# Session 2 – SOURCES OF LAW: CASE LAW

# Basic principles of the doctrine of precedent

* Rules of the common law are derived from past cases (judicial decisions). Judges decide cases on the basis of legal rules determined in previous cases with similar facts: *stare decisis –* treating ‘like cases alike’.
* But can one case really be ‘like’ another case?
* On one level, Yes
* On another level, Never
* So for practical purposes, Maybe

= Doctrine of precedent is complex

* Basic features of the doctrine of precedent (*Laying Down the Law* parag 6.9):
* Each court is bound by decisions of courts higher in its hierarchy
* A decision of a court in a different hierarchy or lower in the same hierarchy may be ‘persuasive’ but not binding
* Generally a court will not consider itself bound by its own past decisions but will depart from them only with reluctance
* Only the *ratio decidendi* (‘reason for the decision’) of a past case is binding
* *Obiter dicta* (‘remarks in passing’) are not binding but may be persuasive
* Precedents do not lose their force by lapse of time
* Case law may be overridden by legislation
* So we need to understand:
* What is the court ‘hierarchy’
* Where/how can I get hold of a court decision
* What is *ratio*
* What is *obiter*

# Court hierarchies

* (Simplified) **FEDERAL** HIERARCHY**:**

Federal Circuit Court >>>> Family Court – single judge / appeal division (family matters) *or* Federal Court single judge / full court (other matters) >>> High Court of Australia

***Plus:***

Magistrates Court (territories) or Magistrates / District Courts (states – on federal matters) >>> Supreme Court of Territory / State – single judge or full court/ court of appeal >>> Federal Court Full Court >>> High Court of Australia

*Plus:*

AAT appeals go to the Federal Court (but could be remitted to FCC)

**NOTE** that the Federal Circuit Court and the Family Court are due to be merged on 1 September 2021. See more here: <https://www.ag.gov.au/legal-system/courts/structural-reform-federal-courts>

* (Simplified) **STATE** HIERARCHY**:**

Local Courts (*incl Magistrates Court / Small Claims / Coroners Court / Court of Petty Sessions / Children’s Court*) >>> District / County Courts >>>> State Supreme Court – Single Judge (*Courts / tribunals of civil & specialist jurisdiction*) >>> State Supreme Court – Court of Appeal / Full Court >>> High Court of Australia

* Refer to *Laying Down the Law* A2-A4.

# Finding a past case

* Record of decision – critical to development of precedent and body of legal rules based on past cases
* Found in law reports. Can have authorised/unauthorised reports and general/specialist reports.
* Need to understand citation method to understand how to find a case. Citation contains:
* parties’ names (ie, the people in dispute)
* date (NB depending on whether there are square brackets or round brackets, the year may or may not be the year in which the case was handed down)
* (for some reports) a volume number
* abbreviation of the law report
* page number where case starts
* Some judgments are ‘unreported’ – mostly use ‘medium neutral citation’.

# Identifying *ratio* and *obiter*

* Need to know first how to read and analyse a case.

# Reading and analysing cases

* Two methods for doing a case analysis - a longer version and a shorter version (see *Laying Down the Law* parag 6.4).
* Best understood by doing one – will do this in the live Zoom session.

# Identifying the *ratio* and *obiter*

* *Ratio / rationes:*
* ‘the reason(s) for deciding’ – the legal principle(s) in relation to the facts of the case which the court has relied on in coming to its decision
* not always clear or easy to distil
* more realistic to say that *ratio* determined / made clear by subsequent cases
* may be stated at higher and lower levels of generality eg *Donoghue v Stevenson*
* within 4 years - principle applied to a manufacturer of clothing (*Grant v Australian Knitting Mills Ltd* (1936)).
* Within 30 years – principle applied to an architect of a shire hall as the “manufacturer” of the hall’s plans and drawings (*Voli v Inglewood Shire Council* (1962))
* *Obiter dictum / dicta*
* a ‘passing remark’
* *not* everything the judge says in a case aside from *ratio*.
* usually a discussion of a legal rule that is not strictly applicable on the facts of the case
* not binding, but may be persuasive (depending on seniority of court)

# Exploring some of the nuances of case law

# How to ‘avoid’ precedents

* Mostly not really methods of *avoiding* precedents – rather ways of saying that a given precedent is not binding in the particular circumstances
* Recap some of these:
* Precedent is distinguishable on the facts
* Statement of law the earlier case (ratio) has been stated too widely and should be more confined to its facts
* Statement of law in earlier case is obiter dictum and so the principle is not a binding precedent
* Precedent should not be applied due to changed social conditions
* Precedent is unsatisfactory
* Precedent is wrongly decided – per incuriam – ‘want of care’
* Importance of a **right of appeal** for system of precedent to work
* High Court never bound by own decisions but only departs reluctantly – see *John v Federal Commissioner of Taxation* (1989) 166 CLR 417.

# Judicial decision-making

* Doctrine of precedent not as rigid as it appears - space for creativity exists (at least at appellate level)
* Traditional view of role of judges – legal formalism and the ‘declaratory theory’ of the common law: - judges’ ‘creative’ role limited to being able to declare the law where it was unsettled or apply the existing law to new circumstances.
* Legal realism view – 20th century movement: emphasis on ‘choices’ facing judges’ in their decision-making which allow other factors (eg policy) to enter into the equation, meaning judges do ‘make’ law
* Modern view **-** accepted that judges do make law within proper limits and subject to the legislature; judges have *choices* but these are not completely unbridled and more often than not the existing authorities and principles point the judge towards a ‘correct’ choice (cf ‘judicial activism’ which is a critics’ term for excessive, illegitimate innovation]. They all work within certain shared parameters but do have their own perspectives and approaches to their task.
* Within modern view, different positions exist on extent of choices available to a judge eg. Heydon J v Kirby J. It is a spectrum. And judges don’t always appear to conform to the ‘position’ that is typically ascribed to them!
* ‘The Case of the Speluncian Explorers’ – famous fictional teaching tool illustrating different judicial approaches to reasoning – posted as optional extra reading on course Wattle page.