

2005

## Rule of law, separation of powers and judicial decision making in Australia- Part 2

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### Recommended Citation

Hunter-Schulz, Tina (2005) "Rule of law, separation of powers and judicial decision making in Australia- Part 2," *The National Legal Eagle*: Vol. 11: Iss. 2, Article 6.

Available at: <http://epublications.bond.edu.au/nle/vol11/iss2/6>

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# Rule of Law, Separation of Powers and Judicial Decision Making in Australia – Part 2

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### The High Court and Judicial Decision Making

There are many opinions regarding the role of the judge in judicial decisions, both from commentators, and from the justices themselves. In a recent address Justice Michael Kirby assessed changes in judicial reasoning, and the current backdrop of judicial reasoning within the High Court. He noted a need for judicial activism and for the High Court to consider policy principle and rules to ensure that laws are interpreted in ways that meet the needs of the community they serve.

Whether this modern judicial reasoning upholds the doctrines of the rule of law and separation of powers has been a contentious issue, debated by judges and commentators alike. What can be substantiated is that judicial reasoning over the last 100 years has altered, as a consequence of both intrinsic and extrinsic factors.

There have been a number of judicial ‘periods’ in the High Court, marked by significant judicial decisions, with a number of influences on these decisions, internal and external to the court. The history of judicial decision making in the High Court since Federation might be characterised as falling within four distinct periods.

#### 1. 1903 - 1920

The justices of the High Court in this period, and the decisions themselves, were influenced by their role in the Federation of Australia. Indeed, the first three Justices (Griffith CJ, Barton and O’Connor JJ) had been Constitution convention delegates, involved in the drafting of the Constitution. Consequently, these Justices had personal and intimate knowledge of the aims of the Constitution. This influence manifested in the Court in two ways:

- Limitations imposed on state and federal powers, with the State and federal Governments prevented from intruding in each others affairs, reinforced with the doctrine of immunity outlined in the decision of *D’Emden v Pedder*.<sup>2</sup> Whilst this doctrine is not explicit in the Constitution, the members of the Court established this as precedent through judicial decisions early into their tenure, to support to the goal of coordinated federalism.<sup>3</sup>
- Early decisions were less concerned with legalistic decision making, than with the establishment of the relative roles of the states and the federal government. The subsequent appointment of Justices Isaacs and

Higgins saw the court focus on the development of a strategy suitable to the conditions of the Australian political and legal landscape. Consequently the High Court adopted the techniques and public rhetoric of ‘strict and complete legalism’ for constitutional cases.<sup>4</sup>

#### 2. 1920 – 1942

A High Court, now larger and different in composition, was the highest court in a nation dealing with recovery from World War One with allegiance to the Empire. These changed circumstances fostered changes in the legal reasoning of the High Court. Rather than the narrow interpretations of the original court appointees, the altered court composition, with the newly appointed Knox CJ and Starke J, allowed a more expansive view on issues of constitutional interpretation. This was typified by the court’s interpretation of the doctrines of implied immunity and implied prohibitions, as challenged in the *Engineer’s Case*.<sup>5</sup> In this decision the court ruled that the Federal arbitration power could be extended to awards of state governments. In a single judgment of the High Court, the Federal legislative powers were substantially broadened, with the balance of state/federal power considerably tipped in the favour of the Commonwealth.

More importantly, this more liberal approach to decision making left a profound and lasting effect on constitutional interpretation that survives today. The words of the constitution were construed to be given their wide and literal effect rather than the narrow, substantive effect construed by the original appointees of the court as reported in a leading newspaper of the time:

*“this is a judgment of momentous importance, providing new principles of interpretation. The judgment of D’Emden v Pedder is overthrown, and all decisions based on it. People must wonder how long this new interpretation will last.”*<sup>6</sup>

The principles of the Engineers case still stands in constitutional law today, providing valuable guidance in the interpretation of Constitution, and ensuring the words and meaning are construed literally.

The relative liberalism of the court in this era was eroded by a number of factors, one internal and one external. Changes in appointment to the court, including the appointment of McTiernan in 1930, Latham in 1935, Dixon in 1929, and Evatt in 1930, significantly altered the court composition. By 1935, the only justices from the Engineers decision still on the bench were Starke and Rich JJ. Alone, this may not have placed the court on the course of strict legalism that it was to maintain for the next forty years. What confirmed the movement to strict legalism was the commencement of World War II, and the corresponding expansion of the purposive Commonwealth Defence power (s51vi of the constitution), culminating in the transfer of tax powers from states to the Commonwealth.

#### 3. 1942 – 1972

The decision in the *Uniform Tax Case*<sup>7</sup> denotes a change in Commonwealth powers in the early 1940’s, and a new era in judicial decision making. This era is characterised by strict legal reasoning and is epitomized by Chief Justice Dixon, in his swearing in speech in 1952:

*“Close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal*

*conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safer guide to judicial decisions in great conflict than strict and complete legalism”<sup>8</sup>*

By strict and complete legalism, Dixon is referring to the utilization of formal legal argument, and reliance upon technical legal solutions rather than the considerations of policy, or other issues and factors.<sup>9</sup> This marked the Court of Dixon, from 1952 to 1964, where a healthy dose of judicial restraint was the norm within the High Court. In this court, his view of the role of law permeated, as a system of law which they administered ‘as both the foundation and the steel framework of the community which they served’.<sup>10</sup>

Whether the application of strict legalism was practical and useful in judicial interpretation of constitutional issues appeared to be secondary to the strict and total adherence to legal reasoning in the Dixon Court. If the decision was narrowing and impractical, then so be it. It was better to adhere to strict legalism than the alternative, since the concept of judicial restraint is grounded in the idea that each branch of government will stick to its own proper function,<sup>11</sup> rather than defy the confines of the position of the court to attain practical judicial decisions.

Even after Dixon’s exit from the Court, this view of the role of law continued, as expressed by Kitto J:

*“I think it is a mistake to suppose that the case is concerned with ‘changing social needs’ or with ‘a proposed new field of liability in negligence [negligence in sport] or that it is to be decided by ‘designing’ a rule. And if I may be pardoned for saying so, to discuss the case in terms of judicial policy and social expediency is to introduce deleterious foreign matter into the water of common law – in which, after all, we have no more than riparian rights”<sup>12</sup>*

#### 4. 1975 – present

The previous legalistic approach of the High Court was affirmed with the appointment of Barwick as Chief Justice to the Court in 1976 – after all he was a peer of Dixon, Kitto et. al., and well versed in the strict legalist approach of the court. His attitude to legal restraint was linked to a lack of a Bill of Rights to interpret,<sup>13</sup> justifying the courts “legalistic attitude to the Constitution and other matters.”<sup>14</sup> It appeared that the judicial attitude of the previous era was to go on continue into the last quarter of the twentieth century, with no relief. Yet the decade from the late 1970’s was perhaps one of the most judicially active since Federation, an era unlikely to be seen again for some time. This rise in judicial activism can be attributed to many factors, some interrelated, some isolated, which together coalesce to form a force capable of altering the reasoning process of the High Court of Australia, and influencing the reasoning process of justices at the same time.

Many fundamental constitutional issues have been decided in the last few decades, encompassing many areas of constitutional law, and interpreted in new ways. Perhaps the greatest illustration of this is the *Tasmanian Dams Case*.<sup>15</sup> This decision epitomized the ‘new thinking’ of the court, by interpreting broadly Commonwealth powers in the areas of External Affairs (s51 xxix), Customs and Excise (s90), Acquisition of Property on just terms (s51 xxxi), and the limits of the Commonwealth Corporations Power. Quite

simply, it was a remarkable decision by a court that in the previous decade had been wrought with judicial indecision and timidity.

Another landmark decision, this time in the Mason Court era, was that of *Mabo*. Whilst it did not challenge or alter the course of any constitutional power forever more, it accomplished something even more fundamental – it rewrote 200 years of history, altering the Australian position on *terra nullius*,<sup>16</sup> and established the common law did acknowledge the concept of native title.

A survey of commentaries regarding this era of ‘judicial activism’<sup>17</sup> note a paradigm shift toward judicial creativity and away from the strict legalism that had dominated the court since World War Two. A number of prominent judiciaries point to events in the late seventies and early eighties which shifted the judicial goalposts, presumably forever, allowing judicial creativity to permeate into the court, influencing fundamental decisions in the original jurisdiction.

In his swearing in speech, Chief Justice Gleeson noted two particular issues in the 1980’s have affected the courts role forever:<sup>18</sup>

*“The first was the abolition of appeals to the Privy Council. In the beginning, and for the greater part of the time since then, the Court’s role in hearing appeals from the various Australian jurisdictions was shared with, and was, to an extent, subject to the Judicial Committee of the Privy Council in London. The abolition of appeals from the High Court, and then from all Australian courts, resulted from legislation enacted in the 1970s and 1980s, but only took final practical effect as pending cases worked their way through the system. The second relatively recent change affecting the appellate work of the Court is that appeals can no longer be brought as of right. Until amendments to the Judiciary Act in 1984, civil appeals could be brought to this Court, without the need for leave, provided the cases involved a specified, relatively modest, amount of money, or involved disputes about property of a certain value. In practice, an appeal could be brought if the appellant considered that what was at stake in the case justified the legal expense. Most such appeals were capable of being decided by the application of settled precedent. For most of this century, work of that kind occupied a large part of the time of the Court. Now, special leave to appeal is required in all civil cases. Leave is granted or refused according to such considerations as whether the case involves a question of law of public importance, or whether the High Court is required to resolve differences between other courts as to the state of the law”<sup>19</sup>*

This opinion is held by Kirby, in his analysis of the Mason Court, encompassing this era of massive change.<sup>20</sup> Mason commenced his judicial service on the High Court espousing the judicial reasoning so prevalent of the day ... “change, especially major change, should be left to the Parliament”<sup>21</sup> Yet his decision in *Teoh*<sup>22</sup> encompassed a healthy dose of judicial activism, with the incorporation of international human rights developments, and a willingness to see these rights reflected in Australia’s legal and constitutional principles.<sup>23</sup> His early decisions such as that in *Trigwell* were entirely orthodox reflections of Sir Owen Dixon’s ‘strict and

complete legalism'. However in later decisions, Mason chose a different path, instituting irreversible changes in a time in law that was ripe for change.<sup>24</sup>

The remarkable transformation of Mason's judicial making in the Court, both as Justice and later as Chief Justice, are seen by Kirby as attributable to a number of important changes which occurred in the 1970's and 1980's,<sup>25</sup> including:

- Physical location of the High Court: The lasting legacy that Barwick CJ created was the relocation of the High Court to a permanent location within the Parliamentary Triangle,<sup>26</sup> reinforcing the role of the judiciary in the Constitutional Trinity<sup>27</sup> and its role in the decision-making process.
- The cessation of Privy Council appeals.<sup>28</sup> It instilled in the minds of the Judicature that the High Court of Australia was THE Court of Appeal now, and could not be overturned., thus permitting the judiciary to establish principles suited to Australian legal and constitutional conditions.
- Growing Nationhood and independence, linked to the *Australia Acts* of 1986, and the severing of all ties with the United Kingdom.<sup>29</sup>
- The introduction of time limits on submission,<sup>30</sup> encouraging identification of legal principles in applications for special leave,<sup>31</sup> thus clarifying in the mind of the judiciary the legal principles involved.
- Disillusionment with parliamentary decision-making – parliament cannot be relied upon to make all of the necessary amendments to the laws, so the judiciary must be relied upon to take a more active role.<sup>32</sup> This view is questionable, since the separation of powers delineates the role of the judiciary as interpreting the law, not making the law.
- Increased knowledge and heightened expectations of justice within the community,<sup>33</sup> especially since decisions such as *The Tasmanian Dams Case*.
- The appointment of several justices.<sup>34</sup> In particular: Justice Lionel Murphy, whose writing had a great influence on Mason (although Mason would never openly admit it!). The judicial reasoning styles of the two jus-

tics were very different. Murphy's techniques of opinion writing were distinct, espousing legal nationalism that questioned English authority,<sup>35</sup> and came to influence other members of the court.

Appointment of Justice Deane in 1982 from Sydney Bar, bringing to the Bench his interest in intellectual property, unjust enrichment and equitable principles which generally stimulated intellectual perceptions of Mason and encouraged the court to consider principles in addition to judicial legalism.<sup>36</sup>

## The Current High Court Bench and Judicial Decision-making

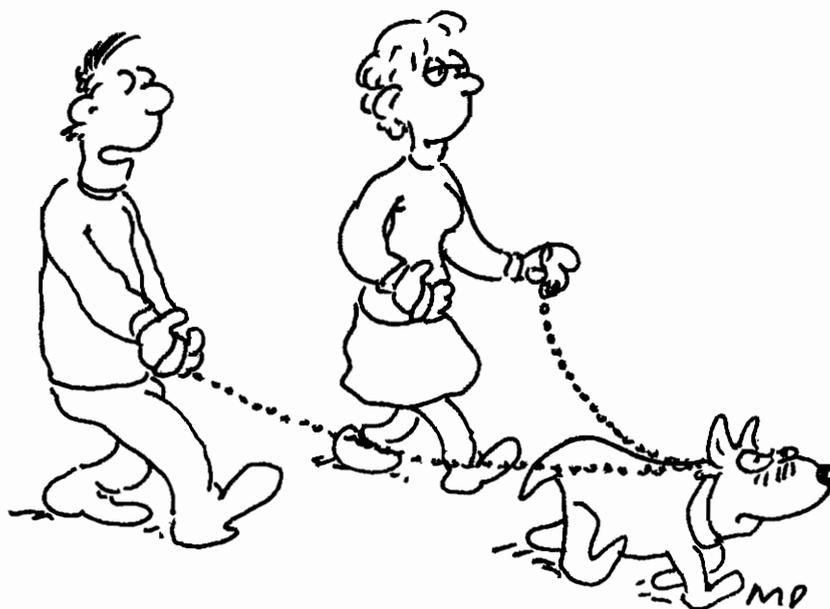
The two most prominent judicial activists in the current High Court are Chief Justice Gleeson, and Justice Michael Kirby. Whilst not singing the same judicial activist tune, these two justices in principle support the use of policy and procedure in judicial decision-making, However one must remember that they are only two of seven sitting justices, with five other justices expressing opinions regarding the apparent wave of judicial activism (or at least a departure from strict legalism that typified the court in the first two thirds of the century).

To call the current court conservative is probably accurate, given the stance of the remaining Justices in relation to judicial activism. Justice Hayne supports traditional jurisprudence, with its roots embedded in rules and precedent.<sup>37</sup> Similarly, Justice Callinan has on previous occasions openly criticized the judicial activism exhibited by the High Court,<sup>38</sup> advocating a return to strict legalism in the tome of Dixon in the 1940's and 50's.

Justice Heydon's views on judicial activism is a clear, leftover legacy of the 1950's –

*"Radical Legal Change is best effected by professional politicians who have a lifetime's experience of assessing the popular will. They might not be an ideal class, but they are fitter than the courts to make radical legal changes"*<sup>39</sup>

He truly believes that judicial activism in any form is the death knell for the Rule of Law.. but is it?



Separation of powers

## The judiciary and the preservation of the Separation of Powers.

*"a stream must not rise above its source"*<sup>40</sup>

The concerns, criticisms and controversy regarding judicial decision-making centers on judicial activism encouraging the judiciary to exceed their role in the separation of powers. This separation is grounded in the constitution, which is said to assume the rule of law. Does judicial activism in utilization of principle, policy and rule jeopardize the separation of powers doctrine?

Lionel Murphy a High Court justice who was very activist in his approach, undoubtedly made some sound judicial decisions. Yet many of his judgments were questioned

*"even those sympathetic to his views, [note] that Murphy failed to clothe his judgments in a legally appropriate manner - from his judgments it was all too clear that his 'reasoning' was a thin veneer to give some legal respectability to his political aims in particular cases"*<sup>41</sup>

A specific issue is the attitude of judicial activism that enhances the role of the government.<sup>42</sup> Gava argues that the 'heroic' style of judging is a catastrophic development, signaling the reversal of time honoured beliefs about the roles of judges.<sup>43</sup> But one must question this attitude. It is conceded that the role of the judge has changed. But had not also the nature and structure of the society we live in?

Society today is exceedingly complex, participating in the global arena, forging external relationships and ties reflecting these changes.

But even the most active of judicial decision-makers, Michael Kirby, advocates control on judicial activism.<sup>44</sup>

*"we need a middle ground that reflects the pragmatic character of the Common law in contemporary times. The extremes of unbound judicial creativity and invention will be tamed. But so too will be the extreme of mechanical application of old law without considering the context in which it must operate and its justice and conformity to basic principle"*<sup>45</sup>

The issue that needs to be considered is simple – has the judicial stream risen above its source, exceeding its power in interpreting the law in the separation of powers, or has the judicial decision stream merely changed course, as it meanders its way across the Australian political and social landscape. Does judicial change mean alteration in judicial power? Perhaps. Only time will determine this, but indications based on precedent suggest that judicial decisions in the original jurisdictions will embody the original meaning of the Constitution within a modern context, rather than a court in a desperate grasp for political power.

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