COMMENT

STARE DECISIS AS APPLIED BY THE HIGH COURT TO ITS PREVIOUS DECISIONS

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In two recent cases before the High Court it has been argued that the Court should overrule one of its own previous decisions. In *Viro* v. *R.*[1] the issue was whether, in circumstances relating to self-defence, the High Court should follow a decision of the Privy Council[2] or its own decision in *R.* v. *Howe*,[3] while in *Queensland* v. *Commonwealth*[4] the Court was asked to reconsider its own previous decision in *Western Australia* v. *Commonwealth*.[5] This comment considers the decisions in which this question has been raised and attempts to determine what factors have led the Court to adhere to the principle of *stare decisis* and what factors have been relied upon to justify an exception.[6]

(a) *"Manifest Wrong" or "Fundamental Error"*

A factor influencing the Court to reconsider a previous decision has been the presence in that decision of what has been described as a "manifest wrong" or "fundamental error". The first use of the phrase "manifest wrong" was by Isaacs J. in *Australian Agricultural Co.* v. *Federated Engine Drivers and Firemen's Association of Australasia*[7] which, *inter alia*, considered the validity of an agreement between an organisation of employees and an employer which purported to prevent the parties to it or either of them from instituting proceedings in the Commonwealth Court of Conciliation and Arbitration. An earlier decision, *J.C. Williamson Ltd* v. *Musicians' Union of Australia*,[8] had held that such an agreement could and ought to be enforced by injunction. Isaacs J. analysed this decision and the question of overruling previous cases, and said that where a former decision was clearly wrong, and there were no circumstances counterveiling the primary duty of giving effect to the law as the Court found it, the real opinion of the Court should be expressed. He concluded that where the prior decision

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[1] (1978) 18 A.L.R. 257.

[2] *Palmer* v. *R.* [1971] A.C. 814.

[3] (1958) 100 C.L.R. 448.

[4] (1977) 16 A.L.R. 487.

[5] (1975) 134 C.L.R. 201.

[6] For some recent journal literature on this topic see: Bennett, "The High Court of Australia—Wrong Turnings" (1977) 51 A.L.J. 5; Prott, "Refusing to Follow Precedents: Rebellious Lower Courts and the Fading Comity Doctrine" (1977) 51 A.L.J. 288; St. John, "The High Court and the Privy Council; The New Epoch" (1976) 50 A.L.J. 389.

[7] (1913) 17 C.L.R. 261.

[8] (1912) 15 C.L.R. 636.

was "manifestly wrong", then, irrespective of consequences, "it [was] the paramount and sworn duty of this Court to declare the law truly".[9] The other members of the Court agreed that the earlier decision attempted to oust the jurisdiction of the Conciliation and Arbitration Court and that it should be overruled on the ground that it was contrary to public policy.[10]

The following year in *The Tramways' Case*[11] the High Court[12] was asked to reconsider its previous decision in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *ex parte Whybrow & Co.*[13] on the issue of whether it had jurisdiction to issue prohibition against the President of the Commonwealth Court of Conciliation and Arbitration. On the question of overruling the previous decision Griffith C.J. said that:

> it is impossible to maintain as an abstract proposition that the Court is either legally or technically bound by previous decisions. Indeed, it may in a proper case be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is manifestly wrong, as, for instance, if it proceeded upon the mistaken assumption of the continuance of a repealed or expired Statute, or is contrary to a decision of another Court which this Court is bound to follow; not, I think, upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter were *res integra*.[14]

Similarly Barton J. said that the Court was always able to listen to argument as to whether it ought to review a particular decision and that "the strongest reason for an overruling is that a decision is manifestly wrong, and its maintenance is injurious to the public interest".[15]

The principles enunciated in these decisions were affirmed in *Cain* v. *Malone*[16] where it was made apparent that nothing less than a manifest wrong would suffice if the Court was to overrule a former decision and in *Attorney-General (N.S.W.)* v. *The Perpetual Trustee Co. Ltd.*[17] In the latter case Dixon J. stressed several reasons for refusing to reconsider the earlier decision of *Commonwealth* v. *Quince*.[18] He said that:

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[9] (1913) 17 C.L.R. 261, 279.

[10] *Id.* 288 *per* Higgins J.; 290 *per* Gavan Duffy and Rich JJ. Powers J. at 292-293 agreed the Court had a duty to reverse it if it was shown to be wrong, but thought that in the circumstances of this case it was unnecessary to do so.

[11] *Ex parte the Brisbane Tramways Co. Ltd* (1914) 18 C.L.R. 54.

[12] Griffith C.J., Barton, Isaacs, Gavan Duffy, Powers and Rich JJ.

[13] (1910) 11 C.L.R. 1.

[14] (1914) 18 C.L.R. 54, 58.

[15] *Id.* 69; 70 *per* Isaacs J.; 83 *per* Gavan Duffy and Rich JJ. and 86-87 *per* Powers J.

[16] (1942) 66 C.L.R. 10, 15 *per* Latham C.J. and 15-16 *per* Rich J.

[17] (1952) 85 C.L.R. 237.

[18] (1944) 68 C.L.R. 227.

> the decision was reached only after a very full examination of the question. It cannot be said that any compelling consideration or important authority was overlooked or that the decision conflicts with well established principle or fails to go with a definite stream of authority. It is a recent and well considered decision upon what is evidently a highly disputable question. The question stands by itself. The decision does not affect some wider field of law so that its importance goes beyond the matter in hand. In my opinion the proper course to take is simply to follow the decision and apply it.[19]

Fullagar J. stated that the Court ought not to depart from decided cases "except in the light of clear and cogent reasoning or very definite superior authority".[20] However, in *Commonwealth* v. *Brisbane Milling Co. Ltd*,[21] the High Court was prepared to overrule its earlier decision in *Baume* v. *Commonwealth*.[22] Griffith C.J. said that:

> *Baume's Case*, which was not a considered judgment had proceeded upon a manifest misapprehension of the effect of sec. 2 of the *Judiciary Act*. . . . It follows that *Baume's Case* was wrongly decided and should be overruled. . . .[23]

The difficulty arising from the use of such expressions as "manifestly wrong", "plainly wrong" and "fundamental error" is that what may be regarded as such to one person may not be to another and it is perhaps the uncertainty of this subjective element that led to the criticism of their usage in *Queensland* v. *Commonwealth*.[24] Stephen J. described the use of such phrases as "merely pejorative", while Aickin J. in his judgment, after discussing the use of the phrase "manifestly wrong" in the cases, concluded that "the expression, used without some qualification or explanation, suggests a subjective criterion not easily applied to distinguish one opinion from another".[25] He did state, however, that the expression was "accurate and appropriate" to describe "cases which have been overtaken by subsequent decisions in the same field where a different approach has prevailed".[26] Thus, apart from cases of the type referred to by Aickin J., the use of the expressions "manifestly wrong", "fundamental error" and "plainly wrong" to justify overruling a previous decision of the Court in the future is unlikely.

(b) *Overruling Decisions of Long Standing*

The Court will take cognisance of previous decisions that have

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[19] (1952) 85 C.L.R. 237, 244.
[20] *Id.* 282.
[21] (1916) 21 C.L.R. 559.
[22] (1906) 4 C.L.R. 97.
[23] (1916) 21 C.L.R. 559, 565. With these views Gavan Duffy and Rich JJ. agreed and Barton J. at 570 reached the same result.
[24] (1977) 16 A.L.R. 487. This case is more fully considered later in the context of the Court overruling constitutional cases.
[25] *Id.* 515.
[26] *Id.* 517. See the later discussion of such cases under (e).

existed without challenge for a long period. In *James* v. *Commonwealth*[27] the plaintiff challenged the validity of the Dried Fruits Act 1928-1935, alleging that it was inconsistent with section 92 of the Constitution and the question was whether the Court should overrule its previous decision in *W. & A. McArthur Ltd* v. *Queensland*.[28] The Court however declined to reopen its previous decision because:

> Both the Commonwealth and the States, acting upon that case, have enacted legislation which, but for the decision, might be open to question. . . . Further, collective marketing of goods and competition between railway and motor services have assumed national importance in Australia, and important decisions have been given in this Court upon legislation affecting such matters and the relation of sec. 92 to that legislation. . . . The case has been acted upon for so long that this Court should now treat the law as settled.[29]

This principle was affirmed in the recent decisions of *Point* v. *Federal Commissioner of Taxation [No. 2]*[30] and *Geelong Harbour Trust Commissioners* v. *Gibbs, Bright & Co.*[31] In the former case the issue was whether the decision of a justice upon an appeal from a Board of Review was final and conclusive or whether an appeal could be brought to the Full High Court. The Court held that no appeal lay to the Full Court and, by so deciding, affirmed its earlier decision in *Watson* v. *Federal Commissioner of Taxation*.[32] Barwick C.J. stressed the fact that the earlier decision had been acted upon during the intervening years and was not of a kind that ought to be overruled because it was a decision upon a matter in respect of which Parliament could make a different provision.[33]

In the *Geelong Harbour Trust Case* a vessel of which Gibbs, Bright & Co. was the agent within the meaning of section 110 of the Geelong Harbour Trust Act 1928 (Vic.), broke loose from its moorings due to an exceptionally strong wind gust and caused damage to a beacon owned by the appellants. The question in issue was whether the ship's agents were liable under the section to make good the damage. In a previous decision,[34] the Court had said of a similar provision in the Harbour Boards Act (Qld) that it was only procedural, dealing with the mode in which a right of action already provided by the common law should be asserted, and did not create a new and extended liability. The

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[27] (1935) 52 C.L.R. 570.

[28] (1920) 28 C.L.R. 530, which held that the Commonwealth was not bound by s. 92.

[29] (1935) 52 C.L.R. 570, 589 *per* Starke J. Note also the comments at 586 *per* Rich J. and 593 *per* Dixon J.

[30] (1971) 124 C.L.R. 669.

[31] (1970) 122 C.L.R. 504.

[32] (1953) 87 C.L.R. 353.

[33] (1971) 124 C.L.R. 669, 671.

[34] *Townsville Harbour Board* v. *Scottish Shire Line Ltd* (1914) 18 C.L.R. 306.

Court rejected the contention that it should be overruled even though the House of Lords[35] had undercut the authority upon which the earlier decision rested. The important consideration for the majority of the Court[36] was that:

> in Australia a decision of this Court has stood without question for over fifty years and has, inevitably, been present to the minds of those responsible for legislation made during this time, including the Act now under consideration. Moreover, commerce has, no doubt, been conducted on the footing of the correctness of what this Court has decided. . . . In this field, reform is best left to Parliament by means of amending legislation with prospective effect only.[37]

The decision was affirmed by the Privy Council[38] where their Lordships expressed the view that:

> The law laid down by a judicial decision, even though erroneous, may work in practice to the satisfaction of those who are affected by it, particularly where it concerns the allocation of the burden of unavoidable risks between parties engaged in trade or commerce and their insurers. If it has given general satisfaction and caused no difficulties in practice, this is an important factor to be weighed against the more theoretical interests of legal science in determining whether the law so laid down ought now to be changed by judicial decision.[39]

Similarly in *Dickenson's Arcade Pty Ltd* v. *Tasmania*,[40] though the Court expressed dissatisfaction with its earlier decision in *Dennis Hotels Pty Ltd* v. *Victoria*,[41] each justice applied the principles it decided. The question in issue was whether Parts II and III of the Tobacco Act 1972 (Tas.), which concerned the imposition of licence fees and a consumption tax, were within section 90 of the Constitution. Counsel for the plaintiff submitted that that part of the decision in the *Dennis Hotels Case*, which established that the fee imposed by section 19(1)(a) of the Licensing Act 1958 (Vic.) for a victualler's licence was not a duty of excise, was incorrect. However the submission was rejected by the Court. Menzies J. said that:

> In any event I would not reopen either part of the decision in *Dennis Hotels Pty Ltd* v. *Victoria*. It is an important decision upon the faith of which States have ordered their affairs for some thirteen years.[42]

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[35] *Great Western Railway Co.* v. *Owners of S.S. Mostyn* [1928] A.C. 57 and *Workington Harbour and Dock Board* v. *Towerfield (Owners)* [1951] A.C. 112.
[36] McTiernan, Menzies and Kitto JJ.
[37] (1970) 122 C.L.R. 504, 518.
[38] (1974) 129 C.L.R. 576.
[39] *Id.* 582 *per* Lord Diplock, delivering the judgment of their Lordships.
[40] (1974) 130 C.L.R. 177.
[41] (1960) 104 C.L.R. 529.
[42] (1974) 130 C.L.R. 177, 212.

Other members of the Court[43] also stressed the fact that the decision had been accepted as authoritative in later cases and for this reason refused to reconsider the question.[44]

The final decision, and one more conveniently dealt with under this heading, is that of *Viro* v. *R.*[45] The relevant issue was whether the trial judge should have instructed the jury that they might return a verdict of manslaughter in circumstances where the defendant would have succeeded on a plea of self-defence but for the fact that he had used excessive force. The question was whether the High Court decision in *R.* v. *Howe*[46] or that of the Privy Council in *Palmer* v. *R.*[47] should be followed.

All members of the Court[48] agreed that the High Court was no longer bound by decisions of the Privy Council and a majority held that the decision in *Howe's Case* should be followed. Stephen J., in stating his preference for the decision in *Howe* said that: "That view was at the time no novelty in the law and has since been followed in a number of reported cases both in Australian jurisdictions and overseas".[49] Similarly Mason J. agreed that the doctrine enunciated in *R.* v. *Howe* was "not a novel development in the criminal law without any previous foundation in judicial decisions".[50] Jacobs J. also preferred the decision in *Howe* to that of the Privy Council in *Palmer*, as did Aickin J. who expressly stated his concurrence with the views of Stephen and Mason JJ.[51] Murphy J., although expressing dissatisfaction with the approach taken in both *Howe* and *Palmer*, said that the decision in *Howe* reflected the "persistent notion . . . that murder should be reserved for killings done with intent to kill . . . where there are no mitigating circumstances".[52]

Thus, the decision also illustrates the weight which the Court will attach to the fact that its previous decision was both consistent with earlier decisions and had been followed in subsequent cases.

(c) *The Position in Constitutional Cases*

The attitude of the Court to the application of the doctrine of *stare*

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[43] *Id.* 226 *per* Gibbs J.; 236 *per* Stephen J. and 240 *per* Mason J.

[44] Note also the dissenting judgment of McTiernan J. in *Commonwealth* v. *Cigamatic Pty Ltd* (1962) 108 C.L.R. 372, 380-381 in which he refused to overrule an earlier decision because it had long been acted upon, and the considerations taken into account by the majority in *R.* v. *Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 295-296 in invalidating certain provisions of the Conciliation and Arbitration Act, the validity of which had previously been assumed for 30 years.

[45] (1978) 18 A.L.R. 257.

[46] (1958) 100 C.L.R. 448.

[47] [1971] A.C. 814.

[48] Barwick C.J., Gibbs, Stephen, Mason, Jacobs, Murphy and Aickin JJ.

[49] 18 A.L.R. 257, 293.

[50] *Id.* 297.

[51] *Id.* 330.

[52] *Id.* 321.

decisis in constitutional cases has developed with the passage of time. It was first suggested that the doctrine may not be applied in constitutional cases in the same way as it is in other cases by Isaacs J. in the *Australian Agricultural Co. Case*,[53] where he said that there were good reasons why the doctrine of *stare decisis* "should not be so rigidly applied to the constitutional as to other laws".[54]

The next suggestion that the doctrine operated differently in constitutional cases was made in *Perpetual Executors & Trustees Association of Australia* v. *Federal Commissioner of Taxation*.[55] The question in issue was whether, in a partnership agreement, the deceased partner's share in the good will formed part of his dutiable estate. Latham C.J., delivering the judgment of the Court,[56] stated that the appeal must fail unless the Court was prepared to reconsider and overrule its earlier decision in *Trustees Executors & Agency Co. Ltd* v. *Federal Commissioner of Taxation*.[57] On the question of *stare decisis* the Court said that:

> in this Court, which is the highest court of appeal in Australia, the principle of *stare decisis* should be applied, save in very exceptional cases.... It may be that considerations are present in constitutional cases, where Parliament is not in a position to change the law, which do not arise in other cases.[58]

In *Hughes & Vale Pty Ltd* v. *New South Wales*,[59] the question was whether the State Transport (Co-ordination) Act 1931-1952 (N.S.W.) contravened section 92 of the Constitution. Three years earlier, in *McCarter* v. *Brodie*,[60] the High Court had held that the Act did not infringe section 92 and it was now contended that this decision should be overruled. A majority of the Court[61] rejected this contention; however it is necessary to consider only the views of the minority since it was they who were affirmed on appeal to the Privy Council.[62] Fullagar J. stated that "[i]t is, of course, in general, a very bad thing that decided cases should not be followed",[63] but nevertheless he felt in the circumstances that the constitutional importance of the decision being given and the grave potentialities flowing from *McCarter* v. *Brodie* were such as to warrant it being overruled. Similarly, Kitto J. said that "continuity and coherence in the law demand that, particularly in this Court, which

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[53] (1913) 17 C.L.R. 261.
[54] *Id.* 278.
[55] (1949) 77 C.L.R. 493.
[56] Latham C.J., Rich, Dixon, McTiernan and Webb JJ.
[57] (1944) 69 C.L.R. 270, which deemed goodwill part of the notional estate of the deceased.
[58] (1949) 77 C.L.R. 493, 496.
[59] (1953) 87 C.L.R. 49.
[60] (1950) 80 C.L.R. 432.
[61] Dixon C.J., McTiernan, Williams, Webb JJ.; Fullagar, Kitto and Taylor JJ. dissenting.
[62] (1954) 93 C.L.R. 1.
[63] (1953) 87 C.L.R. 49, 99.

is the highest court of appeal in Australia, the principle of *stare decisis* should be applied, save in very exceptional cases".[64] But in the end he too concluded that *McCarter* v. *Brodie* should be overruled,[65] as did Taylor J.[66] Before the Privy Council it was contended that their Lordships should dismiss the appeal and apply the principle of *stare decisis*.[67] Their Lordships, however, rejected this contention and instead affirmed the minority views expressed in the High Court.[68]

Similarly, in *Commonwealth* v. *Cigamatic Pty Ltd*[69] the Court[70] regarded the constitutional question as so significant that it overruled its earlier decision in *Re Foreman & Sons Pty Ltd; Uther* v. *Federal Commissioner of Taxation*[71] on the particular point in issue. That case had held that in a winding up pursuant to the Companies Act 1936 (N.S.W.) the rights of the Crown did not take priority over other creditors. Dixon C.J. said that:

> Believing, as I do, that the doctrine thus involved is a fundamental error in a constitutional principle that spreads far beyond the mere preference of debts owing to the Commonwealth, I do not think we should treat *Uther's* case as a decisive authority upon that question which we should regard as binding.[72]

Similarly, Menzies J. agreed that the constitutional importance of the decision warranted the overruling of the particular point in the earlier case. He said that:

> Were the matter not one of vital constitutional importance I would have been disposed to accede to the plea of *stare decisis*, notwithstanding the diversity of the paths whereby the members of the Court who constituted a majority arrived at their conclusion, but on such a fundamental matter a "clear conviction must find expression in the appropriate judgment".[73]

Five years earlier in *Victoria* v. *Commonwealth*[74] Dixon C.J., McTiernan and Kitto JJ. had declined to follow the decision in *South Australia* v. *Commonwealth*[75] concerning the constitutional validity of section 221(1)(a) of the Income Tax and Social Services Contribution Assessment Act 1936-1956 (Cth). Dixon C.J., with whom Kitto J. agreed,[76] expressed his reasons as follows:

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[64] *Id.* 102.
[65] *Id.* 105, 106.
[66] *Id.* 108.
[67] (1954) 93 C.L.R. 1, 8.
[68] *Id.* 34 *per* Lord Morton on behalf of their Lordships.
[69] (1962) 108 C.L.R. 372.
[70] Dixon C.J., Windeyer, Kitto, Menzies and Owen JJ.; McTiernan and Taylor JJ. dissenting.
[71] (1947) 74 C.L.R. 508.
[72] (1962) 108 C.L.R. 372, 377.
[73] *Id.* 389.
[74] (1957) 99 C.L.R. 575.
[75] (1942) 65 C.L.R. 373.
[76] (1957) 99 C.L.R. 575, 658.

> It is that I regard the decision as isolated, as receiving no support from prior decisions and as forming no part of what in one metaphor is called a stream of authority and in another a *catena* of cases. Secondly, I think the decision gives an application to the constitutional doctrine of incidental powers which may have great consequences and which I believe to be unsound. What I have said already in dealing in principle with the validity of s. 221(1)(a) will be enough to indicate why I say this. In the third place the question relates to the Constitution and falls within s. 74 and affects the States in many aspects besides "uniform tax".[77]

The most recent constitutional case involving a consideration of the doctrine of *stare decisis* is *Queensland* v. *Commonwealth*.[78] In that case the States of Queensland and Western Australia sought declarations that the provisions of the Senate (Representation of Territories) Act 1973 ("the Senate Act"), section 6 of the Northern Territory Representation Act 1922-1968, and section 18 of the Australian Capital Territory (House of Representatives) Act 1973, were beyond the powers of the Parliament of the Commonwealth and were invalid. Two years previously the Court in *Western Australia* v. *Commonwealth*[79] had held by a majority[80] that the Senate Act was valid. The result was that both of the Territories to which the Act applied were entitled to be represented in the Senate by two senators directly chosen by the people of the Territory voting as one electorate, the senators having all the powers, immunities and privileges of State senators. Similar provision had been made by section 6 and section 18 in respect of the House of Representatives.

The new challenge to the Senate Act could only succeed if the contentions made by the States of Queensland and Western Australia in favour of overruling the earlier decision were upheld by the Court. The approach taken by the Court varied. Mason, Jacobs and Murphy JJ. each affirmed the majority views they expressed in the previous decision.[81] The remaining four judges each preferred the minority view, but diverged in their application of the doctrine of *stare decisis*. Gibbs and Stephen JJ. held that they were bound by the doctrine and thus unable to grant the declarations sought, while Barwick C.J. and Aickin J. held that the previous decision should be overruled. The

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[77] *Id.* 615-616. See also 626 *per* McTiernan J. who held the earlier decision on s. 221(1)(a) to be manifestly wrong. Note also the obiter comments made by Gibbs J. in the *Dickenson's Arcade Case* (1974) 130 C.L.R. 177, 226 where he suggested that constitutional issues might be sufficient to justify overruling a previous decision.

[78] (1977) 16 A.L.R. 487. This case is fully examined in Part 3 of this Review, p. 375.

[79] (1975) 134 C.L.R. 201.

[80] McTiernan, Mason, Jacobs and Murphy JJ.; Barwick C.J., Gibbs and Stephen JJ. dissenting.

[81] The other judge in the majority, McTiernan J., resigned on 12 September 1976 and was replaced on 20 September 1976 by Aickin J.

comments made in regard to *stare decisis*, though obiter, provide an interesting insight into the attitude of current members of the Court.

In considering whether he ought to follow the decision of the majority in the earlier case, notwithstanding that he believed it to be wrong, Gibbs J. took into account several factors. He noted first that the Court was not bound by its own decisions, but said that it was "only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a justice may give effect to his own opinions in preference to an earlier decision of the court".[82] He said that a change in the constitution of the Court could not justify the review of an earlier decision. Nor could it be suggested, he said, that the earlier decision had failed to advert to any relevant consideration, that it overlooked any opposite decision or principle, or that a later decision was in conflict with it. Another factor of importance was that the earlier decision had been acted upon; senators had been elected to represent the Territories. Thus Gibbs J. concluded that in all the circumstances of the case it was his duty to apply the doctrine of *stare decisis* and to follow the earlier decision.

Stephen J. agreed that the Court was able to review its previous decisions but said that it would only do so in exceptional circumstances after a careful scrutiny of the precedent authority in question and a full consideration of the consequences. Similarly he agreed that the Court's ability to reconsider earlier decisions was of particular importance in the field of constitutional law. Three factors influenced Stephen J. to apply the doctrine of *stare decisis*. First, was the fact that the earlier decision had recently been fully argued before a Bench of seven on the very matter now in question. Next was the nature of the subject matter for decision which he said involved the interpretation of words "upon which different minds might reach different conclusions, no one view being inherently entitled to any pre-eminence as conforming better than others to principle or to precedent".[83] Lastly, was the fact that as a result of the earlier decision senators had been elected to represent the peoples of the Territories. For these reasons Stephen J. said he was bound by the earlier decision, notwithstanding "that the arguments of counsel in the present cases would not have led me to decide that case at all differently".[84]

In contrast to these views, both Barwick C.J. and Aickin J. overruled the previous decision in *Western Australia* v. *Commonwealth*.[85] Barwick C.J. affirmed the views he expressed in the earlier case and rejected as reasons for following the majority in that case the fact that it was a recent decision and that there had been a change in the

[82] (1977) 16 A.L.R. 487, 497.
[83] *Id.* 500.
[84] *Id.* 501.
[85] (1975) 134 C.L.R. 201.

constitution of the Bench in the interim. He acknowledged that to depart from a previous decision was "a grave matter and a heavy responsibility",[86] but said that if a justice was convinced of its error, his duty to express what is the proper construction was paramount.[87] He emphasised this view by stating that:

> it is fundamental to the work of this court and to its function of determining, so far as it rests on judicial decision, the law of Australia appropriate to the times, that it should not be bound in point of precedent but only in point of conviction by its prior decisions. In the case of the Constitution, it is the duty, in my opinion, of each justice, paying due regard to the opinions of other justices past and present, to decide what in truth the Constitution provides.[88]

Aickin J. agreed that the Court's "power to overrule [its previous decisions] should be exercised only with great caution and for 'strong reasons' "[89] and concluded also that the earlier decision was erroneous. His judgment provides a comprehensive review of the main cases which have considered the application of the doctrine of *stare decisis*. His Honour summarised his findings as follows:

> The cases to which I have referred above show that some general considerations have emerged which assist in the determination of the question whether a previous constitutional decision regarded as erroneous may, or should, be overruled. The first is that there should be no inhibitions about overruling a decision, the error of which has been made manifest by later cases which however have not directly overruled it. The second is that the Court will be slow to overrule, or should refuse to overrule, cases which "go with a definite stream of authority" and do not "conflict with well established principle". The third is whether the prior decision can be confined as an authority to the precise question which it decided or whether its consequences would extend beyond that question. The fourth is whether the prior decision is isolated "as receiving no support from prior decisions and as forming no part of what in one metaphor is called a stream of authority and in another a *catena* of cases". The fifth is whether it concerns "so fundamental a provision of the Constitution", or involves a question of such "vital constitutional importance", that its consequences are likely to be far reaching even though not immediately foreseeable in detail.[90]

To these considerations, which were said not to be exhaustive, Aickin J. added the fact of the abolition of the right of appeal to the Privy

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[86] (1977) 16 A.L.R. 487, 492.
[87] *Ibid.* He cited in support of this view the words of Isaacs J. in the *Australian Agricultural Company Case* (1913) 17 C.L.R. 261, 278.
[88] *Ibid.*
[89] (1977) 16 A.L.R. 487, 514.
[90] *Id.* 522.

Council[91] which made the High Court in all respects a court of ultimate appeal. He said that the fact that error could no longer be corrected elsewhere must to some extent change the Court's approach to the overruling of its own decisions. In the light of these considerations Aickin J. concluded that the earlier decision provided not the justification for its continued existence but the proper basis for it being overruled.

It is still clear following this decision that the doctrine of *stare decisis* is of paramount importance to the Court in determining whether it should overrule one of its own previous decisions. Three justices affirmed their earlier views, two with contrary views felt themselves constrained by the doctrine to affirm the earlier majority decision and two, in dissenting, did so not through any disregard for the doctrine but because they felt such action was warranted in the circumstances of the particular decision in question.

These authorities also show how the attitude of the High Court has changed from the initial suggestions made in some early cases that constitutional issues may provide an exception to the doctrine of *stare decisis* to one whereby the Court is justified in overruling one of its previous decisions in appropriate circumstances on the basis that constitutional issues are involved.[92]

(d) *Previous Decisions in which the High Court was Evenly Divided in Opinion*

In *Colonial Sugar Refining Co. Ltd* v. *Attorney-General for the Commonwealth*[93] and *Gray* v. *Dalgety Ltd*[94] it was pointed out that previous decisions of the Court which were evenly divided in opinion would not generally be considered of great authority. This view was affirmed in *Tasmania* v. *Victoria*,[95] which involved a challenge to section 4 of the Vegetation & Vine Diseases Act 1928 (Vic.). Section 4 empowered the Governor in Council by proclamation to prohibit, *inter alia*, the importation into Victoria of any vegetable likely to introduce disease or insect. The Court, in holding that a proclamation made in respect of potatoes imported from Tasmania was invalid because it contravened section 92 of the Constitution, declined to follow its earlier decision in *Ex parte Nelson [No. 1]*[96] where the Court had been evenly divided in opinion. Rich J. said of *Ex parte Nelson* that:

> The decision was given upon an equal division of opinion in the Court and is not a precedent which according to the rule adopted

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[91] Privy Council (Limitation of Appeals) Act 1968 and Privy Council (Appeals from the High Court) Act 1975.

[92] See also the comments by Barwick C.J. in *Damjanovic* v. *Commonwealth* (1968) 117 C.L.R. 390, 396 and Latham C.J. in the *Perpetual Executors Case* (1953) 87 C.L.R. 49, 102.

[93] (1912) 15 C.L.R. 182, 234 *per* Griffith C.J.

[94] (1916) 21 C.L.R. 509, 529 *per* Barton J. and 551 *per* Higgins J.

[95] (1935) 52 C.L.R. 157.

[96] (1928) 42 C.L.R. 209.

> by the Court of Appeal in England is binding upon the Court in subsequent cases.[97]

Dixon J. agreed that the decision was not "binding". He said that it did not "become a precedent which in this Court has authority".[98] These views were also affirmed in *Long* v. *Chubbs*[99] and *Western Australia* v. *Hamersley Iron Pty Ltd [No. 2]*.[1]

(e) *Overruling Previous Decisions in the Light of Later Authority*

It is in the cases discussed in this section that the High Court is best able to justify the overruling of one of its own previous decisions on the ground that it is manifestly wrong. The reason is best illustrated by example. In *Pilkington* v. *Frank Hammond Pty Ltd*[2] the issue was whether the respondent company, in carrying goods from Rocherlea (Tasmania) to Bell Bay (Tasmania) to place them on a ship for Melbourne, was engaged in inter-State trade and entitled to be protected in that carriage by section 92. A majority of the Court[3] held that each carrier for reward who co-operated in the movement of goods across State boundaries as part of an entire transport operation was entitled to the protection of section 92 in respect of that part of that operation which he had performed although his activities were wholly confined within one State, and by so holding overruled the earlier decision of the Court in *Hughes* v. *Tasmania*.[4] There merchants carrying on business in Hobart bought fruit from sellers in mainland States. The course of trade was for sellers to ship the fruit to ports in Northern Tasmania which, on arrival, was collected by an agent acting on behalf of the merchants and transported to Hobart. The decision, which was upon a case stated that took no account of the trade of the Hobart merchants, was that the carrier himself was not engaged in inter-State trade and therefore received no protection from section 92 from the incidents of the business of carrying under Tasmanian law.

A review of the majority judgments in *Pilkington's Case* clearly shows that by 1974 the Court was of the opinion that its earlier decision in *Hughes' Case* was no longer good law because the principle which was there enunciated had been criticised and distinguished often in the intervening nineteen years as the Court developed its view as to the

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[97] (1935) 62 C.L.R. 157, 173.

[98] *Id.* 179.

[99] (1935) 53 C.L.R. 143, 151-152. See also the decision in *Metal Trades Employers' Association* v. *Amalgamated Engineering Union* (1935) 54 C.L.R. 387, 407 *per* Latham C.J.; 416 *per* Rich and Evatt JJ.; 435-436 *per* Dixon J. and 440 *per* McTiernan J.

[1] (1969) 120 C.L.R. 74, 82-83 *per* Kitto J. and 85 *per* Menzies J.

[2] (1974) 131 C.L.R. 124.

[3] Barwick C.J., Gibbs, Stephen, Mason and Jacobs JJ.; McTiernan and Menzies JJ. dissenting.

[4] (1955) 93 C.L.R. 113.

constitutional protection afforded by section 92 to segmented transportation across the boundary of the State.

In *Russell* v. *Walters*,[5] two years after *Hughes' Case*, the Court purported to explain and distinguish the earlier decision. Immunity was there granted to an inter-State trader in fruit who picked up his fruit ex ship from Burnie (Tasmania) and carried it to Launceston (Tasmania). The Court[6] said:

> The plaintiff in *Hughes* v. *State of Tasmania* was undoubtedly engaged in intra-State trade. The defendant Walters was undoubtedly engaged in inter-State trade up to the point when his goods were landed at Burnie. The question is whether he had ceased to be so engaged before his vehicle entered an area for which it was not licensed. If he had so ceased, he must, one would think, have so ceased when the goods were landed at Burnie.[7]

Later the Court said:

> we are of opinion that the character of inter-State commerce attached to the journey of the fruit in question from the time of its departure from Deacon's premises at the Victoria Market in Melbourne to the time of its arrival at Walters' premises in Launceston. The end and object in view from the inception of the transaction was the arrival of the fruit at Walters' premises in Launceston. It was essentially a Melbourne-Launceston transaction. The intended destination of the fruit, when it left Victoria Market, was Launceston.[8]

This ground of distinction raises problems. Why the carrier in that case was regarded as "contributing to the single end" of a transport of goods from Victoria Market to Launceston and not the carrier from the Tasmanian port in *Hughes' Case* is hard to understand. Each seems to have been contributing to the performance of a "single journey in contemplation". Gibbs J. in *Pilkington's Case* said of the purported distinction that:

> in *Hughes* v. *Tasmania*, as in *Russell* v. *Walters*, the "end and object in view from the inception of the transaction" . . . was the arrival of the fruit at the merchants' premises and it would seem to follow that as a matter of practical reality, and viewed from a business standpoint, the inter-State carriage in that case also continued until the fruit reached its intended destination in the merchants' stores.[9]

In 1961 in *Simms* v. *West*[10] an agent purchasing sawn timber in Queensland for a principal in Sydney accepted the obligation to trans-

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[5] (1957) 96 C.L.R. 177.
[6] Dixon C.J., McTiernan, Webb, Fullagar, Kitto and Taylor JJ.
[7] (1957) 96 C.L.R. 177, 183.
[8] *Id.* 184.
[9] (1974) 131 C.L.R. 124, 171.
[10] (1961) 107 C.L.R. 157.

port the timber from Ravenshoe to a shipping agent at Cairns for shipment to Sydney. The Court[11] held that the carriage of the timber from Ravenshoe to the mills in Sydney formed part of a continuous inter-State operation in the carriage of goods and was entitled to the protection of section 92. The Court applied *Russell* v. *Walters* and distinguished the decision in *Hughes' Case* on the basis that there the carrying activities of the carrier himself formed no part of inter-State trade and commerce and that even though the goods being transported by the carrier were still in the course of inter-State trade, that circumstance provided no foundation for the proposition that the exaction of charges from the carrier constituted an interference contrary to section 92. However this ground of distinction does not appear to stand up under close analysis. The burden of which the carrier complained in *Hughes' Case* was not the financial exaction from him as the Court in *Simms* v. *West* alleged,[12] but rather that the legislation forbade him and the owner of the fruit from using a vehicle to carry the fruit to Hobart except with the permission of the State. Indeed, it could not be moved from the wharf except by such permission and in fact it was such an operation of the legislation which the Court found obnoxious to section 92 in *Simms* v. *West*. Thus, the effect of the decision in *Simms* v. *West* was that "the immunity of the carrier was placed on the inter-State trade of the owner of the goods being carried, rather than directly upon the trade of the carrier himself" (as had been the case in *Hughes' Case*).[13]

Notwithstanding the decision in *Simms* v. *West*, two years later in *Bell Bros Pty Ltd* v. *Rathbone*[14] the Court adopted the view that it was the carrier's trade (and not that of the owner) which attracted immunity because it formed part of an entire operation of inter-State transportation. In that case the carrier, who conducted business in Western Australia, entered into an engagement to carry timber from a mill in Western Australia owned by a timber merchant to the merchant's yard in Melbourne and in the course of that trade, the carrier transported the timber from the mill to Fremantle for shipping to Melbourne. The Court[15] held that in carrying the timber from the mill to Fremantle, the carrier was engaged in the performance of a transaction under the protection of section 92 and thus was not obliged to obtain a licence under the relevant Western Australian legislation. Again *Hughes' Case* was distinguished, first, on the ground that the contract to carry the fruit from northern Tasmania to Hobart did not involve an inter-State element and, second, on the ground that the complaint was against a financial exaction and not against a prohibition of the carriage of

[11] Dixon C.J., Kitto, Taylor and Windeyer JJ.; McTiernan J. dissenting.
[12] (1961) 107 C.L.R. 157, 162 *per* Dixon C.J. and 165 *per* Taylor J.
[13] (1974) 131 C.L.R. 124, 140 *per* Barwick C.J.
[14] (1963) 109 C.L.R. 225.
[15] Dixon C.J., McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ.

goods. It is interesting to note also of the *Bell Bros Pty Ltd Case* that even though the Court shifted the immunity of the carrier from the inter-State trade of the owner to that of the carrier himself which was the reverse of the effect in *Simms* v. *West*, the Court sought to rely on *Simms* v. *West* for the conclusion it reached! Thus it seems that the suggested distinction of *Hughes' Case* from *Simms* v. *West* and *Bell Bros Pty Ltd* v. *Rathbone* is founded upon a misdescription of what was the real matter in suit in *Hughes' Case*. The questions asked in the special case stated by the parties in *Hughes* for the opinion of the Full Court and the arguments submitted on behalf of *Hughes* as set out in the report clearly indicate that the scope of the case was not limited to a complaint against the financial exaction as was alleged in subsequent cases but in fact extended to a complaint against the legislation which required a discretionary licence, as well as a payment therefor.

The validity of the decision in *Hughes' Case* was weakened further in 1972 by two other decisions of the High Court. In the first, *Brambles Holdings Ltd* v. *Pilkington*,[16] the appellant company was contracted to transport goods from a mill in Devonport (Tasmania) to consignees in Sydney. In performance of this obligation the appellant carried the goods in its own vehicles from the mill to the railyards at Devonport, where they were loaded in a railway container and carried by the Government Railways of Tasmania to Hobart. There the goods were transferred to a sea container and shipped to Sydney. It was contended on behalf of the respondent that the decision in *Hughes' Case* was correct, but without any express reference to that decision, the Court[17] in effect rejected the contention when it held that

> the carriage of the goods by the appellant from the mill to the rail at Devonport was in the course of inter-State trade and commerce. It was none the less so because for the commercial reasons we have mentioned the goods, at a later stage in their movement to their inter-State destination, had to be removed from the railway container and placed in the shipping container.[18]

The contrary view that had been expressed earlier in *Hughes' Case* was ignored. The second decision was that of *Holloway* v. *Pilkington*[19] where an agent of a carrier of goods from the mainland to various ports of Tasmania had been instructed to collect goods at Burnie (Tasmania) from ships arriving from Melbourne and to deliver them to their destinations in other parts of Tasmania. In the course of delivering certain goods, he took them to his depot at Wivenhoe for sorting and repackaging in a more convenient form for carriage to Stanley. Notwith-

[16] (1972) 126 C.L.R. 524.
[17] Barwick C.J., Menzies, Windeyer, Walsh and Gibbs JJ.
[18] (1972) 126 C.L.R. 524, 528.
[19] (1972) 127 C.L.R. 391.

standing the fact that the goods were sorted and repacked, the Court[20] held that

> the movement of the plant and equipment from Melbourne, through Burnie and Wivenhoe, to Stanley was an inter-State operation and to prevent the appellant from carrying out part of that inter-State movement unless it had obtained a licence under the *Traffic Act* . . . would amount to an unconstitutional interference with the freedom of inter-State trade and commerce.[21]

The Court in reaching their decision affirmed the earlier views expressed in *Simms* v. *West* and *Bell Bros Pty Ltd* v. *Rathbone*, but distinguished once again the decision in *Hughes' Case*, and in fact did so in an off-hand way. The Court said of *Hughes' Case* that:

> The plaintiff in that case, unlike the appellant in this case was not the agent of a carrier who had an obligation of through carriage of the goods. He was the agent of a purchaser who, having purchased fruit to be brought from the Mainland to the Tasmanian coast, was bringing his goods to his place of business in Hobart. Whether or not that difference in the facts is sufficient to distinguish that case from this need not be decided in order to dispose of this case.[22]

Having regard to the cases already referred to and the principles enunciated in them, the difference in the facts of *Hughes' Case* and those of *Holloway's Case* does not constitute any ground of distinction between those two cases.

By the time *Pilkington* v. *Frank Hammond Pty Ltd* was decided in 1974 there were in existence no less than five decisions which had either sought to distinguish or to ignore the earlier views expressed in *Hughes' Case* and therefore, in the light of these decisions, the Court decided finally to overrule it. Barwick C.J. considered the cases subsequent to *Hughes' Case* and criticised the fine distinctions that had been drawn and which in his opinion lacked substance. He felt *Hughes' Case* to be plainly wrong and concluded after reviewing the authorities that:

> I am of the opinion that neither the actual decision nor the reasons given therefore in *Hughes* v. *Tasmania* are now supportable. The decision and the reasons are, in my opinion, quite inconsistent with the later decisions to which I have referred and the reasons which support them; and in my respectful opinion are not in accordance with the Constitution. It is now appropriate, in my opinion, that the case be expressly overruled.[23]

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[20] Barwick C.J., Menzies, Windeyer, Walsh and Gibbs JJ.
[21] (1972) 127 C.L.R. 391, 394.
[22] *Id.* 395.
[23] (1974) 131 C.L.R. 124, 151.

Gibbs J. concluded that: "It ought now to be recognized that the decision in *Hughes* v. *Tasmania*, that the activities of the carrier in that case were not entitled to the protection of s. 92, is inconsistent with the later authorities and in the light which those authorities provide must be regarded as erroneous."[24] Similarly, Jacobs J. said:

> that case [had] been so often distinguished in subsequent cases that it is very doubtful whether the conclusion or any substantial part of the reasons now affords a continuing useful precedent. In so far as the reasoning was based on an examination of the carrier's trade to the exclusion of consideration of the trade commerce and intercourse of the owner of the goods that reasoning cannot stand with *Bell Bros. Pty. Ltd.* v. *Rathbone* and probably not with *Russell* v. *Walters* and *Simms* v. *West*. The result in that case would seem to me only to be justifiable on the basis that the transit from the other States to Tasmania was at an end in such a way that the goods had become "part of the mass of property within the State" (*Fox* v. *Robbins* [(1909) 8 C.L.R. 115 at p. 124]). This concept involves many problems of refinement but the facts in *Hughes* v. *Tasmania* do not appear to bear out any such view of the case. It is better that *Hughes* v. *Tasmania* be regarded as overruled by the application of the [reasons] applied in the later cases to which I have referred.[25]

The other members of the Court expressed the same view.[26]

Two further cases which culminate this process of attitudinal change in the Court are *R.* v. *Foster; ex parte Eastern and Australian Steamship Co. Ltd*[27] and *Strickland* v. *Rocla Concrete Pipes Pty Ltd.*[28] It is sufficient for present purposes however to note only that the same process occurred in respect of the cases which they overruled[29] as had occurred with *Hughes' Case.*

In conclusion it can be said that where the High Court, in attempting to fit an earlier decision of its own into a particular line of reasoning, resorts to making fine distinctions of fact which have no real justification or to ignoring the decision completely, then that decision is likely to be overruled on the ground that it is manifestly wrong in the light of the subsequent line of authority. Such circumstances therefore constitute a valid exception to the doctrine of *stare decisis.*

(f) *The Engineers' Case*[30]

The *Engineers' Case* was concerned with the question of whether a

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[24] *Id.* 175.
[25] *Id.* 201.
[26] *Id.* 180 *per* Stephen J. and 193 *per* Mason J.
[27] (1959) 103 C.L.R. 256.
[28] (1971) 124 C.L.R. 468.
[29] *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association [No. 3]* (1920) 28 C.L.R. 495, and *Huddart Parker & Co. Pty Ltd* v. *Moorehead* (1909) 8 C.L.R. 330.
[30] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 289.

dispute between an organisation of employees and a Minister of the Crown for a State acting as an employer under the authority of a statute of that State amounted to an "industrial dispute" within the meaning of section 51(5) of the Constitution. The Court[31] reviewed a large number of cases and noted "the utmost confusion and uncertainty"[32] existing between them concerning the application and reliance upon the State instrumentalities immunity doctrine. Therefore, using these difficulties and contradictions as justification, the Court held that an "industrial dispute" existed and thereby laid the doctrine to rest and effectively overruled the decisions in *Deakin* v. *Webb*[33] and *Baxter* v. *Commissioner of Taxation*[34] (in so far as they decided that the Income Taxation Act of Victoria did not validly extend to tax moneys that had been received as Commonweath salary) and the *Railway Servants' Case*.[35] In reaching their decision the Court said:

> We have anxiously endeavoured to remove the inconsistencies fast accumulating and obscuring the comparatively clear terms of the national compact of the Australian peoples; we have striven to fulfil the duty the Constitution places upon this Court of loyally permitting that great instrument of government to speak with its own voice, clear of any qualifications which the people of the Commonwealth or, at their request, the Imperial Parliament have not thought fit to express, and to clear of any questions of expediency or political exigency which this Court is neither intended to consider nor equipped with the means of determining.[36]

Higgins J. agreed that the previous decisions should be overruled but did so on the basis that they were "manifestly wrong".[37]

(g) *The Resurrection of Foggitt Jones*

In *Duncan* v. *Queensland*[38] the Court[39] held on 25 October 1916 that the Meat Supply for Imperial Uses Act 1914 (Qld) was not contrary to section 92 of the Constitution. Five months previously, on 5 May 1916, the Court in *Foggitt, Jones & Co. Ltd* v. *New South Wales*[40] had reached a contrary result in respect of an identical New South Wales statute. The most interesting comment made by the Court in overruling *Foggitt's Case* was that of Griffith C.J. when he said:

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[31] Knox C.J., Isaacs, Rich and Starke JJ.
[32] (1920) 28 C.L.R. 129, 159.
[33] (1904) 1 C.L.R. 585.
[34] (1907) 4 C.L.R. 1087.
[35] *Federated Amalgamated Government Railway and Tramway Service Association* v. *N.S.W. Railway Traffic Employees' Association* (1906) 4 C.L.R. 488.
[36] (1920) 28 C.L.R. 129, 160.
[37] *Id.* 170.
[38] (1916) 22 C.L.R. 556.
[39] Griffith C.J., Higgins, Gavan Duffy, Powers and Rich JJ.; Barton and Isaacs JJ. dissenting.
[40] (1916) 21 C.L.R. 351.

> The conclusion at which I have arrived is inconsistent with the decision of this Court in the case of *Foggitt, Jones & Co. Ltd* v. *New South Wales*. . . . That case was very briefly and, I regret to say, insufficiently argued and considered, on the last day of the Sydney Sittings. . . . The arguments which now commend themselves to me as conclusive did not then find entrance to my mind. In my judgment that case was wrongly decided, and should be overruled.[41]

Four years later the saga continued when in *W. & A. McArthur Ltd* v. *Queensland*[42] the High Court overruled *Duncan's Case* and resurrected the decision in *Foggitt's Case*. The majority of the Court[43] were of the opinion that *Duncan's Case* was wrong in law and that to profess to distinguish the decision in *Foggitt's Case* would be to create a real inconsistency. The Court said:

> It would leave standing two decisions that are not really reconcilable. It would embarrass both Commonwealth and States with respect to their Constitutional position in relation to interstate trade, commerce and intercourse. It would make the validity or invalidity of State legislation depend on whether a particular form of words had been used. . . . The only course open to us is to say that, having regard to the provisions of sec. 92 of the Constitution, *Duncan's Case* was not, in our opinion, rightly decided, and that the Constitution was correctly interpreted in the case of *Foggitt, Jones & Co.*[44]

Both Higgins and Gavan Duffy JJ. felt that the Court was bound by its previous decision and therefore refused to overrule *Duncan's Case*.[45]

These cases illustrate the absurd consequences that might result from the Court improperly refusing to apply the doctrine of *stare decisis*, namely that:

> "Great inconvenience and, therefore, impropriety" follow from "adopting a course which tends to make the law fluctuate according to the opinions of particular judges."[46]

(h) *Conclusion*

This review of the cases indicates some of the considerations which the Court may take into account when applying the doctrine of *stare decisis* in circumstances where it has been contended that one of its previous decisions should be overruled. They can be listed as follows:

(i) Whether the previous decision was based on the mistaken assumption of the continuance of a repealed or expired statute;

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[41] (1916) 22 C.L.R. 556, 581-582.
[42] (1920) 28 C.L.R. 530.
[43] Knox C.J., Isaacs, Starke and Rich JJ.
[44] (1920) 28 C.L.R. 530, 556; see also 569 *per* Rich J.
[45] *Id.* 564 *per* Higgins J. and 569 *per* Gavan Duffy J.
[46] *Waghorn* v. *Waghorn* (1942) 65 C.L.R. 289, 292 *per* Rich J., citing *Lozon* v. *Pryse* (1840) 4 My. and Cr. 600, 617; 41 E.R. 231, 237.

(ii) Whether maintenance of the previous decision is injurious to the public interest;

(iii) Whether the decision "conflicts with well-established principle or fails to go with a definite stream of authority";

(iv) Whether the decision relates to "so fundamental a provision of the Constitution", or concerns a question of such "vital constitutional importance", that its consequences are likely to be far reaching even though not immediately foreseeable in detail;

(v) Whether it is a recent and well-considered decision which "was reached only after a full examination of the question";

(vi) Whether the decision stands by itself without affecting some wider field of law and forming no part of "what in one metaphor is called a stream of authority and in another a *catena* of cases";

(vii) Whether the previous decision has existed without challenge for a long period and become the basis of government and/or commercial activity;

(viii) Whether the situation resulting from a previous decision can be rectified by Parliament;

(ix) Whether the previous decision was one in which the Court was evenly divided; and

(x) Whether the previous decision has been shown to be wrong in the light of later authority or lacking in uniformity with existing authority.