (2003) 215 CLR 1 at 51 [132].

⁴⁷ (2004) 219 CLR 562.

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

⁴⁹ 539 U.S. 558 (2003), at 576-577; contrast at 586, per Scalia J. See also "The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer", (2005) 3 *International Journal of Constitutional Law* 519; M D Kirby, "International Law – The Impact on National Constitutions" (2006) 21 *American University International Law Journal* 327.

Probably the most significant change in the law that has occurred in recent times, relevant to the operation of the doctrine of precedent in Australia, has been the shift towards statute law. The common law today operates in an orbit of statute law⁵⁰. This, of itself, has consequences for the content of the common law that are still being worked out⁵¹.

A judicial interpretation of a particular statutory provision, given by a court superior in the hierarchy of courts, will bind the courts below to apply the same meaning to the words in question. If the same expression appears in a different statute, courts bound by the earlier ruling will ordinarily seek to apply similar principles to the new setting. However, strictly speaking, the binding rule of the earlier authority will be specific to the words of the legislative text with which that authority dealt. As a matter of precedent it will not bind a court to apply the same construction to different legislation, however much it may be prudent for the court to do so for reasons of logical consistency.

⁵⁰ *Gray v Motor Accident Commission (SA)* (1998) 196 CLR 1 at 12-13 [33], 27 [83], 45-47 [128]-[130]; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 602 [231]; *Pilmer v Duke Group Ltd* (2001) 207 CLR 165 at 230 [170]; *Batistatos v Road Traffic Authority (NSW)* (2006) 80 ALJR 1100 at 1132 [173].

⁵¹ *Cotogno v Lamb [No 3]* (1986) 5 NSWLR 559 at 568-570; *Lamb v Cotogno* (1987) 164 CLR 1 at 11-12; *Kars v Kars* (1996) 187 CLR 354 at 381-382; *Gray v Motor Accident Commission (SA)* (1998) 196 CLR 1 at 25 [80].

The new emphasis by the High Court of Australia upon the importance of purpose and context in ascertaining legislative meaning⁵² means that the construction of a particular word or phrase, used in a new context, will need to be reconsidered when presented in a later case. It follows that the law of precedent, as it applies to legislative texts, is bound to have less significance than in the statement of the broad principles of the common law. Thus, the growth of the amount and importance of legislation and subordinate legislation as sources of law results in a correlative reduction in the significance of the doctrine of precedent for the ascertainment of the law. In giving meaning to a legislative text the necessary starting point, in every case, is the text itself⁵³ – not what judges may have said on other texts or on the principles of the common law that preceded the adoption of the text.

A reflection of this development can be seen in important contemporary changes in legal education. In 2006 the Harvard Law School voted to alter the way in which undergraduates have been introduced to, and taught, law over more than a hundred years. During this time, the Harvard Law School became famous for the case book

⁵² See eg *Coco v The Queen* (1994) 179 CLR 427 at 437; *Durham Holdings Ltd v New South Wales* (2001) 205 CLR 339 at 415-416 [29]-[32]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382; M D Kirby, "Towards a Grand Theory of Interpretation", (2003) 24 *Statute Law Review* 95 at 103.

⁵³ *Central Bayside General Practice Association v Commissioner of State Revenue (Vic)* (2006) 80 ALJR 1509 at 1528 [84] and cases cited in fn 64.

method. Basic principles of law were taught by analysis of judicial reasons and by a search for the *ratio decidendi* amongst the *obiter dicta*. In fact, the case book method became the hallmark of legal education at Harvard. It spread from there to other Law Schools in North America. In the twentieth century, it then migrated to Australia. Many an academic scholar made a name by publishing casebooks, reproducing judicial reasons, interrupted by interlinear comments or criticisms offered by the teacher of law concerned.

This methodology is now up for revision. Harvard Law School has decided to abandon the case book method and to lay greater emphasis on statute law and its interpretation. Statutory interpretation will become a compulsory subject in the first year course. So will international law, to reflect another important contemporary development in the law.

This recognition of the change in the practice of law in the United States of America is bound to have consequences for legal education in Australia for it has its origins in identical social phenomena: the growth of legislation both in quantity and importance. However, the same developments have relevance for the operation of the doctrine of precedent. It seems likely, over the long term, that judge-made rules of the common law will decrease in importance as statutory interpretation predominates as the principal task of judges and practising lawyers. As this happens, it seems inevitable that the role of precedent as the essential tool for finding the law applicable to reasoning in legal problems in society will diminish as legislation, subordinate legislation,

court rules, written instruments and international documents occupy most of the time of lawyers.

MESSY BUT IT WORKS

Notwithstanding the foregoing developments, the doctrine of precedent still continues to play an important role in the Australian legal system. In many, perhaps most, cases, particularly those decided in trial and intermediate courts, the identification and application of a binding rule of legal precedent will ordinarily be decisive where a statute is not⁵⁴. There have, however, been changes in the use of precedent in Australia over the past two decades. My purpose has been to describe the most important of these changes.

Lawyers of the civil law tradition, and some common law practitioners, sometimes regard the discursive style of reasoning of common law courts as messy, imprecise and unfocused; the presence of dissenting opinions as destabilizing to the authority of the law; and the doctrine of precedent as obscure in practice and seemingly optional in application, at least in the higher courts⁵⁵.

⁵⁴ K M Hayne, "Letting Justice be Done Without the Heavens Falling", (2001) 27 *Monash University Law Review* 12 at 17.

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

However, for those raised in the common law tradition as it operates in Australia, the principles ordinarily work well, taken as a whole. They give a measure of stability and predictability to the law, without imposing hidebound inflexibility. They mean that the broad contours of legal doctrine are generally known or fairly readily discoverable. 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 is therefore always in a process of evolution to some degree. 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 and by those who make or declare it. Like evolution in nature, there are creative bursts, after which there are periods of apparent consolidation and quiescence. At the moment, in Australia, we are in the latter period. But from legal history we can be sure that the next period of creativity lies somewhere ahead.

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