

## THE JUDICIAL CONFERENCE OF AUSTRALIA'S COLLOQUIUM

### *Have the Judges Gone too far?*

#### **Introduction**

For most of this year one of the leading political issues in Australia has been the so-called 'crisis' in the availability and affordability of public liability and medical indemnity insurance. This 'crisis' has been characterised by numerous media stories about community organisations being unable to hold events as symbolic as ANZAC Day marches and as innocuous as running cake stalls due to the inability to afford insurance premiums. Even more worrying has been the spectre of doctors withdrawing services from rural areas or from pursuing particular specialist services such as obstetrics.

Public concern has led to governmental responses in the form of Ministerial meetings, Prime Ministerial summits, COAG communiques and Treasury officials working groups, all searching for reasons why insurance costs have risen and what policy solutions should be advanced. Into this heady mix of finger pointing, media sensationalism, serious policy development and political posturing came in March the intervention of retiring Queensland Supreme Court Justice James Thomas.

In his remarks, His Honour regretted the impact of the developments in the tort of negligence. He was critical of his fellow judges when he said:

*"We have allowed the tests for negligence to degenerate to such a trivial level that people can be successfully sued for ordinary human activity. We now have a compensation-oriented society in which people know that a minor injury may be a means of getting more money than they could possibly save in a lifetime. The incentive to recover from injury disappears with such a system. Self-reliance becomes a scarce commodity and society becomes divisive and weak. The judiciary has a lot to answer for this. It's no use blaming the plaintiffs' lawyers. We are the ones who have laid down the rules and given the judgments. The buck stops with us, not them. We are the ones who have let the quantum of damages get out of hand and who have lowered the barriers of negligence and causation. Common sense has long gone from the system in the area of tort and damages for personal injuries. When I say 'we' I means all levels of adjudication right up to the High Court. Some of us have enjoyed playing Santa Claus forgetting that someone has to pay for our generosity."*

Because of a coincidence of timing, His Honour's remarks had apparently quite an impact at the Ministerial meeting held a few days afterwards. His comments were reportedly cited with gusto by some Ministers who argued that the major policy response to the insurance premium issue should be to 'reform' tort law by introducing caps and thresholds on damages and claims,

and legislatively recasting notions of the standard of care owed by a person to their neighbour.

Have the Courts gone too far, as suggested by his Honour Justice Thomas, in allowing the 'empirical march of negligence'<sup>1</sup>. Did the Judge himself go too far in making his remarks at a time of intense political and policy debate about liability and insurance? What is the role of a judge in a democratic society.

### **What is the role of the judiciary in a democratic society?**

To answer this question and whether judges have exceeded this role, I will attempt to identify some propositions, I call them 'basic truths' about judging and the expectation the Executive Government has about courts.

If I can open by quoting Chief Justice Gleeson.

*"The rule of law is not enforced by an army. It depends upon public confidence in lawfully constituted authority. The judiciary claims the ultimate capacity to decide what the law is. Public confidence demands that the rule of law be respected, above all, by the judiciary."*<sup>2</sup>

So the first "basic truth" is:

**The role of the judiciary in a democratic society is to uphold the rule of law.**

But what exactly does this mean?

Clearly, democracy itself does not dictate the precise nature and role of the judiciary. Judges in European countries that follow a civil law tradition perform a substantially different role from judges in common law countries such as Canada, the United States, the United Kingdom and Australia.

In countries that follow common law traditions, judges do more than 'decide' what the law is, they also 'make' the law 'as an incident to judicial adjudication'<sup>3</sup>. Sir Anthony Mason in his 1996 Mayo Lecture to the James Cook University, explained the way in which Australian judges make law<sup>4</sup>, as follows:

1. Most commonly a judge is called upon to decide if an established principle applies to a particular set of facts when that question has not been previously considered by a court. This adds to the body of the law.

---

<sup>1</sup> See the comments of McHugh J in Transcript, *Graham Barclay Oysters Pty Limited & Anor v Ryan & Ors S258/2001 (13 March 2002)*

<sup>2</sup> The Hon Murray Gleeson, "Courts and the Rule of Law", The Rule of Law Series, Melbourne University, 7 November 2001

<sup>3</sup> The Hon Sir Anthony Mason "The Judge as Law-Maker" 3JCULR1 at 2

<sup>4</sup> Mason op cit

2. Higher courts, particularly the High Court, sometimes go much further than an 'inching' forward by incremental decisions. Decisions such as *Mabo (No. 2)*<sup>5</sup> discarded previous understandings of the common law and established new principles. These 'breakthrough' decisions occur if the High Court accepts that the previous principles require rationalisation or should give way to a 'more unifying or general principle'.<sup>6</sup>
3. Statutory interpretation is inevitably a judge made gloss to the words in a statute. In cases where the factual situation was not in the legislators mind, the judge is invariably required to 'make law' by deciding between two or more possible interpretations.
4. Constitutional decisions are a special category of interpretative decisions which cannot be amended by simple legislative action. As such, the decisions tend to be the most controversial examples of judicial law making.

Judicial activism in the common law is constrained within relatively conservative limits, not the least of which being the appeal process. While 'breakthrough' cases occur that make significant changes to common law principles, these cases will only be accepted as "law" after surviving a series of appeals to higher courts and after a majority of the most senior judicial officials in the country have agreed that the law needs to change. As the Chief Justice of Australia has pointed out,

*"There are 976 judicial officers in Australia, and only seven of them are judges whose decisions are never the subject of a potential appeal to a higher court. The appellate system is a powerful instrument for ensuring adherence to the principle of legality by the judiciary. The possibility of appellate review means that, even in the small minority of cases where judges might be called upon to break new ground, or in areas where they are invested with substantial discretion, judges must conform to a legal discipline by which their powers are circumscribed."<sup>7</sup>*

While judicial law making has occurred for about 700 years, in the 20<sup>th</sup> century, statute law assumed a new prominence in common law countries, and both the role of the judiciary and its relationship with the parliament and executive changed. The ability of the judiciary to scrutinise, and overturn, legislation is one of the most controversial areas of judicial activity. Some of the most outspoken critics of the courts in recent times have been government ministers unhappy when decisions do not go the government's way.

The fact that a law has been created by the parliament also does not mean that the judiciary is any less involved in its ongoing development. Many

---

<sup>5</sup> (1992) 175 CLR1

<sup>6</sup> Mason op cit at 3

<sup>7</sup> The Hon Murray Gleeson, "Courts and the Rule of Law", The Rule of Law Series, Melbourne University, 7 November 2001

modern statutes are ambiguous and open ended, and deliberately leave significant portions of the law making process to the judiciary. The use of words such as "reasonable", "unfair" and "appropriate" in legislation without further elaboration is clearly an invitation to the members of the judiciary to apply their own individual value judgements to bear on the matter.

Which leads to the second "basic truth":

**There are almost always a range of possible outcomes in any contested legal proceedings, all of which could be justified as valid in law.**

While this is not always the case, it is generally true that, where the law on the matter is clear, litigation can be avoided. Individuals take matters to court because their legal advisers do not agree that the answer *is* clear. And cases that find their way to Full bench of the High Court of Australia are usually the least certain of all. This is particularly so in the area of civil law, where appeals to the High Court require special leave. The High Court does not waste its time on "easy" cases.

As Sir Anthony Mason points out<sup>8</sup>, the constraints on judicial law making go beyond the discipline of the appeal process. The doctrine of *stare decisis* serves the objectives of consistency, certainty and predictability in the law. Courts are not law reform bodies. They decide cases on the evidence and arguments presented to them and not based on surveys, consultations, discussion papers and the like. This means that courts are properly constrained from making judgments on what are desirable outcomes in overall public policy terms as opposed to the facts and circumstances of the individual case.

### **Have judges gone too far?**

Given that judicial law making is hardly new, what has caused the complaint that judges have exceeded their role and usurped the legitimate powers of the other branches of government? Professor Dennis Pearce, Chair of the Administrative Review Council and a former Commonwealth Ombudsman, made some interesting observations about Executive disquiet about the Courts shortly after retiring as Ombudsman.

He described 4 Executive concerns with courts and tribunals, namely<sup>9</sup>

(1) A failure to appreciate administrative difficulties

This entails issues such as a lack of appreciation of the administrative problems caused by a decision or the resources required to comply with a ruling.

---

<sup>8</sup> Mason op cit 7-10

<sup>9</sup> Dennis Pearce 'Executive versus Judiciary' (1991) 2 PLR 179

## (2) Invasion of Executive Domain

This involves concern that the courts are taking policy decisions out of the hands of the Executive, for example, by use of devices in administrative law cases which John McMillan canvasses in immigration matters.

## (3) Vagueness of Grounds of Review

Here it is believed that the grounds on which administrative decisions are reviewed are not stated with such clarity as to afford the decision maker sufficient guidance to enable it to be sure that a valid decision is made.

## (4) Pedantic attitude to Procedural Requirements

The concern identified by Professor Pearce was on the use of the requirement for natural justice in decision making. Here the criticism was that the insisted upon procedures did nothing to actually improve the standard of decision making.

The sum total of Executive misgivings about the approach of courts in administrative review was captured in 1996 by Henry Burmester, then Chief General Counsel of the Attorney-General's Department:

*"...the aggressive and activist work, principally of the Federal Court, in curbing the excesses of the executive as they see it, by resort to reliance on the protection of individual rights, by the expansion of procedural safeguards, and by interference at the preliminary or investigative stage of the administrative process. The outcome has been to turn judicial review into a merits review exercise, to find a means, if at all possible, to overturn decisions that a judge does not like."<sup>10</sup>*

From my perspective as Attorney-General, there were several decisions of the High Court which created concern about the role of the judiciary and its relationship with the Executive. The first was on the impact on domestic law of the ratification of an international treaty or other instrument. In *Minister for Immigration and Ethnic Affairs v Teoh*<sup>11</sup>, the court extended the effect of ratification of a treaty to create a legitimate expectation in a citizen that the exercise of a statutory discretion will be undertaken consistently with the treaty obligation.

The decision was warmly welcomed by many, but it caused no end of political and policy consternation within the then government as it occurred when the notions of National Sovereignty, in a globalised world and the role of the

---

<sup>10</sup> Burmester Commentary (1996) 24 Fed Law Rev 387  
<sup>11</sup> (1995) 183 CLR 447

Executive and Parliament in the treaty making process was in dispute. The court can't decide the timing of matters brought by private litigants, nor should political considerations of an Executive Government play any role in deciding cases, but the decision did surprise the government by giving international instruments a new role in domestic law, when the Executive and the Parliament might have felt that this step was a political/policy decision for these branches of the government.

Sir Anthony Mason argues that there is a 'lack of clear demarcation between the judicial and legislative roles'<sup>12</sup>, and that 'the court will stand by an existing principle and will not act as a legislature is not a statement based upon a firm principle.'<sup>13</sup> Clearly this grey area between the judicial and legislative/executive functions is where the courts and the other branches of government will come into conflict.

Sir Anthony goes on to identify a series of decisions, some of the High Court and others by the House of Lords which dealt with fundamental moral and ethical issues because of the failure of parliament to determine the questions. This means that judges are obliged to apply 'community values' to judgments, although exactly what this means is not clear.

The most constant criticism of courts in the popular media is in the sentencing of offenders. The judges are constantly told they are out of step with community attitudes and are too lenient with sentences. Such 'attitudes' probably do reflect views held by a substantial section of the community, even a majority. But such attitudes should not be given effect to as they are misconceived and often largely irrational. However, distinguishing 'values of an enduring kind' and misguided albeit long held attitudes is again a task fraught with difficulty. Within the limits of legal reasoning and legal principles, judges must apply principles such as compassion and fairness in reaching decisions. It is naive to suggest that their personal values and experiences do not affect decisions on such matters.

Which leads to the most controversial "basic truth":

**Your background, personality and education, will affect your approach to any problem, including a legal one.**

Many, including former High Court judges, would argue vehemently against this proposition. They argue that it is important to select the best lawyers to be judges, and that issues such as gender and cultural or ethnic background are irrelevant in determining who would make a good judge.

These arguments in fact hark back to the "declaratory" theory of judicial decision making. But once we recognise the important and legitimate role that the judiciary has in "making" law and shaping the nature of our democracy, it also becomes important that the judiciary reflects a range of social and cultural backgrounds.

---

<sup>12</sup> Mason op cit at 10

<sup>13</sup> Mason op cit at 9

### **Have judges gone too far?**

The answer is in the final "basic truth":

**Whether you think the judiciary has "gone too far" in any individual case is likely to reflect (at least in part) your personal views about the worthiness of the outcome.**

Thus the High Court's *Mabo* decision was hailed as a triumph of legal reasoning by some, and as a usurpation of the powers of the parliament by others.

Even the approach of strict legalism cannot save the High Court from criticism. The Court's recent decisions on the corporations law cross vesting scheme in cases such as *Re Wakim* have evinced a torrent of criticism from all quarters, largely because they rejected the "co-operative federalism" approach in favour of a legalistic approach to constitutional interpretation.

So, it seems that the High Court will be criticised by somebody, whatever approach it takes.

A federal constitution will always place special and significant powers in the hands of the courts. Judicial review of legislative action is one of the more controversial areas of judicial activity, because it brings into relief the balance of power between the legislative and judicial arms of government.

The High Court has been called upon to make decisions that affect the balance of power between the states and Commonwealth ever since it first sat. Its views on the proper balance have changed over time. Today, its views must also be tempered by principles of international law that do not provide clear cut answers.

If the law is to reflect community values, it cannot be immutable. If the law changes over time to reflect community values, then surely the judiciary is doing its job.

And ultimately if there was no "judicial activism", we would still be checking our ginger beer bottles for snails.

MICHAEL LAVARCH