

## JUDICIAL RETROSPECTIVITY IN AUSTRALIA

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### **Introduction**

Whenever judges decide doubtful cases, they are creating or changing the law and then applying it retrospectively to the parties to the dispute. They are creating new rules which impose new legal consequences on past actions. This activity is not confined to those relatively few cases where an earlier decision is formally overruled. Even a clarification amounts to the creation of a new rule where previously there were either conflicting rules, an unclear rule, or rules of similar but not identical content. There was, of course, a period in which judges denied that they made law. They claimed that their judgments merely declared what the law had always been, so that no retrospectivity was involved in applying the newly declared law to the case before them. Most judges are a little more open about their legislative role these days. One of the earlier admissions of the truth is Lord Reid's statement that:

There was a time when it was thought almost indecent to suggest that judges make law — they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave is hidden the common law in all its splendour, and that on a judge's appointment there descends on him knowledge of the magic words 'open sesame'. Bad decisions are given when the judges muddle their passwords and the wrong doors open. But we do not believe in fairy tales any more.<sup>1</sup>

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1 Lord Reid, 'The Judge as Lawmaker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 25–29.

The first part of this paper addresses the question of how the retrospective nature of judicial decision-making might be justified. The second part of this paper discusses some recent decisions of the High Court of Australia and the Supreme Court of Victoria which exemplify the retrospective nature of judicial decision-making and some of the problems associated with such retrospectivity. This draws on a detailed study of the use of judicial retrospectivity in the High Court and Victorian Supreme Court's over a seven-year period in the late 1980s (the results of which are tabulated at the end of the paper).

### **Justifications for, and Objections to, Judicial Retrospectivity**

In our article on retrospective legislation we identified a number of arguments for and against retrospective rule making. We argued that there was one core argument against retrospectivity — the reliance citizens may reasonably place upon their expectation that the laws that will be applied to their actions (and transactions) by courts will be the same as the laws that applied at the time they acted or transacted.<sup>2</sup> This argument is not always conclusive and does not always run against retrospectivity. Sometimes retrospective rule making may protect the reasonable reliance of those who acted in a reasonable, principled but erroneous view of the law. At other times, it is desirable that the law should discourage some forms of reliance.

In criminal law, the reliance argument is particularly strong. Indeed, it is strong enough to found a human right against such legislation — albeit a defeasible right that can be defeated by other human rights. But even in criminal law the reliance argument may run the other way as there are some actions for which there should be no protected reliance.<sup>3</sup>

As we shall see in this article, many of the same arguments are raised with respect to judicial decision making — although, thankfully, with nothing like the hysteria that sometimes greets retrospective legislation.

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2 A. Palmer and C. Sampford 'Retrospective Legislation in Australia: Looking Back at the 1980s' (1994) 22 *Federal Law Review* 217.

3 See the cases of the Chilean Torturer and the Tasmanian murderer discussed in our article: *Id* at 231.

Reliance remains the key, especially, though not indefeasibly, in criminal law.

### *Dworkin's Attack on Hart*

Perhaps, the most celebrated attack on judicial retrospectivity from a legal philosopher was by Ronald Dworkin. One of his main reasons for rejecting Hart's theory of law was that it appeared to entail a retrospective legislative role for the judiciary in so-called 'hard cases'.

Hart's approach to hard cases was that they fell within an area of legal uncertainty caused largely by our inability to foresee all 'possible combinations of circumstances'.<sup>4</sup> Those who made rules would have some clear criteria in mind and some clear examples of its application (which would constitute a 'core' of meaning). However, there would always be an 'indeterminacy of aim' with regard to cases involving unanticipated combinations of circumstances. Such cases would fall within a penumbra of meaning in which the results could not be determined by the pre-existing rule but by the judges. In such areas, judges exercise a quasi-legislative role — 'choosing between the competing interests in the way which best satisfies.'<sup>5</sup> This choice could be informed by other cases. It could refer to policy arguments and an assessment of the consequences of different interpretations.<sup>6</sup> But choice there will be, as the quotation emphasises. Hart likened this to 'subordinate legislation' by judges,<sup>7</sup> and Bell referred to it as 'interstitial legislation'.<sup>8</sup>

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4 H.L.A. Hart, *The Concept of Law*, 2nd edn, Clarendon Press, Oxford, 1961, 128.

5 *Id* at 129.

6 Lord Devlin, *The Judge*, Oxford University Press, Oxford, 1979, 11. Arguments that started as the former might often end up as the latter. See, for instance, *Oceanic Sunline Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252 per Deane J.

7 Hart, *above* n 4 at 135.

8 J. Bell, *Policy Arguments in Judicial Decisions*, Oxford University Press, Oxford, 1982, 17. This term is specifically adopted in the Postscript of the second edition of Hart: *id* at 273. The Postscript is edited by P.A. Bulloch and J. Raz.

The apparent legislative ‘discretion’ was attacked by Ronald Dworkin. He criticised this and any other judicial discretion for implying that judges made decisions retrospectively.<sup>9</sup> Dworkin argued that judges do not exercise discretion to choose a new rule but find the rule which has the best fit with ‘the best constructive interpretation of the community’s legal practice’, consisting of other legal rules and principles.<sup>10</sup> There would be, in theory, only one right answer according to that construction. The party which would benefit from applying this one right answer had more than a legitimate expectation that it would be applied. They had a ‘right to win’.<sup>11</sup> Dworkin accordingly raised reliance to the pinnacle of his political philosophy — rights. Of course, judges may differ in the extent to which they see one rule as a better fit than another. Furthermore, the decision that provided the best fit for one judge might not fit for another. For Dworkin there was no retrospectivity and reliance interests or rights were not disappointed. Indeed, even in those cases where the court consciously, explicitly and formally overruled an earlier case, there would be no retrospectivity. The overruled case was not retrospectively repealed: it did not fit because it was inconsistent with higher principles already present within the law. The extent to which this actually furthered reliance depended on how predictable the judges were. It might be hoped that the rule chosen as the best fit would at least not be too surprising and that alternatives and opposites would not have been relied upon by citizens in planning their affairs.

This may be the case where the question is whether or not to apply an existing set of rules to a new situation, what might be called extending (where the decision is to apply the existing rule) or distinguishing (where the decision is to not apply the existing rule) decisions. However, the Dworkinian model seems less plausible where the decision is to abrogate an existing rule or to overrule an earlier decision. For the

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9 ‘Hard Cases’ in R. Dworkin, *Taking Rights Seriously*, Duckworth, London, 1987, 81–130.

10 R. Dworkin, *Law’s Empire*, Fontana, London, 1986, 225.

11 See R. Dworkin, ‘No Right Answer?’ (1978) 53 *New York University Law Review* 1.

Dworkinian judge, the overruling of decisions which did not support the overall integrity of the system involves their replacement by principles which have a better fit. However, before the court had decided to overrule the earlier decision, reliance upon the older ‘ill-fitting’, but at the same time apparently authoritative, rules might have seemed perfectly reasonable. Whether or not the new decision fitted the law better than the previously accepted rule, it is likely to defeat some quite reasonable expectations.

Of course, it could be argued that the retrospectivity objection has little relevance to ‘hard cases’ because these are by definition situations in which there is uncertainty in the law.<sup>12</sup> In such cases it may be argued that the dispute could not be resolved without the retrospective application of the new rule. It may be further argued that the uncertainty makes it difficult for anyone to mount the most powerful argument against retrospectivity — that they had relied upon the law to their detriment. However, people have to arrange their affairs on some basis, and the only possible basis is what their legal advisers advised was most likely to be the rule, whether existing rules are likely to be challenged or the best course of action to avoid that uncertainty. Unfortunately, if there is uncertainty then lawyers are rarely unanimous and different people will have relied on different advice. Given the general reluctance of judges to overrule, even the most well informed legal advisers may not have anticipated the overruling of a long standing doctrine. In any case, the likelihood of different advice in hard cases is generally demonstrated by the fact that the parties resort to court. Proving at least some of the advice wrong will be impossible for the court to avoid. In so doing, at least one of the clients’ expectations must be disappointed and reliance interests frustrated.

Jurisprudential developments over the last fifteen years might seem to make reliance arguments even less sustainable. Critical legal scholars and post-modernists have emphasised the indeterminacy of legal

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12 See the Hon Mr Justice M. McHugh, ‘The Law-making Function of the Judicial Process – Part II’ (1988) 62 *ALJ* 116, 124; and J. Bell, *Policy Arguments in Judicial Decisions*, Oxford University Press, Oxford, 1983, 234. The point is explicitly made by Hart in the Postscript to the second edition of *The Concept of Law*, above n 4 at 276.

reasoning. All cases are hard, or can be made to be hard.<sup>13</sup> Even without any overruling, the meaning and effect of cases is continually and essentially contestable. Judicial decisions are determined, if at all, by factors outside of the text of the cases and the means of interpretation formally adopted. Such theories might be seen as suggesting that all judicial decisions are retrospective, and that reliance is pointless because there is nothing on which to rely.

However, as we shall see, judges do attempt to take reliance seriously and attempt to be relatively predictable. They avoid overruling earlier decisions of their own and try to achieve a degree of consistency and constancy in their interpretations. They treat with great respect the decisions of their superiors, attempting to understand how the case before them would be seen by an appellate court and avoiding the embarrassment of reversal. Judges also attempt to provide a significant degree of predictability on which legal advisers can rely so as to avoid a permanent state of legal flux and resort to appeals. We emphasise that judges only attempt to achieve these ends and that their degree of success is highly debatable. The means by which the attempt is made is itself a matter of uncertainty among judges and debate among legal philosophers. Most judges do not have a well developed theory about how they decide cases and are only dimly aware of the details of the theories that seek to explain their activity. For most judges Hart, and perhaps Dworkin, are the theorists with which they would be familiar.

For this reason, we have devoted some time in this section to discussing the debates which address what is an important issue for judges between theorists who are among those most likely to have influenced the jurisprudential ideas of the current bench.

### *Reliance and the Better Rule*

Although the importance of reliance is often argued by philosopher and judge alike, there is always a strong simple contrary argument - that the new rule is simply a better rule. According to Savigny, 'a new law is

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13 Even Dworkin effectively admits as much in *Law's Empire*, above n 10 at 255–256.

always enacted in the persuasion that it is better than the former one. Its efficacy, therefore, must be extended as far as possible, in order to communicate the expected improvement in the widest sphere'.<sup>14</sup> Mr Justice McHugh has stated that the alternative to allowing the retrospective application of new rules is that 'the court should maintain and apply an unjust or inefficient rule'.<sup>15</sup>

This evaluation of the original rule does not undermine the argument for reliance. The mere fact that the older rule is, in the judgment of those making the decision, a worse one, does not mean that the interests of those who have followed the earlier rule are reduced, nor does it make their reliance less worthy of protection. The belief of the decision-maker that the new rule is better than the old is a necessary precondition for there being an issue at all. The next issue is the time from which the rule should apply.

For Dworkin, such consequentialist reasoning is beside the point. He argues that it is unjust to deny a person's right to a decision in their favour on the grounds that the general welfare might thereby be promoted.<sup>16</sup> Of course, Dworkin would argue that the rule is not a new one at all because it has a better fit with the best possible constructive interpretation of the community's legal practice. The rule is not retrospectively imposed but is embedded in the principles of the law. But even if it were possible to predict exactly how a judge might ultimately decide a case after a process of legal interpretation, the sense of injustice that triggered the whole process may well be felt by others and be predictable for others.

Furthermore, although for Dworkin the issue is one of the rule emerging from a process of interpretation of past decisions, that process

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14 F.C. von Savigny, *Private International Law and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time*, 2nd edn, T. & T. Clark, Edinburgh, 1880, 344. However Savigny, who is discussing statutes rather than judicial decisions, adds that 'the natural limits of this authority of a new law are indicated by the principle of non-retroactivity'.

15 McHugh, *above* n 12 at 124.

16 Dworkin, *Taking Rights Seriously*, *above* n 9 at 85.

of reasoning does not occur in every case. In Dworkin's model of judging, the whole process of questioning previous cases only arises when a judge feels that there is something wrong with a rule.<sup>17</sup> On this basis, Dworkin's approach is not so much that the new rule is a *better* one but that the existing rule is *worse* than one a member of the judiciary is prepared to tolerate.

If one were to reject Dworkin's theories and return to legal positivist ideas of limited judicial discretion in the 'penumbra' of uncertainty, reliance arguments are equivocal. Since a judge-made change in the law 'rarely comes out of a blue sky', it will seldom be truly surprising, even if it is not entirely predictable.<sup>18</sup> Reliance on a rule around which judicial storm clouds are gathering may not be entirely rational. Indeed, it can perhaps be argued that people should be encouraged to anticipate judge-made changes in the law. Kaplow has argued in relation to legislative changes that people should not be encouraged to rely on the law remaining static because this involves the application of a sub-optimal rule to more cases than would otherwise be the case. This increases total losses to the community.<sup>19</sup> Instead, people should be encouraged to anticipate change and to act as if the changes are already law, rather than relying on the existing law remaining unchanged. This argument may be weaker in relation to judge-made changes to law, because it will be more difficult to anticipate that change will occur, when it will occur, and what the new rule will be. Changes to judge-made rules are inherently more uncertain. They will not occur unless the right litigant is prepared to appeal all the way to the ultimate appellate court, and that court is itself willing to hear the appeal.

Thus we might conclude, as we do with legislative retrospectivity, that reliance arguments are important but they will vary in strength — in this case, depending on how uncertain the judicial and legal climate was and what alternatives were available to those who acted on an assumption of no change.

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17 Dworkin, *Law's Empire*, above n 10 at 255–256.

18 Lord Devlin, above n 6 at 11, approvingly quoted by McHugh, above n 12 at 124.

19 L. Kaplow, 'An Economic Analysis of Legal Transitions' (1986) 99 *Harvard Law Review* 511.

*Reliance and the Criminal Law*

The argument based on reliance is stronger in relation to the criminal law. We have argued elsewhere that there is a defeasible human right against retrospective legislation.<sup>20</sup> The better rule argument is weaker. The reason for the strength of the reliance argument and the weakness of the better rule argument is that the purpose of rules of criminal law are generally different from those of civil law. The prime purpose of the criminal law is to identify forms of social behaviour which are damaging to society and to attach penalties to those who pursue them. When it works it does so because the fact of disapproval is sufficient for most people to comply and because most of the remainder will comply for fear of the punishment or the social disapproval that accompanies conviction. But the criminal law is only effective as a future guide if it is known in advance. The other purpose of the criminal law is to punish those whose activity has been declared deserving of censure and this would seem manifestly unjust if the official condemnation were not predictable in advance.

Certainly judges are wary of retrospective rule-making in criminal law. But they are prepared to do so in some circumstances as in the abolition of a husband's immunity from prosecution for the rape of his wife. In the English Court of Criminal Appeal Lord Lane CJ stated that:

we take the view that the time has now arrived when the law should declare that a rapist remains a rapist and is subject to the criminal law, irrespective of his relationship with his victim.... This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive.<sup>21</sup>

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20 Palmer and Sampford, *above* n 2.

21 *R v R* [1991] 2 All ER 257 at 265–266. This passage was specifically approved by the House of Lords when it dismissed the husband's appeal against the judgment of the Court of Appeal: *R v R* [1992] 1 AC 599 at 633.

In the same year, the High Court of Australia in *R v L* also rejected the marital immunity rule, with members of the Court referring to Lord Lane's decision in the course of their judgments.<sup>22</sup> Dawson J stated that:

[W]hatever may have been the position in the past, the institution of marriage in its present form provides no foundation for a presumption which has the effect of denying that consent to intercourse in marriage can be withdrawn. There being no longer any foundation for the presumption, it becomes nothing more than a fiction which forms no part of the common law.<sup>23</sup>

Lord Lane's statements clearly indicate the legislative — as opposed to declaratory — nature of the English Court of Appeal's decision. It was not the existing law which declared that a rapist remains a rapist, but the court. The retrospective effect was clear in that the accused was convicted of an offence to which at the time of commission he had a complete defence.

In this case, the reliance argument is weak. It is perhaps unlikely that the husband actually acted in reliance on this defence, although it is certainly possible that he was aware that there was no such thing, in the eyes of the law, as rape within marriage.<sup>24</sup>

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22 *R v L* (1991) 174 CLR 379 at 389 per Mason CJ, Deane and Toohey JJ; at 402 per Brennan J; and at 405 per Dawson J.

23 *Id* at 405.

24 It should be noted that the members of the High Court in *R v L* expressed the view that it was unlikely that the marital immunity rule had ever been a part of the ecclesiastical or common law of England, whereas Lord Lane accepted that Sir Matthew Hale's statement was an accurate statement of the common law as it then stood in the eighteenth century, but that community standards had since changed, rendering the rule obsolete. *Id* at 389 per Mason CJ, Deane and Toohey JJ; at 398 per Brennan J; and at 405 per Dawson J. Furthermore, the Australian case turned on an inconsistency argument. A man was charged with the rape of his wife contrary to s 48 of the *Criminal Law Consolidation Act 1935* (SA), with s 73(3) of this Act providing a statutory abrogation of the marital immunity rule. The husband argued that s 73(3) of the South Australian legislator was inconsistent

If he was so aware, then his thought process might have been as follows: ‘She does not want to have intercourse, but I can get away with forcing her to do so because she happens to be my wife’. If that was the thought process, then his reliance on the existing rule seems to make his actions more, rather than less, morally reprehensible because of the premeditation. His expectation that he would avoid criminal sanctions would be rational, but without moral force. On the other hand, the accused may have thought: ‘She is my wife and I have a right to sexual intercourse with her; this right is recognised by society as evidenced by the fact that the law would not regard it as rape’. Although most people would condemn such reasoning, this sort of reliance might not add to the moral culpability.

Nonetheless, the retrospective criminalisation of the husband’s action would have breached what Toohey J has described as the basis for the objection to retroactive criminal liability; that is, ‘the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanctions’.<sup>25</sup>

Toohey J responded to this objection by saying that:

In so far as the principle of non-retroactivity protects an individual accused, it is arguably a mutable principle, the right to protection dependent, to some extent on circumstances. Where, for example, the alleged moral transgression is

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with s 114(2) of the *Family Law Act* 1975 (Cth), within the meaning of s 109 of the Commonwealth Constitution. Section 114(2) empowers the Family Court, in exercising its power to grant an injunction restraining a party to the marriage from entering or remaining in the matrimonial home, to make an order ‘relieving a party to a marriage from any obligation to perform marital services or render conjugal rights’. The High Court held that there was no inconsistency: s 114(2) of the Commonwealth Act did not identify the services or rights whose existence it recognised, nor did it give statutory indorsement to them. The provision in the South Australian Act only rebutted any presumption at common law of consent to sexual intercourse by virtue of marriage to the other party. In addition, the members of the Court, in statements which were strictly *obiter dicta*, went on to reject any common law rule of a wife’s irrevocable consent to sexual intercourse with her husband.

25 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 688.

extremely grave, where evidence of that transgression is particularly cogent or where the moral transgression is closely analogous to, but does not for some technical reason amount to, legal transgression, there is a strong argument that the public interest in seeing the transgressors called to justice outweighs the need of society to protect an individual from prosecution on the basis that a law did not exist at the time of the conduct.<sup>26</sup>

This justification suggests two bases for overcoming the retrospectivity objection.

1. The conduct of the husband was undoubtedly a moral transgression which was closely analogous to the legal transgression of rape.
2. The public interest in punishing his moral transgression outweighed his right to protection.

This would suggest that public interest, essentially consequentialist reasons, can override what others see as a right not to be subject to retrospective criminal law. For some, this might go too far. In this case it is unnecessary. The principle that Toohey J cited against retrospectivity ('the desire to ensure that individuals are reasonably free to maintain control of their lives') is a strong one. Indeed, we would describe this as a right. However, this right also justifies the court's decision to override it in this case. The courts were acknowledging the wives' *right* to maintain control of their lives and their bodies. This was a clash of rights and the courts can be seen as preferring the stronger right.

### *Decisions with Prospective Effect*

The maintenance of unjust or inefficient rules is not, however, the only alternative to the retrospective application of better rules. Changes in the law may be given prospective effect only. Courts in the United

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26 *Id* at 689.

States have adopted such a practice in some cases<sup>27</sup> and there has been discussion in both the United Kingdom<sup>28</sup> and Australia<sup>29</sup> about the desirability of such a practice being adopted. Some High Court judges have been prepared to consider such an innovation. For example, Mason J noted in a case involving the overruling of a decision upon which there had been reliance, that:

some of the difficulties inherent in the problem under discussion might be avoided if the Court were to adopt the technique of prospective overruling.... But the matter was not debated in argument and the technique is not without problems.<sup>30</sup>

The technique seems most appropriate where a court is overruling an old precedent upon which people have or might have relied: the case of the better rule, rather than the uncertain rule. There is a *prima facie* case of unfairness in retrospectively overturning a rule upon which people have relied, even if the rule is a bad one; there is no unfairness in overturning such a rule prospectively. Indeed, the arguments against making a decision on policy grounds would be considerably weakened if the court had the choice of applying the new rule prospectively only: the court could thereby avoid depriving anyone of their right to a decision in their favour. This leads to one of the strongest arguments both for and

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- 27 The literature is voluminous. See, for example, L.A. Richardson and L.B. Mandell, 'Fairness Over Fortuity: Retroactivity Revised and Revisited' [1989] *Utah Law Review* 11; and R.D. Branigan III, 'Sixth Amendment — The Evolution of the Supreme Court's Retroactivity Doctrine: A Futile Search for Theoretical Clarity' (1990) 80 *Journal of Criminal Law and Criminology* 1128.
- 28 See J.F. Avery Jones, 'Decisions With Prospective Effect: A Less Drastic Solution for the House of Lords' [1984] *British Tax Review* 203.
- 29 See K. Mason QC, 'Prospective Overruling' (1989) 63 *ALJ* 526.
- 30 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 15. See also *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 171 per Toohey J; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 257 per Deane J; *John v Commissioner of Taxation (Cth)* (1989) 166 CLR 417 at 450 per Brennan J; and *Peters v Attorney-General (NSW)* (1988) 84 ALR 319 at 322 per McHugh JA.

against the practice of prospective rulings: it would undoubtedly remove one of the strongest inhibitions on judicial creativity and activism.<sup>31</sup>

### *Comparison with Legislation*

An interesting question is whether the arguments justifying retrospective rule-making by courts can be applied to other branches of government. For instance, if there is uncertainty in the law, if it can be seen that ‘hard cases’ will arise, is there any reason why the legislature should not be able to retrospectively clarify the law in the same way as a court — making the law more principled and coherent? The Act would be largely a clarifying one but would, in clarifying, change the law, even if only by making clear that which was previously uncertain.

Another interesting question runs the other way. Why does it seem to be acceptable for judges to change the criminal law retrospectively, if it is generally seen as totally unacceptable for a legislature to do so? We have already discussed the decisions of the High Court and the English Court of Criminal Appeal abolishing the marital immunity for rape. The same reform was brought about in most Australian States by legislation, and in Victoria following an horrific case of rape which ended in acquittal because of the marital immunity.<sup>32</sup> However, the legislation was clearly prospective and it is not hard to imagine the outrage which

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31 See Mason, *above* n 29 at 530–531.

32 The marital immunity for rape is explicitly abolished in the Australian Capital Territory, New South Wales, South Australia and Victoria. See *Crimes Act 1900* (ACT) s 92R; *Crimes Act 1900* (NSW) s 61T(a); *Criminal Law Consolidation Act 1935* (SA) s 73(3); *Crimes Act 1958* (Vic) s 62(2). Section 10 of the *Crimes (Amendment) Act 1985* (Vic) repealed and substituted s 62(2) of the *Crimes Act 1958* (Vic). During the second reading debate of the amending bill on 16 October 1985 in the Victorian Legislative Council, it was revealed that the judge in the Supreme Court of Victoria had suppressed the names of the defendant, the plaintiff and his own name after adverse media coverage of the case: see *Victorian Parliamentary Debates (Hansard)* Spring Session 1985, Legislative Council, Melbourne, Government Printer, vol. 379 at 390. The criminal codes of the Northern Territory, Queensland, Tasmania and Western Australia are silent as to rape within marriage. However, because of the High Court’s decision in *R v L*, in all jurisdictions the fact that the accused is married to the other person is no longer a bar to a conviction for sexual assault or rape.

would have resulted if the Victorian statute had had retrospective effect so as to ensure that that particular individual was convicted; yet this was precisely the result of the English court's reforming decision.

There is a bad answer and a partial answer to these questions. The bad answer is just to say that judges can be better trusted than the legislature (although it is true that much legislation affects government/citizen relations and it will often benefit from legislation in a way that courts do not). A better answer is that judges are likely to be make more limited decisions, and have neither the power nor the inclination to make more far-reaching decisions. They are naturally aware of the effect of the new rule on those who might be affected by it because they have such persons before them in the parties to the dispute. They can gauge whether there is a relevant and justifiable reliance interest, an uncertainty to be resolved or merely a question of which is the better rule.

### **Judicial Retrospectivity in Australia**

We now turn to a discussion of some recent decisions of the High Court of Australia and Supreme Courts of Victoria and Queensland which exemplify the retrospective nature of judicial decision-making and some of the problems associated with it. We have divided the decisions into the following categories: first, abrogating decisions, where the court abrogated existing rules or limitations; secondly, overruling decisions, where the court overruled its own earlier decision, or the decision of a lower court which had stood for some time; thirdly, extending decisions, where the court applied existing rules to new situations, or made novel interpretations of constitutional or legislative provisions; and fourthly, distinguishing decisions.

#### *Abrogating Decisions*

When courts abrogate an existing rule of law, this has the clearest similarities to a legislative process. In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*, Mason CJ and Wilson J stated that it was 'the responsibility of the Court to reconsider in appropriate cases

common law rules which operate unsatisfactorily and unjustly'.<sup>33</sup> A similar approach was indicated by Kirby P in *Halabi v Westpac Banking Corporation*, where he stated that the New South Wales Court of Appeal had the power to declare a rule obsolete and no longer part of the law of New South Wales.<sup>34</sup> The rule in question was the so-called 'felony/tort' rule, which requires that a felon must be criminally prosecuted before he or she becomes liable to civil suit.<sup>35</sup> The fact that the jettisoning of the special rules relating to occupiers' liability brought about by the High Court's decision in *Australian Safeway Stores Pty Ltd v Zaluzna*,<sup>36</sup> was achieved by statutory reform in the United Kingdom, Scotland, Canada and New Zealand,<sup>37</sup> strongly suggests that the court engages in something very similar to a legislative process in these situations.

Further recent High Court examples of the abrogation of existing rules include the abandonment of the first condition of the rule in *Phillips v Eyre*, and its replacement with a single choice of law rule,<sup>38</sup> the abrogation of the long-standing rule that damages in contract and tort do not generally include interest on the loss suffered,<sup>39</sup> and the overturning of the traditional view that a purchaser who failed to complete a contract for the sale of land on an 'of the essence' date could not then claim specific performance of the contract.<sup>40</sup> The Court has

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33 (1988) 165 CLR 107 at 123.

34 (1989) 17 NSWLR 26.

35 See 'Practice Note' (1990) 64 ALJ 295.

36 (1987) 162 CLR 479.

37 See 'Recent Cases' (1987) 61 ALJ 245.

38 *Breavington v Godleman* (1988) 169 CLR 41. See 'Recent Cases' (1989) 63 ALJ 133.

39 *Hungerfords and Ors v Walker and Ors* (1989) 171 CLR 125. See 'Recent Cases' (1990) 64 ALJ 364, 365, where it was noted that in a paper entitled 'The Future in the Distance', Mr J.J. Doyle QC had argued that this decision showed that 'courts today are less willing than before to allow pockets of apparently inconsistent rules to remain'.

40 *Legione v Hateley* (1983) 152 CLR 406. The authority for the traditional view was two 1916 Privy Council decisions: see G. Nicholson, 'Breach of an Essential Time

also reversed the long-standing rule of construction that the Crown is not bound by the provisions of a statute unless the statute provides, by express words or necessary implication, to the contrary. In the last case, the new principles of construction formulated by the Court will, however, only apply to statutes enacted subsequent to the date of decision, so they are obviously intended as a guide to the drafters of future statutes only.<sup>41</sup> One further example is *Trident*<sup>42</sup> where it was held that a third party, who was not a party to the insurance contract in question, but who fell within the class of persons expressed to be insured by the contract, was indemnified by the insurance contract and could insist on its performance. Although the various members of the majority reached their decision on differing grounds, the decision clearly makes inroads into the doctrine of privity of contract and to the requirement that consideration must move from the promisee.

Reliance issues are most obviously raised by *Trident* and *Safeway*. In *Trident*, the defendant had breached the contract and the question was simply one of whether the plaintiff could enforce it. Mason CJ and Wilson J stated that to deny the plaintiff the opportunity to do so would be unjust because it would fail to give effect to the common intention of all the parties; they also stated that the law should take into account the fact that the third party (here the plaintiff) would almost certainly have acted in reliance on the belief that the insurance contract provided it with a benefit.<sup>43</sup> Such an expectation would, of course, have been based on a misunderstanding of the law, but given that the defendant had received consideration for the promise to provide the benefit, justice favoured ensuring that the expectation was not defeated. In *Safeway*, on the other hand, the question concerned the standard of care which the defendant owed to the plaintiff, and it is possible that the defendant

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Stipulation an Relief against Forfeiture' (1983) 57 ALJ 632; and 'The Conveyancer' (1987) 61 ALJ 369.

41 *Bropho v The State of Western Australia and Anor* (1990) 171 CLR 1. See 'Current Topics' (1990) 64 ALJ 527.

42 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107. See 'Recent Cases' (1989) 63 ALJ 368.

43 (1988) 165 CLR 107 at 123–124.

acted in reliance on the fact that, on the existing state of law, a lower standard of care was owed; there is no answer to this objection other than to argue that the new rule was fairer and more just than the old rule.

Analogous to decisions which abrogate existing rules are cases in which a court signals a change of direction in its approach to an area of law. While such cases may involve the defeat of some specific expectations, they are more significant for the fact that they send a signal that more general expectations should be adjusted. They are the Lord Devlin's 'warnings of unsettled weather' which reduce the likelihood of later judge-made change in coming 'out of a blue sky'.<sup>44</sup> It is clearly preferable that such a signal be given than that expectations be defeated without warning. A good example of this sort of signal was that given by the present High Court in relation to taxation. The High Court's decision in *Federal Commissioner of Taxation v Gulland; Watson v Federal Commissioner of Taxation; Pincus v Federal Commissioner of Taxation*,<sup>45</sup> for instance, was described as a 'a warning that the Court has perhaps signalled a change of direction away from the pro-taxpayer proclivities of the recent past towards an interpretation more favourable to the Revenue'.<sup>46</sup> The actual decisions in these cases breathed life into the long dormant s 260 of the *Income Tax Assessment Act* 1936 (though, ironically, when s 260 had been superseded by Part IVA). Similarly, in *Commissioner of Taxation (Cth) v Myer Emporium Ltd*,<sup>47</sup> the High Court found that a fairly complicated attempt to convert income into capital for the purpose of minimising tax was ineffective. The *Australian Law Journal* (*ALJ*) noted that:

[The] judgement leaves the clear impression that an arrangement which bears an appearance of a contrived revenue-oriented device is unlikely to find favour with the present High

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44 *Above* n 6 at 11. The full comment by Lord Devlin is as follows: 'A judge-made change in the law rarely comes out of a blue sky. Rumblings from Olympus in the form of *obiter dicta* will give warning of unsettled weather'.

45 (1985) 160 CLR 55.

46 See 'Revenue Note' (1986) 60 *ALJ* 302.

47 (1987) 163 CLR 199.

Court. It follows that the present generation of revenue practitioners, whose experience and judgment have predominantly been formed by the approach of the Barwick High Court, need to become subject to a programme of re-orientation in order to be able to predict with tolerable accuracy the course of future litigation.<sup>48</sup>

Finally, *Commissioner of Taxation (Cth) v Totalisator Administration Board of Queensland*,<sup>49</sup> which dealt with sales tax provisions, and involved the overturning of a Full Federal Court decision from which the High Court had refused special leave to appeal. This decision was said by J.G. Starke to have provided further evidence that 'the present High Court bench does not regard as sacrosanct the traditional principle that in case of doubt, a statutory provision as to tax should be construed in favour of the tax-payer'.<sup>50</sup>

### *Overruling Decisions*

**Constraining principles** The overruling by a court of its own earlier decision, like the abrogation of existing rules of law, clearly involves retrospectivity. Harris identifies four principles which have constrained the House of Lords and High Court in exercising their power to overrule their own earlier decisions.<sup>51</sup> The first is what he calls the 'No-New-

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48 See 'Revenue Note' (1987) 61 *ALJ* 428, 428-429.

49 (1990) 170 *CLR* 508.

50 See 'Recent Cases' (1991) 65 *ALJ* 172, 173. The principle that a taxation statute should be constructed in favour of the taxpayer has been removed in Queensland. Section 14A of the *Acts Interpretation Act* 1954 (Qld) requires, according to the example given at the end of the section, that a provision imposing taxation be interpreted 'in the way that best achieves the Act's purpose, whether or not to do so would be in a taxpayer's favour'.

51 J.W. Harris, 'Towards Principles of Overruling: When Should a Final Court of Appeal Second Guess' (1990) 10 *Oxford Journal of Legal Studies* 135. Cf L.V. Prott, 'When Will a Superior Court Overrule Its Own Decision' (1978) 52 *ALJ* 304. Prott, at 314-315, identifies 15 arguments which have been used to justify the overruling of precedent, and 15 which have been used to justify a refusal to overrule. Each list contains some contradictory arguments, and there are some arguments contained in both lists. The arguments which have been used to justify overruling are as follows: the impugned decision is wrong; it causes obvious

Reasons Principle'.<sup>52</sup> This is that where a legal question is finely balanced between two equally tenable views, a court should not second-guess, because they will be unable to deny that a later court might wish to third-guess. As Lord Pearson noted 'Finality of decision would be utterly lost'.<sup>53</sup> Harris notes that this principle has 'a long pedigree in Australia', although it is usually expressed in the form that 'a mere change in the constitution of the bench is not a sufficient ground' for overruling.<sup>54</sup> New reasons may arise where there is evidence of the legislature's intention, which was not introduced in the earlier case. If the case turned on questions of doctrine, new reasons may arise where some principles were overlooked (Gaudron J's dissent in *Jones* was

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injustice; it no longer represents good public policy; circumstances have changed since the case was decided; Parliament has legislated on the subject and has not changed the law; it concerns some broad issue; it is a recent decision; it is an old decision; it is impeding the development of the law; the rule concerned is procedural rather than substantive; the precedent has led to over-refined distinctions and increased certainty in the law; the case is a constitutional one and no appeal lies from the High Court nor can Parliament correct the Court's errors; the decision was given per incuriam or conflicted with some other decision or well-established principle; the composition of the court has changed; the decision has subsequently been exploited by legislative action to disturb the balance of the Constitution. The arguments which have been cited in support of a decision not to overrule are as follows: the precedent is not wrong; to overrule the precedent would upset certainty in this area of law; commercial, financial and fiscal arrangements have been based on it; to overrule the precedent would encourage frequent litigants such as the Commissioner of Taxation to re-open arguments once concluded against them; Parliament has legislated on the subject and has not changed the law; to overrule the precedent would re-open many issues settled on the basis of that decision; it is a recent decision; it is an old decision; it relates to a subject on which Parliament is the proper authority; there is a strong divergence of judicial opinion and either view is tenable; it concerns a case of statutory construction; it concerns the criminal law; it is part of a series of decisions more than once reaffirmed; the decision held certain legislation valid and that legislation has been acted upon; the case was thoroughly argued in the same way to the prior court.

52 *Id* at 156–169.

53 *R v National Insurance Commissioner; ex parte Hudson* [1972] AC 944 at 996–997.

54 Harris, *above* n 51 at 161.

based on this argument<sup>55</sup>). If the decision turned on the consequences of the competing alternatives, a new reason may arise from unforeseen or unforeseeable consequences of the decision (an example being the difficulties for judge and jury resulting from the rule in *Viro*).<sup>56</sup>

The second constraining principle applies where there has been justified reliance on the previous decision.<sup>57</sup> For instance, the House of Lord's 1966 Practice Statement, in which it announced its preparedness to depart from its own earlier precedents, included the statement that:

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.<sup>58</sup>

Harris suggests that the House of Lords has not restricted its caution to these particular areas, noting that:

If it seems likely that a class of the citizenry, as distinct from the executive, have acted on the basis of the law laid down in an earlier decision, they have a reliance interest which tells against exercising the overruling power; and such justified reliance may, in principle, be shown to exist in relation to any department of the law.<sup>59</sup>

The third constraining principle identified by Harris he calls 'Comity with the Legislature'.<sup>60</sup> This is the idea that a court ought not to overturn a decision if the legislature has acted on the assumption that the decision represents the law, and in particular, has evinced an intention

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55 Below n 72 at 349–350.

56 Below n 88.

57 *Id* at 169–177.

58 House of Lords, *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

59 Harris, *above* n 51 at 169.

60 *Id* at 177–180.

that the decision ought to remain the law. The most convincing evidence he considers to be where the Parliament has rejected, or failed to adopt, the recommendation of a law reform agency that the rule be abrogated. The fourth and final constraining principle is that of 'mootness'; this is the principle that a court should not embark on the review of rules which do not bear directly on the issue in the case at hand.<sup>61</sup>

Of these, the justified reliance principle is most relevant to the issue of retrospectivity.

**Self-overruling by the High Court** In *John v Commissioner of Taxation*,<sup>62</sup> the High Court identified the following four matters which justified the overruling of an earlier decision, the fourth of which is concerned with reliance:

1. If the earlier decision was not based on a principle carefully worked out in a significant succession of cases;
2. If there were differences in the reasoning of the majority judges;
3. If the earlier decision had achieved no useful result and had in fact caused considerable inconvenience; and
4. If the earlier decision had not been independently acted upon in a way which militated against its reconsideration.

The actual decision in *John's* case was to overrule *Curran v Commissioner of Taxation*,<sup>63</sup> holding it to be clearly erroneous. The case was, of course, reversed by statute in 1978 so the decision was only of any effect for the years 1974 to 1978. The Revenue Editor of the *ALJ* criticised the decision on the grounds that thousands of taxpayers had relied on the original decision during that period.<sup>64</sup> Although the court

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61 *Id* at 180–184.

62 (1989) 166 CLR 417 at 438–439.

63 (1974) 131 CLR 409

64 See 'Revenue' (1989) 63 *ALJ* 273.

acknowledged that people had acted on the decision in a way which militated against its reconsideration<sup>65</sup>, it held that its fundamental duty was to give effect to the intention behind the statute. In our view, however, there was no real injustice in this case because the taxpayers did not rely on the *Curran* interpretation to their detriment. They had hoped to generate very large paper losses from transactions that in fact cost them no more than the scheme promoter's fees (fees that were calculated on the tax savings involved). According to the High Court in *John*, the *Curran* interpretation was wrong. It is obviously a pity that this was not realised at the time. However, in applying what is now seen as the correct interpretation, no great harm is done to the taxpayer. The test should not be whether the taxpayer was worse off than he would have been under the erroneous view of the Act.<sup>66</sup> The test should be whether they were worse off than they would have been had the correct interpretation been known. The court's concern should not be that the taxpayer loses a benefit to which the court realises he was never entitled: the concern should be that the taxpayer should not suffer because of the court's temporary 'error' in interpretation.<sup>67</sup>

The four criteria in *John* were referred to by the High Court in *Northern Territory v Mengel*,<sup>68</sup> the case in which the Court decided to overrule its much criticised decision in *Beautesert Shire Council v Smith*.<sup>69</sup> The *Beautesert* case gave birth to the principle that 'independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the

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65 *Above* n. 62 at 440 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ; and at 450 per Brennan J.

66 Of course, it might be that, had the taxpayer known that *Curran* was wrongly decided, he would have decided to run with a difference tax avoidance scheme which might have had a better chance of succeeding. However, this is an example of a reliance argument that the court would not accept as justified.

67 When it is remembered that the taxpayer's gain is the revenue's loss (and with it the loss of the people of Australia), there is even less justification for preserving taxpayer's gains from erroneous decisions.

68 (1995) 69 ALR 1 at 12, fn 15.

69 (1966) 120 CLR 145.

inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other'.<sup>70</sup> The Court observed that there were a lack of authorities supporting *Beaudesert* and there were difficulties in defining the terms 'unlawful act' and 'inevitable consequence', creating the risk of a harsh and arbitrary operation of the principle on persons who committed an inadvertent, technical breach of the law. The principle was also said to be out of step with the modern law's emphasis on intentional wrongdoing in relation to tortious liability. The Court noted that 'apart from the fact that it was a unanimous decision and, perhaps, has not led to any great inconvenience, *Beaudesert* is a case which satisfies the criteria [in *John*]',<sup>71</sup>

The High Court also discussed the circumstances in which it will exercise its power to overrule its own decisions in *Jones v The Commonwealth*.<sup>72</sup> By a six to one majority, the Court declined an invitation to reconsider its recent decision in *Hilton v Wells*, a controversial three to two split decision.<sup>73</sup> In that decision a bare majority of the Court declared constitutionally valid provisions of the *Telecommunications (Interception) Act 1979* (Cth) which conferred the power to issue warrants for telephone intercepts on Federal Court judges. Part of the decision involved a finding that the power was exercisable by the judges in their personal capacity and the exercise of such power could not be attributed to the Court itself.<sup>74</sup> The Court in *Jones* stressed that the power to overrule should be exercised with great caution; in this case factors against the exercise of the power were the fact that the decision was a very recent one and that amendments had been made to the statute which had been interpreted in the decision, so that the authority of the earlier decision would be confined to that period before the making of the amendments. The fact that the earlier decision

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70 *Id* at 156.

71 *Northern Territory v Mengel*, above n 68 at 12.

72 (1987) 61 ALJR 348.

73 (1985) 157 CLR 57.

74 See 'Current Topics' (1985) 59 ALJ 303.

was solely one of statutory interpretation provided a further reason for declining to overrule it.<sup>75</sup> One would have thought, however, that the newness of a decision should be seen as a matter making the exercise of the overruling power more likely, given that the decision would not have had time to create long acquired vested interests.<sup>76</sup>

In the landmark decision of *Mabo v Queensland [No. 2]*, in which the High Court rejected the doctrine of *terra nullius* as part of the common law of Australia, Brennan J referred to *Jones v The Commonwealth* in the course of his judgment.<sup>77</sup> His Honour stated that the Court was ‘even more reluctant to depart from earlier decisions of its own’ than to depart from English precedent, where the consequence would be to ‘fracture the skeleton of principle which gives the body of our law its shape and internal consistency.’<sup>78</sup> Brennan J argued that the Court was not free to adopt rules that accorded with contemporary values and human rights if their adoption would ‘fracture’ this ‘skeleton of principle.’ However, where the rule seriously offended modern values and rights and international standards, it was legitimate for the Court to determine whether the rule should be preserved. In answering this question, the Court should not only assess whether the rule was an essential doctrine of the legal system, but also weigh the benefits to be gained by the overturning of the rule against the potential for community uncertainty and disturbance.<sup>79</sup> His Honour held that the theory that an inhabited colony could still be *terra nullius* because of the ‘primitive’ nature of its indigenous people, used to deprive indigenous people of title to their land, could no longer underpin the common law. It was based on discriminatory and racist assumptions about Aboriginal and Torres Strait Islander people that did not accord with the known facts — even from the early days of the colony’s settlement — about Australian indigenous cultures. Nor would it ‘fracture a skeletal principle of our

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75 See Harris, *above* n 51 at 149.

76 See ‘Current Topics’ (1987) 61 *ALJ* 762.

77 (1992) 175 CLR 1 at 30.

78 *Id* at 29–30.

79 *Id* at 30.

legal system' for the common law to recognise the land rights of indigenous people, as:

[i]t is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants.<sup>80</sup>

Nevertheless, reliance was offered as a reason for declining to overrule an earlier decision in *Geelong Harbour Trust Commissioners v Gibbs, Bright and Co*,<sup>81</sup> *Queensland v The Commonwealth*,<sup>82</sup> and *Zecevic v DPP*.<sup>83</sup> In the first of these cases, which concerned the question of whether a statute imposed strict liability on those who damage port facilities, the fact that commercial transactions may have been entered into on the basis that the impugned decision, *Townsville Harbour Board v Scottish Shire Line Ltd*,<sup>84</sup> represented the law was important. The second case concerned the question of whether the Commonwealth Constitution permitted the Parliament to grant representation in the Senate to the Australian Territories. The question had been decided in the affirmative, by a four to three majority, in *Western Australia v The Commonwealth*.<sup>85</sup> Four of the judges in *Queensland* thought that the decision in *Western Australia* had been wrong, but only two of these judges (Barwick CJ and Aickin J) were prepared to overrule it. The other two judges (Gibbs and Stephen JJ) thought that the decision should not be overruled because:

[t]o reverse the decision now would be to defeat the expectations of the people of the Territories that they would be represented ... by senators entitled to vote — expectations that

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80 *Id* at 48. See J. Malbon, 'The Implications of *Mabo v Queensland (No. 2)*' (1992) 2(57) *Aboriginal Law Bulletin* 7.

81 (1970) 122 CLR 504.

82 (1978) 139 CLR 585.

83 (1987) 162 CLR 645.

84 (1914) 18 CLR 306.

85 (1975) 134 CLR 201.

were no less understandable because in my view they were constitutionally erroneous, and that were encouraged by the decision of this court.<sup>86</sup>

However, a much stronger reason was that the only reason for the changed majority on the substantive issue was the changed composition of the court. They were clearly discouraging the re-opening of recently decided questions on such a basis. If this were not discouraged, it might invite further litigation and, even more dangerously, encourage governments to take into account the views of aspiring appointees to the bench in relation to recently decided cases.

Finally, in *Zecevic v DPP*,<sup>87</sup> the High court discarded the test for self-defence which it had itself enunciated in *Viro v R*.<sup>88</sup> The *Viro* formulation of the defence was so complicated that it had caused great problems for judges directing juries. The difference between the new and old tests turned on the effect of a finding by the jury that the amount of force used by the accused, albeit in self-defence, was excessive. According to *Viro*, such a finding implied a verdict of manslaughter; according to *Zecevic*, such a finding would result in a verdict of murder (providing no other defence, such as provocation, was made out).<sup>89</sup> Deane J (as he then was) dissented on the grounds that there might be people awaiting trial who had relied on *Viro's* case, in the sense of having made admissions or confessions which they would not have made if the law had been as formulated in *Zecevic*. This is a legitimate concern. However, it could be addressed in a far less drastic way by

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86 (1978) 139 CLR 585 per Gibbs J; see also at 603–604 per Stephen J; and, for a contrary view, at 630 per Aickin J. The case is remarkable for the fact that the majority views on the two issues in the case did not produce the outcome that would be logically entailed by those views. Four thought the first case was wrongly decided and at least four judges thought it appropriate to overrule in cases such as this (Barwick CJ, Aickin, Murphy and Jacobs JJ). However, because part of the majority on the second point were in the minority on the first, the logical conclusion from the two majority held views did not prevail.

87 (1987) 162 CLR 645.

88 (1978) 141 CLR 88.

89 See 'Current Topics' (1987) 61 ALJ 759; and Harris, *above* n 51 at 149.

determining that any such admissions or confessions reached in the course of such a trial could be withheld from the jury.

There were several other cases in the 1980s in which the High Court has overruled itself. In *Baker v Campbell*,<sup>90</sup> the High Court overturned its own extremely recent decision in *O'Reilly v State Bank of Victoria Commissioners*,<sup>91</sup> in holding that legal professional privilege is not confined to judicial and quasi-judicial proceedings. In *Cole v Whitfield*,<sup>92</sup> the High Court completely re-interpreted s 92 of the Constitution, effectively creating a new test of discriminatory protectionism.<sup>93</sup> In *Jaensch v Coffey*,<sup>94</sup> the High Court unanimously swept aside the limits on recovery for nervous shock laid down by the High Court decision of *Chester v Waverley Corporation*.<sup>95</sup> In *R v Coldham; Ex parte Australian Social Welfare Union*,<sup>96</sup> the High Court overruled *Federated State School Teachers Association of Australia v Victoria*<sup>97</sup> in deciding that, for the purposes of the *Conciliation and Arbitration Act 1904* (Cth), the phrase 'industrial dispute' includes all disputes between employer and employee about terms of employment or conditions of work, and is not confined to those disputes which take place in a profit-based or productive industry. In *Re Lee; Ex parte Harper*,<sup>98</sup> the Court reiterated its rejection of the rule in *Federated State School Teachers Association* and also overruled *Pitfield v Franki*,<sup>99</sup> in deciding that an association of teachers, including state school teachers,

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90 (1983) 153 CLR 52.

91 (1983) 153 CLR 1.

92 (1988) 165 CLR 360.

93 See P.H. Lane, 'The Present Test for Invalidity under Section 92 of the Constitution' (1988) 62 *ALJ* 604; and 'Current Topics' (1991) 65 *ALJ* 123.

94 (1984) 155 CLR 549.

95 (1939) 62 CLR 1. See 'Recent Cases' (1985) 59 *ALJ* 44.

96 (1983) 153 CLR 297.

97 (1929) 41 CLR 569.

98 (1986) 160 CLR 430.

99 (1970) 123 CLR 448.

is eligible to register under s 132(1) of the *Conciliation and Arbitration Act 1904* (Cth) The High Court in *Street v Queensland Bar Association*,<sup>100</sup> considered the meaning of s 117 of the Commonwealth Constitution in so far as it relates to the rights of a legal practitioner in one State to apply for admission in another. The High Court in overruling its earlier decision in *Henry v Boehm*<sup>101</sup> relied on the first and fourth matters identified in *John's* case, and in addition, on the importance of the Constitution being correctly interpreted.<sup>102</sup> Dawson J also argued that the decision was relatively recent, that it was a split decision, and that in constitutional matters, the Constitution itself must provide the answer.<sup>103</sup>

**Overruling of lower courts by the High Court** Where an ultimate appellate court overrules the decision of a court lower in the hierarchy then expectations which are defeated are, at least arguably, less rational in that it can never be assumed that an ultimate appellate court will agree with the reasoning of a lower court. That is to say, the expectation should take into account the fact that the rule being relied on has not been accepted by the highest court in the land. Nevertheless, a decision which has stood for some time may have been acted upon in a way which militates against its reconsideration.

A good example of this is provided by the decision in *Babaniaris v Lutony Fashions Pty Ltd*,<sup>104</sup> where by a majority (comprising Mason, Wilson and Dawson JJ, with Brennan and Deane JJ in dissent), the High Court overruled the decision of the Workers Compensation Board of Victoria in *Little v Levin Cuttings Pty Ltd*.<sup>105</sup> That decision had held, in effect, that an outworker who was an independent contractor was covered by the *Workers Compensation Act 1958* (Vic), while an

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100 (1989) 168 CLR 461.

101 (1973) 128 CLR 482.

102 See *above* n 63.

103 See 'Current Topics' (1990) 64 ALJ 753, 754-755.

104 (1987) 163 CLR 1.

105 (1953) 3 WCB (Vic) 71.

employee outworker was not covered. It was submitted, and accepted, that even if the decision was wrong it had been acted on since 1953, in that premiums had been assessed and paid on the basis that independent contractor outworkers were covered by the Act. There was considerable discussion of the doctrine of *stare decisis*,<sup>106</sup> all judges agreeing that where a statute was ambiguous an earlier decision should be left standing, even if the individual judge would have reached a different construction of the provision. The majority held that the provision was not ambiguous however, and that they therefore had no choice but to overrule the earlier decision. The minority, on the other hand, held that they were ‘quite unable to say positively that it was wrong and productive of inconvenience’.<sup>107</sup> They noted that:

If *Little’s* case were now overruled, insurers would obtain a windfall liberation from the risk of undischarged liabilities to independent contractors against which the employers were insured. There is no practical injustice in leaving *Little’s* case stand, especially as the operation of the Act will fall away as the *Accident Compensation Act* 1985 (Vic) comes into effect.<sup>108</sup>

Sometimes an overruling decision can provide an unexpected benefit to the persons affected. For example, in *Re Coldham; Ex parte Australian Builders Construction Employees and Builders Labourers’ Federation*,<sup>109</sup> the High Court overruled the decision of the Conciliation and Arbitration Commission in *Amalgamated Television Services Pty Ltd v Professional Radio Employees’ Institute of Australasia*,<sup>110</sup> in deciding that s 41(1)(m) of the *Conciliation and Arbitration Act* 1904 (Cth) allowed the Commission to extend the prescribed time for taking a

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106 (1987) 163 CLR 1 at 12–15 per Mason J; 22 per Wilson and Dawson JJ; and 28–33 per Brennan and Deane JJ.

107 (1987) 163 CLR 1 at 28, quoting *Bourne v Keane* [1919] AC 815 at 874 per Lord Buckmaster.

108 (1987) 163 CLR 1 at 31.

109 (1985) 159 CLR 522.

110 (1963) 105 CAR 123.

step in proceedings even if that prescribed time had expired. The effect of the decision was that the BLF was able to lodge an appeal against a decision of the Commission. If the union had formed any expectation on the basis of the earlier decision then it would have been that an extension would not be granted.

*He Kaw Teh*<sup>111</sup> is also interesting from a reliance point of view; in this case the High Court overruled *R v Bush*<sup>112</sup> and a whole line of cases which had followed it, in deciding that s 223B(1)(c) of the *Customs Act* 1901 (Cth), which makes it an offence to possess prohibited imports requires the prosecution to prove that the accused knew of the existence of the goods. The High Court also overruled *R v Gardiner*<sup>113</sup> and *R v Parsons*,<sup>114</sup> in deciding that s 223B(1)(b) of the *Customs Act* 1901 (Cth), which makes it an offence to import prohibited imports, also requires the prosecution to prove that the accused knew of the existence of the goods. In short, the High Court required proof of *mens rea*, notwithstanding the fact that the statute appeared to have created strict liability offences. It would have been impossible, however, for a person to have acted on an expectation that no *mens rea* was necessary, because to have done so they would have to have been aware of the fact that they were in possession of the prohibited imports. Even if the earlier decisions had been to the effect that *mens rea* was necessary and the High Court had decided the opposite — so that its decision was detrimental to the accused — then there could still have been no unjustly defeated expectations for the same reason that reliance would imply knowing possession of the prohibited imports. The prosecution would have been relieved of the burden of proving *mens rea*, but the fact of reliance would mean that it was nevertheless present.

**Overruling by intermediate courts of appeal: a case study of the Supreme Court of Victoria** There were six reported overruling decisions of the Supreme Court of Victoria in the period from 1983 to

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111 (1984) 157 CLR 523.

112 [1975] 1 NSWLR 298.

113 [1981] Qd R 394.

114 [1983] 2 VR 499.

1990; only one of these decisions, however, involved the Full Court overruling an earlier Full Court decision. This was *R v Pantorno*,<sup>115</sup> in which the Full Court reconsidered its decision in *R v Bridges*,<sup>116</sup> mainly it seems because the High Court, in refusing special leave to appeal from that case had made some disapproving comments. Victorian Supreme Court practice is to avoid reconsidering recent Full Court decisions; where a reconsideration is necessary the Full Court is constituted as a five judge bench. Both cases dealt with s 73(1)(b) of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), which provides that a lesser penalty may be imposed where the accused can prove that the offence of possession of narcotic substances was not committed for any purpose related to trafficking. The section deals, in other words, with *mitigating* circumstances. The court in the *Bridge's* case had, however, treated the section as if it dealt with *aggravating* circumstances, and on that basis, had ruled that only a jury could decide whether the relevant facts existed. In *Pantorno's* case it was held that it was for the judge to decide this matter and that, accordingly, the trial judge had not made an error of law. The accused appealed to the High Court, which in allowing his appeal, noted that the Supreme Court, sitting as the Court of Criminal Appeal, had denied the applicant procedural fairness by failing to meet its obligation to afford the applicant 'an opportunity of discharging the evidentiary onus which, by overriding *Bridges*, the Court of Criminal Appeal had itself placed on him'.<sup>117</sup>

The other five overruling cases were all Full Court decisions overruling single judge decisions. In the absence of a separately constituted court of appeal in Victoria, such decisions are more akin to the overruling of a court lower in the hierarchy than the overruling by a court of its own earlier decision. *Re Fabo P/L*<sup>118</sup> overruled *Re Wildtrek Ltd*;<sup>119</sup> both cases dealt with s 364(2)(a) of the *Companies (Victoria)*

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115 [1988] VR 195.

116 (1986) 20 A Crim R 271.

117 *Pantorno v R* (1989) 166 CLR 466 at 483 per Deane, Toohey and Gaudron JJ. See 'Practice Note' (1989) 63 ALJ 638.

118 [1989] VR 432.

119 (1987) 12 ACLR 398; 6 ACLC 1.

*Code*, which allowed a creditor to seek to have a company wound up on the grounds that it is unable to pay its debts. The creditor in the later case was the Deputy Commissioner of Taxation, and the issue was whether the notice given under s 364(2)(a) was invalid merely because it overstated the amount of debt claimed. The overstatement was of an extremely minor nature, as the notice incorrectly included an amount of \$19.60 of costs, for which no order had been made. The court in the later case held that the notice was valid. In *McPherson & Kelley v Kevin J Prunty & Assoc*,<sup>120</sup> the Full Court overruled two earlier single judge decisions in *Belous v Willetts*<sup>121</sup> and *Carfora v Burges*.<sup>122</sup> The issue in all of the cases was whether a retained solicitor is concurrently liable to his or her client in both contract and tort if he or she discharges his or her duties negligently. In this case both respondent and appellant were firms of solicitors who had acted for the plaintiff client in relation to a claim which had, due to the negligence of both, become statute-barred. The earlier decisions followed the Court of Appeal decision in *Groom v Crocker*<sup>123</sup> in holding that a client's action was in contract only. The result of overruling these decisions and deciding that concurrent liability existed, was that the respondent firm of solicitors was liable for a greater proportion of the client's loss than it would otherwise have been. In *National Mutual Fire Insurance Co Ltd v Insurance Commissioner*,<sup>124</sup> the Full Court overruled *Commercial Union Assurance Co of Aust Ltd v Insurance Commissioner*<sup>125</sup> in deciding that the expression 'any liability' contained in s 40(1) of the *Motor Car Act 1958 (Vic)* included liability to pay workers compensation under the *Workers Compensation Act 1958 (Vic)*. The effect of this decision was

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120 [1983] 1 VR 573.

121 [1970] VR 45.

122 Southwell J. Supreme Court of Victoria, unreported, 17 October 1980.

123 [1939] 1 KB 194.

124 [1985] VR 811.

125 [1980] VR 433.

that there was double insurance and the third party insurer was liable to contribute.<sup>126</sup>

The Full Court of the Supreme Court of Victoria is unlikely to depart from an interpretation of uniform national legislation by another appellate court because of the decision of the High Court in *Australian Securities Commission v Marlborough Gold Mines Ltd*.<sup>127</sup> This case concerned a successful appeal by the Australian Securities Commission from a decision of the Full Court of the Supreme Court of Western Australia, which had permitted a scheme of arrangement under s 411 of the Corporations Law by which the company sought a change in its status from a company limited by shares to that of a no liability company. In an earlier case the Full Court of the Federal Court had said, by way of *obiter dicta*, that there was no power under s 411 to achieve this transformation.<sup>128</sup> The High Court held that the need for uniformity of interpretation of uniform national legislation required that an intermediate appellate court should not depart from an interpretation placed on the Corporations law by another appellate court unless convinced that the interpretation was plainly incorrect. This restriction was said to apply even more strongly to lower courts and single judges. The New South Court of Appeal, in *Gye v Davies*, has recently applied the *Marlborough* principle to the *Bankruptcy Act* 1966 (Cth).<sup>129</sup>

### *Extending Decisions*

The application of existing rules to new situations was essentially the process by which the common law was developed and continues to be developed. These sorts of decisions are probably less surprising than

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126 The other two decisions were *Nicholls v Board of Examiners for Barristers and Solicitors* [1986] VR 719, which overruled *Re Oden* (Starke J, Supreme Court of Victoria, unreported, 27 March 1985), and *R v Papoulias* [1988] VR 858, which overruled *Blayney v Barrow* (Nathan J, Supreme Court of Victoria, unreported, 10 September 1987).

127 (1993) 177 CLR 485.

128 *Windsor v National Mutual Life Association of Australasia Ltd* (1992) 34 FCR 580.

129 *Gye v Davies* (1995) 131 ALR 723.

those considered above because there will usually be no direct authority as to what rule should cover those situations. Any expectations that the rule will not be extended may, therefore, be irrational in the sense that it should have been possible to foresee that the court might decide to extend the existing rules by analogy to the new situation.

Recent High Court examples include the extension of the exception to the claim of legal professional privilege which applies where the allegedly privileged communications arose in the furtherance of a crime or fraud to communications which arise from an attempt to abuse a statutory power,<sup>130</sup> and the placing of the action for money had and received to the use of the plaintiff as a result of mistake on the grounds of restitution or unjust enrichment, rather than on its historical basis of *assumpsit*.<sup>131</sup> In *Baumgartner*, the High Court held that a constructive trust could be created by operation of law on grounds of unconscionability. The previous position had been that a constructive trust could only be created as a result of a proven common intention, while a resulting trust would only be created where there had been a financial contribution to the purchase price.<sup>132</sup> The High Court has also extended an area of law by identifying criteria for determining when a warning to the jury would be appropriate at a trial where the major evidence against the accused is an uncorroborated confession, or 'verbal'.<sup>133</sup> It also created a new duty of care which would justify the imposition of vicarious liability on employers for torts committed by independent contractors and their employees.<sup>134</sup> In *Pavey*, the Court allowed a builder with an oral contract to enforce the contract relying on the action for *indebitatus assumpsit*, despite the fact that s 45 of the *Builders Licensing Act* 1971 (NSW) provides that a builder cannot

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130 *Attorney-General for the Northern Territory v Kearney* (1985) 158 CLR 500.

131 *Australia and New Zealand Banking Group v Westpac Banking Corporation* (1988) 164 CLR 662. See 'Banking Law' (1989) 63 *ALJ* 41.

132 *Baumgartner v Baumgartner* (1987) 164 CLR 137.

133 *Carr v R* (1988) 165 CLR 314. See 'Criminal Law and Justice' (1988) 62 *ALJ* 1046.

134 *Kondis v State Transport Authority (Vic)* (1984) 154 CLR 672. See 'Recent Cases' (1985) 59 *ALJ* 230.

enforce a contract for building work unless the contract is written.<sup>135</sup> The High Court has also expanded the circumstances in which a grant of relief against forfeiture could be ordered;<sup>136</sup> and it has used procedural safeguards, such as the requirement of natural justice, in order to protect civil liberties in the absence of a Bill of Rights.<sup>137</sup>

Three of these cases would appear to involve reliance issues. The first is *Kearney*, the privilege case, where both lawyer and client may have expected that their communications would remain confidential; perhaps the fact that the communications were in furtherance of an abuse of statutory power — and therefore at odds with the rationale of the privilege — is a sufficient grounds for defeating that expectation. The fact that it would have been unconscionable, in the High Court's view, for the de facto husband in *Baumgartner* to deny any interest in the property to his spouse is also a sufficient answer to any argument he might advance that he had so arranged things as to ensure this very thing. Again, the effect of the decision in *Pavey's* case was not to create an action for breach of contract where none existed, but to remove an impediment to such an action and thus ensure that a builder who would otherwise have been without remedy was able to enforce a contract which had clearly been breached.

The expansion or extension of legal rules is not confined to the common law, however; the courts also sometimes adopt interpretations

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- 135 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221. See 'Recent Cases' (1987) 61 *ALJ* 248, 249, where it was noted that that a 'builder who has not been paid for work done in the past under the *Builders Licensing Act* on account of his contract being unenforceable because of s 45 may now be able to claim payment'.
- 136 *Stern v McArthur* (1988) 165 CLR 489. See 'The Conveyancer' (1989) 63 *ALJ* 346, 349, where it was noted that 'indications have begun to appear that the courts will regard *Stern v McArthur* as justifying (nay, compelling) the grant of relief against forfeiture in circumstances where it would have been unthinkable before'.
- 137 *Doyle v The Commonwealth* (1985) 156 CLR 510. See 'Recent Cases' (1986) 60 *ALJ* 44. The High Court has also in recent times demonstrated a willingness to imply certain rights into the text of the Constitution, such as the right to freedom of communication with respect to public affairs and political discussion. See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; and *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

of statutory or constitutional provisions which give them a far wider — or narrower — ambit than they have had in the past. Recent High Court examples of expansive readings of constitutional provisions include a decision which invalidated for breach of s.55 of the Commonwealth Constitution the ‘fee for immigration clearance’ or ‘arrival fee’ imposed by s 7 of the *Migration Amendment Act* 1987 (Cth). The decision was a novelty for two reasons. First, if a law breaches s.55, the section clearly says that the non-taxing provisions fail rather than the taxing provisions; in this case, however, the tax itself was struck down. Secondly, it had always been assumed that the section only applied to each Act enacted by Parliament in respect of its form as an enactment, rather than to an Act as amended. In this case however, the amending Act was valid within the terms of s 55; it was only the Principal Act as amended which contained both taxing and non-taxing provisions.<sup>138</sup> Similarly surprising was the High Court’s decision in *Brown v R* that s 80 of the Commonwealth Constitution, which provides that the trial on indictment of any offence against the law of the Commonwealth shall be by jury, imposed a mandatory requirement binding courts, rather than conferring a privilege which an accused person might waive.<sup>139</sup> The majority’s decision was inconsistent with the weight of previous High Court decisions on this section, and precluded the accused from opting for trial by judge alone.<sup>140</sup> In *AMP Society v Goulden*,<sup>141</sup> the High Court invalidated certain provisions of the *Anti-Discrimination Act* 1977 (NSW) on the grounds of inconsistency with a law of the Commonwealth, namely the *Life Insurance Act* 1945 (Cth). The *ALJ* noted that the case ‘demonstrated once again that unforeseen and unforeseeable results can ensue from the interpretation and application of s 109 of the Commonwealth Constitution’,<sup>142</sup> and that the ‘decision represents a far-reaching extension of the doctrine of inconsistency

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138 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462. See ‘Current Topics’ (1989) 63 *ALJ* 232.

139 (1986) 160 CLR 171.

140 See ‘Current Topics’ (1986) 60 *ALJ* 423.

141 (1986) 160 CLR 330.

142 See ‘Recent Cases’ (1986) 60 *ALJ* 527.

under s 109 of the Constitution, and is difficult to reconcile with the principle of concurrence of State and Federal powers reflected in s 109 itself.<sup>143</sup> A final example of an expansive reading of the Constitution is provided by *Richardson v The Forestry Commission (Tas)*,<sup>144</sup> which further enlarged the ambit of the 'external affairs' power, holding it to be valid for the Commonwealth to pass legislation protecting an area, part of which might, after due inquiry, be found to possess 'world heritage' characteristics. The legislation was valid despite the fact that the Commonwealth was under no obligation to protect the relevant area (the Southern and Lemothyne Forests of Tasmania).<sup>145</sup>

An example of a narrow reading of a constitutional provision is provided by *Queensland v Commonwealth*,<sup>146</sup> in which the High Court considered the validity of the Fringe Benefits Tax (FBT) in so far as it was imposed on the State of Queensland. Section 114 of the Constitution provides that the Commonwealth shall not 'impose any tax on property of any kind belonging to a State'. The majority of the Court held that the section did not prevent the imposition of FBT on the States, holding that the tax was one on transactions (ie the provision of a benefit) rather than on the holding or ownership of property. Gibbs CJ in dissent noted that if the section allowed taxation of the use of State property then the protection it purported to give to the States was completely illusory.<sup>147</sup> Although this case involved a narrow reading of the Constitution, it can be noted that its effect, as in the decisions in *AMP Society* and *Richardson's* case, was to expand the power of the Commonwealth at the expense of the States; all three decisions can therefore be seen as manifesting a centralist tendency on the part of the High Court. A contrast was provided by *New South Wales v The Commonwealth*; *South Australia v The Commonwealth*; and *Western*

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143 *Id* at 528.

144 (1988) 164 CLR 261.

145 See 'Current Topics' (1988) 63 *ALJ* 319.

146 (1987) 162 CLR 74.

147 See 'Current Topics' (1987) 61 *ALJ* 208.

*Australia v The Commonwealth*,<sup>148</sup> where, in a decision condemned by both the financial media and the business community, the High Court held that the power of the Federal Parliament under s 51(xx) of the Commonwealth Constitution to make laws with respect to corporations does not extend to making laws with respect to their incorporation, as distinct from laws regulating the activities of corporations once they were created.<sup>149</sup>

### *Distinguishing Decisions*

A decision to distinguish precedent is essentially the converse of what has been described above as an extending decision; in the latter it is held that there is a sufficient analogy between the situations covered by the existing rule and the new situation for the rule should be applied, whereas in the former it is held that there is an insufficient analogy. The technique of distinguishing also enables the effect of precedent to be avoided without the court having to explicitly abrogate or overrule the existing rule. In other words, it can be used to undermine and confine unpalatable precedent. Therefore, a decision to distinguish a rule can be one of two things: it can either be an honest decision that the situation covered by the existing rule and the new situation are not analogous or it can be the covert avoidance of a rule which should, by analogy, apply to the new situation. The Federal Court's decision in *Federal Commissioner of Taxation v Gregrhon Investments Pty Ltd*,<sup>150</sup> arguably falls into the latter category. In this case it the Court distinguished the

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148 (1990) 64 ALJR 157.

149 See 'Current Topics' (1990) 64 ALJ 235. Hence the current uniform legislation, referred to as the Corporations Law, is the product of an agreement between the Commonwealth, States and Territories to enact complimentary legislation. After the High Court's decision, the Commonwealth enacted the *Corporations Legislation Amendment Act* 1990. The constitutional validity of the Commonwealth's 1989 Corporations Act now rests on s 122 of the Constitution, so that the federal legislation only governs companies in the Australian Capital Territory. This was followed by the enactment by each State and Territory of legislation applying the *Corporations Act* 1989, as amended in 1990, in its jurisdiction. The legislation of the national scheme came in force on 1 January 1990.

150 (1987) 79 ALR 586.

High Court's decision in the famous case of *Slutzkin v Federal Commissioner of Taxation*, the facts of which had provided the model for 'bottom of the harbour' tax schemes.<sup>151</sup> The outrage exhibited by some members of the tax profession certainly indicates that they regarded the decision as one of surreptitious overruling.<sup>152</sup>

In most cases, however, it is very difficult to tell which of these two things the court is doing. Attempting to show that an ostensible distinguishing decision was in reality a covert avoiding decision would require us to show that the court should have accepted the arguments supporting the application of the rule to the new situation; to assess, in other words, the merits of those arguments and of the court's reasons for rejecting them.

From a reliance point of view, however, it is probably unimportant, in that until there has been a decision on whether or not to apply the existing rule to the new situation, no firm expectations should be formed either way. Therefore, what we have chosen to do instead, is to describe how much distinguishing of earlier decisions is done by the courts.

The following two tables show the number and source of the decisions distinguished and overruled by, in the first table, the High Court of Australia, and in the second table, the Supreme Court of Victoria for the periods 1983 to 1989 (or in the case of the Supreme Court of Victoria, 1990).

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151 (1977) 140 CLR 314.

152 See 'Editorial' (1988) 17 *Australian Tax Review* 1; and A.J. Myers QC, 'The Federal Court Decision in the Gregrhon Investments Pty Ltd Case' (1988) 17 *Australian Tax Review* 4. However, the *ALJ* Revenue Editor argued that if the decision in *Gregrhon* was a surprise, it was only because 'revenue practice tends to be so confining in its specialisation that its opinion formers may tend to lose touch with reality': 'Revenue' (1988) 62 *ALJ* 470, 471.

**Table 1**  
**Decisions by the High Court of Australia (HCA)**  
**on Previous Judgments**

	<i>Distinguished by HCA</i>					<i>Overruled</i>		
	Decision of Courts					Decision of Courts		
Year	HCA	Austr 153	UK	Other 154	<i>Total</i>	HCA	Austr	<i>Total</i>
1983	6	1	2	-	9	2	4	6
1984	5	2	5	-	12	1	2	3
1985	6	-	1	-	7	-	2	2
1986	2	-	9	-	11	-1	-	1
1987	2	4	4	-	10	1	2	3
1988	6	2	4	-	12	1	-	1
1989	5	-	3	2	10	2	-	2
<b>Total</b>	32	9	28	2	71	8	10	18

**Source:** 'Table of Cases Affirmed, Reversed, Overruled, Applied or Judicially Commented on in Cases Reported in this Volume', *Commonwealth Law Report (CLR)*: 1983 (vols 153, 154, 155), 1984 (vols 157, 156), 1985 (vols 158, 159), 1986 (vols 160, 161), 1987 (vols 162, 163), 1988 (vols 164, 165), 1989 (vols 166, 167, 168).

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153 Another Australian court.

154 Another jurisdiction, In all cases, in fact, a decision of a New Zealand or Canadian court.

**Table 2**  
**Decisions by the Supreme Court of Victoria (SCV)**  
**on Other Judgements**

	<i>Distinguished</i>						<i>Overruled</i>
	Decision of Courts						Decision
Year <small>155</small>	SCV	HCA <small>156</small>	Austr <small>157</small>	UK	Other <small>158</small>	<i>Total</i>	SCV
1983	4	3	-	5	-	12	1
1984	7	-	4	8	-	19	-
1985	2	1	4	6	-	13	1
1986	2	-	3	1	-	6	1
1987	2	3	1	5	-	11	-
1988	2	2	-	-	3	7	2
1989	6	4	6	3	-	19	1
1990	5	2	1	8	-	16	-
<b>Total</b>	30	15	19	36	3	103	6

**Source:** ‘Table of Cases Judicially Considered’, Cumulative Supplement 1983–1989, Consolidated Index and Tables 1861–1982, *Victorian Law Reports*; *Victorian Law Reports*, 1990 vol.

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155 The years refer to the volume of the Victorian Reports in which the distinguishing or overruling decision is contained, rather than (necessarily) the year in which judgment was handed down.

156 High Court of Australia.

157 Another Australian court.

158 Another jurisdiction. In all cases, in fact, a decision of a New Zealand or Canadian court.

It should be noted that a court may distinguish several decisions in one case and that each decision distinguished has been counted. A single decision may also be distinguished on more than one subsequent occasion; again, each time the decision is distinguished it has been counted.

The 'Overruled' column shows the number of propositions of law overruled in the period, rather than the number of cases which overruled other cases, or the number of cases which were overruled eg if a subsequent decision overruled two earlier ones, and the two earlier decisions stood for different propositions of law, then they will have been counted twice; if the decisions were part of the same line of authority, however, then they will only have been counted once. This different basis for counting introduces a distortion in the ratio between overruled and distinguished cases, overstating the amount of distinguishing in comparison with the amount of overruling. The ratio of overruling to distinguishing shown by the two tables can be interestingly contrasted: it is far higher for the High Court (18 to 71) than for the Supreme Court (6 to 103). This could be interpreted as a matter of judicial style. However, there are structural reasons why this should not be surprising, as the High Court is the ultimate appellate court in Australia, and has the power to overrule both its own decisions and those of other Australian courts. The Supreme Court, on the other hand, if confronted with a High Court decision of which it disapproves, must either distinguish it or reluctantly follow it; if confronted with a decision of another Australian court of which it disapproves it can decline to follow it, but cannot overrule it, as the High Court can.

## **Conclusion**

Judicial law-making and judicial retrospectivity go hand in hand. As the above-mentioned examples emphasise, it is by no means rare. To a large extent the option of prospective judicial rule making is not available so that most judicial law making is effectively retrospective. The most the court can do is to signal the change so that the parties will be wary of relying on old decisions.

Judicial retrospectivity is less criticised than retrospective legislative law making for a number of reasons: it is seen to be more or less

inevitable, it is subject to constraints, and it is generally felt to be justified. However, the justification that retrospective judicial lawmaking makes the law more principled and coherent, is the same as the main justification for legislative retrospectivity. The constraints on judicial retrospectivity are generally framed to assist it live up to that justification. In fact, judicial retrospectivity is instructive in indicating the principles for justified retrospectivity of either kind.