

1-12-2017

Do Judges Make Law?

Michael L. Barker

Federal Court of Australia, associate.barkerj@fedcourt.gov.au

Follow this and additional works at: <https://researchonline.nd.edu.au/undalr>



Recommended Citation

Barker, Michael L. (2017) "Do Judges Make Law?," *The University of Notre Dame Australia Law Review*: Vol. 19 , Article 1.
Available at: <https://researchonline.nd.edu.au/undalr/vol19/iss1/1>

This Article is brought to you by ResearchOnline@ND. It has been accepted for inclusion in The University of Notre Dame Australia Law Review by an authorized administrator of ResearchOnline@ND. For more information, please contact researchonline@nd.edu.au.



DO JUDGES MAKE LAW?*

THE HON JUSTICE MICHAEL BARKER**

Unusually, for me at least, I would like to commence this lecture with a reading from Scripture; more particularly from what Christians call the Old Testament - from Judges 4:4 and 5:

And Deborah, a prophetess, the wife of Lapidoth, she judged Israel at that time. And she dwelt under the palm tree of Deborah between Ramah and Bethel in mount Ephraim: and the children of Israel came up to her for judgment.¹

It seems this involved a personal approach to judging, something that was common in those distant times in both the Jewish and Arabic worlds.

Recently, I was at the Alhambra in Granada, the palace and fort of the Moorish rulers of Spain for hundreds of years until Queen Isabella I and King Ferdinand II expanded their northern and eastern kingdoms and expelled them from Spain in 1492. I found myself standing in the famed Court of Justice. Here, the ruler is said, like Deborah, to have personally heard and resolved the disputes of his subjects.

From such direct decision making by rulers and judges, the expression “palm tree justice” seems to have grown, especially during the 1960s in England. It was an expression I became familiar with when I commenced law school in 1968. No real judge would dispense palm tree justice, was the clear message. In making a judgment, he or she would always follow precedent, apply settled legal rules, and never appeal to broad community principles or values, or simply decide where the “justice” in the dispute appears to lie.

My topic for this evening’s lecture concerns this debate about judicial method. I have sought to reduce it to the question, “Do judges make law?” Do they simply legislate from high, or under a palm tree; or do they, in a more mechanistic way, simply seek to divine the resolution of disputes by identifying settled principles and applying them to the facts of the case at hand;

* This article is a slightly edited version of the David Malcolm Memorial Lecture 2017 delivered by Justice Barker at the Notre Dame University Law School in Fremantle on 26 October 2017.

** LLB(Hons) (UWA), LLM (York University, Canada); Justice of the Federal Court of Australia, Perth.

1 *The Holy Bible*, King James Version (Thomas Nelson, 1984) Judges 4:4-5.

(2017) 19 *UNDALR*

or do they, in some third way, tend to combine both approaches, giving some rein to general notions of justice?

I fear there are some who believe judges do just make it up as they go along and simply try to deliver a judgment that supports the outcome they believe is just. And I fear equally there are others who see the judicial job as involving a relatively simple task of declaring the law and applying it to the facts to produce the outcome – something that a computer could do better, and far more quickly and cheaply!

While I am not the first to ponder this question,² I consider it still to be relevant. Indeed, I have regularly asked myself the question over the 15 years I have been a judge. Am I making law? The answer to the question, which I think is a version of the third way, takes us to the nature of our society and our particular form of government, and enables us to better understand the proper role judges play in it.

But first let me say what an honour it is to be presenting this, the third David Malcolm Memorial Lecture at The University of Notre Dame Australia Law School here in Fremantle.

David was the towering legal figure in Western Australia for many of my generation of lawyers. David made an enormous contribution to the legal life of the State in many guises over a long career in the law.

He was a man of extraordinary energy, and when it came to the law he exhibited a great creative energy as any, even an abbreviated, account of his career attests.

A study of his legal work, his advocacy and his judgments discloses David's broad understanding that not only do judges, along with the lawyers who appear before them, help maintain the democratic concept of the rule of law in our society, but also that they help to fashion the law for the betterment of society in each generation.

David was a lawyer and a judge who had little doubt that judges have this function and responsibility, and he plainly proceeded on that understanding in his advocacy and in his judging.

² See, eg, Ronald Sackville, 'Why Do Judges Make Law? Some Aspects of Judicial Law Making' (2001) 5(1) *University of Western Sydney Law Review* 59; Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2001) 97.

I first met David in the second year of my articles of clerkship, in 1973, when in the course of organising the Australian Legal Convention of that year (coincidentally, one of the first events held in the new Perth Concert Hall) he press-ganged Ralph Simmonds and me into assembling a small army of articulated clerks to assist him as supernumeraries – much like ball kids at the Australian Open! David was then a lawyer on the move, just a few years away from taking silk and accepting part time appointments as Chair of the Law Reform Commission of Western Australia and the nascent Town Planning Appeals Tribunal of Western Australia. David then was impossibly suave and debonair - especially to a 23 year old beginner in the law, as I was at the time! He was also extremely charming, making it nearly impossible to say “No” if he asked you to do something.

I got to know David better, how he thought and how he reasoned, when I became deeply familiar with the Town Planning Appeals Tribunal decisions he delivered in the period 1980-1986. My familiarity arose in the course first of teaching and practising planning law, and later, as a successor to David as Chairman of that Tribunal. He was one of the true pioneers of environmental planning law in this State. Until the Tribunal was established in 1979, there was no such appeal tribunal governed by a body of law and principle, but only a Ministerial appeal system so often characterised by palm tree justice and political whim. David set about establishing a body of planning law and principle. He succeeded. It survives to this day. And it has served the community well.

When I was appointed to the Supreme Court of Western Australia in 2002, David had been the Chief Justice for some 14 years. I then got to know him as a colleague. He was welcoming and supportive of me as a new judge. He provided me with invaluable guidance not only as a new judge, but also in relation to the establishment of the new SAT - the State Administrative Tribunal of Western Australia. David, as Chair of the Law Reform Commission had been a major contributor to that Commission’s report on the reform of administrative law in WA, which report had presaged the creation of the SAT.

As an advocate, David’s powers of persuasion are legendary. In the seminal High Court of Australia decision of *Hewett v Court*,³ David Malcolm QC successfully invited three members of the High Court, over the dissent of two others, to accept his analysis that his client had an equitable lien over a partly constructed transportable home in respect of which

3 (1983) 149 CLR 639.

(2017) 19 *UNDALR*

the client had only made two progress payments at the time the builder became insolvent. He invited the Court to take what seemed to be a new legal step, an extension in equity, in the understanding that the Court could “make law” in that way.

The two dissenting judges, Wilson and Dawson JJ, in a joint judgment thought that:

It is hardly surprising that equity has not extended those principles so far. To do so in this case would, in our view, introduce unnecessary complexity into the ascertainment of the rights of the parties and would be destructive of that certainty which is the basis of sound commercial practice.⁴

The three majority judges, however, took a different view. Gibbs CJ said:

The fact that there is no authority precisely in point does not mean that in the present circumstances no lien can arise. The rules of equity are not so rigid and inflexible that it is necessary to discover precise authority in favour of the existence of a lien before one can be held to have been created. I do not of course intend to suggest that the courts may proceed on general notions of justice without regard to settled principles. But the present case seems to me to fall within the principles which govern the creation of a purchaser’s lien.⁵

You will not have missed the counterpoints, “general notions of justice” and “settled principles”.

Murphy J, in a characteristically short judgment of some five short paragraphs that focussed on the justice of the case, was mostly influenced by the consideration that:

A charge such as this will often be necessary to protect consumers, who, unlike traders, cannot inquire into the solvency of the person with whom they are dealing.⁶

Deane J, an esteemed equity lawyer, in a much longer judgment of some 20 very long paragraphs, concluded that the partly completed home had been “appropriated to the performance of a contract”,⁷ and in the circumstances an equitable lien arose in favour of David Malcolm’s client.

4 Ibid 659.

5 Ibid.

6 Ibid 650-651.

7 Ibid 668.

As Chief Justice of the Supreme Court of Western Australia, in *Craig v Troy*⁸ in 1997, David Malcolm did not hesitate to nail his colours to the mast in the long-standing controversy whether, under s 4(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA)*, damages could be apportioned between a plaintiff and a defendant in a case where a breach of contract also constituted an act of negligence. David held apportionment was open. This was good news for the defendants, and seemed just to me as senior counsel for one of the defendants in that case!

One, however, must always be mindful, as a judge at least, that forays into lawmaking do not always result in permanent contributions to the law. Two short years later, in 1999, the High Court in *Astley v Austrust Ltd*⁹ reversed Chief Justice Malcolm's determination that the 1947 Act operated in the way he had determined.¹⁰

Mention of the High Court leads to the reminder that the High Court is the final court of appeal and the constitutional court in Australia. It is charged with the ultimate responsibility under the Australian Constitution of determining the general law and construing the Constitution, as it will tomorrow in relation to s 44 of the Constitution. What it says in that regard will be the law. The High Court will thereby make law; though of course it didn't enact s 44.¹¹

The High Court obviously has the greatest capacity of all Australian courts to make law.

Certainly that is what the High Court did in *Mabo v Queensland (No 2)*¹² in 1992 when the Court found native title survived the coming of the new British sovereign in Australia from 1788 onwards. It swept aside an understanding that indigenous rights were not recognised under the newly received common law of England. In doing so, the court recognised the injustice of treating the indigenous peoples of Australia as trespassers in their own territories, as the received legal theory to that point had.¹³

8 (1997) 16 WAR 96.

9 (1999) 197 CLR 1.

10 Ibid 31 [68].

11 By way of prescript, the decision of the High Court was delivered on 27 October 2017 in *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Joyce, Re Nash, Re Xenophon* [2017] HCA 45.

12 (1992) 175 CLR 1.

13 See Michael Barker, 'To *Akiba* and Beyond: Old Hopes and New Dreams for Native Title' in Tim Bonyhady (ed), *Finn's Law: An Australian Justice* (Federation Press, 2016) 199.

Mabo perhaps stands as a testament to the proposition that justice trumps received or settled principle in some fundamentally important cases. The High Court is not bound to follow its previous decisions, but it is a big step to decide not to follow them. Reopening a precedent requires courage on the part of all concerned, counsel and the court. Certainty and longevity of legal rules is part of the concept of the rule of law.

The position of intermediate courts of appeal - such as the full court of the Federal Court, on which I sit a number of times a year, and the Western Australian Court of Appeal - are much less free to pronounce the law or change the law in this regard. As a result of the High Court decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*¹⁴ in 2007, an intermediate court of appeal must always apply not only an existing High Court decision that is on point, but also that of another intermediate court of appeal.¹⁵ It can't depart from a High Court precedent, but it can from another intermediate court of appeal decision if it considers it to be "plainly wrong".

Not all judges were enamoured with the High Court's requirements in *Farah* when it came down. On one view it has the potential to stultify the development of the law. It prevents, if you like, the application of Chairman Mao's aphorism, "Let a hundred flowers bloom". I can say, as an appeal judge, it does make it easier for an appeal court to dispose of cases where the precedent is clear. That doesn't mean of course that intermediate appeal judges who aren't convinced as to the correctness of an existing precedent always pass up the opportunity to make their views public! The rule does though mean that a party who wishes to see such a precedent set aside must necessarily seek special leave to appeal to the High Court and then succeed on the appeal if leave is granted.

For first instance, or trial judges, a similar rule applies. Not only are they, of course, bound by High Court precedent and intermediate appeal court precedent, but they also, by a principle of comity, decline to depart from a ruling by another first instance judge which is on point, unless they consider it to be plainly wrong.

The "plainly wrong" rule is not an easy one to apply, or disregard. It requires a judge sometimes to put aside their own strong views as to what is right and wrong in assessing whether the other judge's view is "plainly" wrong. In my experience this is not a state of

14 (2007) 230 CLR 89.

15 Ibid 151-152 [135].

satisfaction easily arrived at. Not surprisingly, the comity rule results in few trial judges ignoring what their colleague has earlier found to be the law.

I should add that in 15 years of judging I have only had occasion once to apply the plainly wrong test, and that was in relation to an extinguishment question arising under the *Native Title Act 1993* (Cth) where I said I considered an earlier full court was plainly wrong on the issue. Fortunately for me, the High Court unanimously agreed!¹⁶

The “plainly wrong” rule has the advantage that, in appropriate cases, intermediate courts of appeal and the High Court control the development of Australian law. If it were otherwise, the law might be the subject of varied expositions which would be inimical to certainty about what the law is in a particular area, possibly encourage forum shopping by litigants, and generally lead to an undermining of confidence in the judicial system more generally.

That brings me back to Chief Justice Gibbs’ observation in *Hewett v Court* that courts do not proceed on “general notions of justice without regard to settled principle”.

As I have suggested earlier, perhaps that is what some people think we judges actually do. The role and function of judges, as I am suggesting, is more nuanced than that. In our system of federal government for example, governmental power is distributed between three arms or branches of government: the parliament, the executive and the judiciary. The parliament legislates and so makes laws. The executive carries those laws into administrative effect and exercises the powers given to it under the laws. The judiciary deals with the resolution of disputes between citizens and others, including with the executive as to the limits of power, including whether laws made by parliament are constitutionally valid. The same position, generally speaking, adheres in the Australian states and territories.

This division, as we know, reflects the separation of powers doctrine emanating most famously from the work of Montesquieu,¹⁷ under which it is believed each branch of government provides restraints and checks on the other, thus avoiding the arbitrary exercise or abuse of power. It is perhaps a peculiar aspect of democracies, especially those with written constitutions. It is certainly a feature of the Australian Constitution, a constitution

¹⁶ See *Western Australia v Brown* (2014) 253 CLR 507.

¹⁷ De Secondat, baron de Montesquieu, *The Spirit of Laws* (Thomas Nugent trans, Colonial Press, 1899) vol 1 [trans of: *De L’esprit des Loix* (first published 1748)].

based on the United States Constitution which in turn adopted enlightenment principles to that end when adopted in the late decades of the 18th century.

Perhaps because parliament has the function of legislating, the idea that courts also make law has been thought by some to be radical and illegitimate. The idea that judges might develop legal principles having regard to “policy” informed by community values and changing circumstances has, I think, been seen by some to involve a usurping of the role of parliament.

In my view, if ever there were a time when courts didn’t make law, it must have been momentary. The courts developed the common law and the principles of equity as time and experience and the demands of commerce and the community required their development. Judges have performed this function for a long time in the common law tradition. As the famous United States Supreme Court Judge, Oliver Wendell Holmes Jnr has observed,¹⁸ the common law develops to meet the circumstances of each generation. That has been considered its genius.

Perhaps the real complaint is aimed more at judges who, in construing statutes, have found meanings in the legislation made by parliament that don’t accord with the aims, intentions and views of the executive empowered to administer those laws.

In that regard, judges, at different times, have been described as “activists”, on the one hand, or as “black letter lawyers” on the other; the former usually intended to convey opprobrium, the latter approbation.¹⁹ By the way, I have always liked to think of myself as an “activist, black letter lawyer”!

But what do these labels or tags actually mean? Put very generally, the “black letter lawyer” apparently is a version of a judge in that moment in time I have just referred to, who is steeped in what the rules in a given area of law are, and simply applies them, inscrutably, to the facts of the case before the judge. That, of course, begs the question as to what the facts of the case before the judge are, because usually they are not agreed, or fully agreed, and the judge has to find them.

18 O. W. Holmes Jr, *The Common Law* (Little, Brown, and Company, 1881) 36.

19 See Susan Kiefel, ‘The Judiciary and Change: 1982 to 2006’ in Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 386, 404.

The “activist” judge is, apparently, a judge considered to have a clear, inevitably personal, predisposed view as to what the outcome of a given case before him or her should be and is able to contrive a plausible way to explain the law, the facts, or both in order to arrive at that outcome.

Here I might observe that whether “black letter” or “activist”, the first thing a trial judge must do is find the facts in relation to a dispute to which the law is to be applied. As the found facts so often dictate outcomes, this is the first and perhaps the primary way in which a judge influences, properly, the outcome of a dispute. It is of course the trial judge’s job to find facts, to discover at least the legal truth of events in dispute.

A topic too large to deal with now, concerns the extent to which judges in our system of law and government are trained in the art of fact finding and judging and, more generally, in judicial methodology.

In my experience, however, trial judges assiduously consider all the evidence led in a case and apply the time honoured tests of what the probabilities suggest happened in relation to disputed events, with the applicant nearly always shouldering the burden of proving their case on the balance of the probabilities. A judge’s findings are always limited by the extent of the evidence the parties decide to lead.

I might add, I do not consider it easy for a trial judge artificially to force outcomes where the principles of law governing a dispute are well settled and the facts are clear. Notions of who has been treated unfairly or where the justice in the dispute seems to lie usually don’t arise in such situations. Trial judges soon discover that you can’t hit a square peg into an evidentiary or legal round hole, as much as you might like to do so on some occasions!

Of course, whether a judge is considered “black letter” or “activist” is all in the eye of the beholder. If one transports oneself from the Australian legal environment, into the almost mythical environment of the United States Supreme Court, where that country’s constitution and Bill of Rights are regularly interpreted and applied, we may ask whether the judge who finds, as in the 1954 decision of the United States Supreme Court in *Brown v Board of Education of Topeka*,²⁰ that racial segregation in the US was unconstitutional, is “activist”; or the judge who might seek to undo a ruling about such segregation in this new millennium

20 347 U.S. 483 (1954).

would be the “activist”. Perhaps the answer is that any judge in any setting who is considered willing to undo some legal orthodoxy is considered “activist”.

In my time as a law student, commencing in 1968, the views of Sir Owen Dixon, Chief Justice of the High Court from 1952 to 1964, on the question of judicial method were highly influential; and they still are. He was considered by many to be the quintessential black letter lawyer, although I think he was much more than that. He wrote about the proper separation of powers between the judicial, the executive and the legislative branches of government. He preached restraint, one might say, so far as judicial method was concerned. When reading Dixon, I think it helps to remember the era in which he lived, through the Wars, when the Australian polity was barely 50 years old; that while a serving judge on the High Court, he also served as Australia’s Minister in Washington; and that after WWII he accepted the challenge from the United Nations of trying to broker peace in Kashmir, a peace that still eludes that part of the world.²¹

In his swearing in as Chief Justice in 1952, Dixon observed:

The High Court’s jurisdiction is divided in its exercise between constitutional and federal cases which loom so largely in the public eye, and the great body of litigation between man and man, or even man and government, which has nothing to do with the Constitution, and which is the principal preoccupation of the court. Federalism means a demarcation of powers and this casts upon the court a responsibility of deciding whether legislation is within the boundaries of allotted powers. Unfortunately that responsibility is very widely misunderstood, misunderstood, largely by the popular use and misuse of terms which are not applicable, and it is not sufficiently recognised that the court’s sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has nothing whatever to do with the merits or demerits of the measure.

Such a function has led us all I think to believe that 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 other safe guide to judicial decisions

21 Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003) 193-6.

in great conflicts than a strict and complete legalism.²²

This statement came just a year after a majority of the Court, including Dixon, struck down the Communist Party Dissolution legislation in the *Communist Party* case.²³

The statement obviously had everything to do with how the Court interprets the Constitution. I think it may also be considered to apply to the interpretation of statutes. But it plainly doesn't extend to the rules that govern the "great body of litigation between man and man" to which Dixon referred.

It is perhaps worth noting, that Owen Dixon, who at the time had not yet taken silk, was counsel for the Commonwealth which intervened in the landmark *Engineers case*²⁴ in 1920, contending for a more literal construction of the Constitution devoid of any limitations to be implied in the text.

In a lecture "Concerning judicial method", delivered at Yale's Howland Prize Ceremony on 19 September 1955, Dixon developed his theme however, on the common law, its traditions, and what his biographer, Philip Ayres, described as "the perils it faces in the present, perils precisely located".²⁵ This was at a time when Lord Denning was making a mark as an appeals court judge in England.

Ayres writes that,²⁶ reflecting the words of the legal historian Frederic Maitland, Dixon said that the common law was "not common sense and the reflection of the layman's unanalysed instincts; rather ... strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries". Dixon considered that there were many signs that the strict logic and the high technique of the common law had fallen into disfavour – it appears he had Denning firmly in his sights.

It was Denning's judgments that mostly attracted the condemnation of being instances of palm tree justice through the 1950s and into the 60s.

You may ask yourselves whether the analysis that Dixon offered to his Yale audience in 1955, of the then state of the world and its learning, resonates in our contemporary times and should

22 'Swearing in of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xiii – xiv.

23 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

24 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

25 Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003) 251.

26 *Ibid.*

lead us to adopt an outlook similar to that Dixon was then promoting. Dixon suggested some causes for why strict logic and high technique of the common law had fallen into disfavour. He said:

It is not an age in which men would respond to a system of fixed concepts, logical categories, and prescribed principles of reasoning. In the exact sciences the faith is gone which the nineteenth century is reputed to have held in the immutability of ascertained and accepted truths. The conclusions of physical science are now held as provisional and working hypotheses. Even more tentative are the fundamental explanations of bacteriology and virology. Philosophy appears to have foregone the search for reality and seldom speaks of the absolute. History concedes the validity of a diversity of subjective interpretations. The visual arts tend to discard form as an expression of aesthetic truth. Clearly, the intellectual climate is unfavourable to the high technique of the common law, to say nothing of strict logic. It is certainly not a time when many minds can be found to respond with lively animation to an encounter with tolled entry upon a descent cast, or with a demurrer to a plea giving express colour on the ground that, lacking a protestando, the plea confesses but does not avoid a count in trespass; or even with the acceleration of a legal contingent remainder by the destruction of a prior contingent interest. We have turned in other directions ... The possession of fixed concepts is now seldom conceded to the law. Rather, its principles are held to be provisional; its categories, however convenient or comforting in forensic or judicial life, are viewed as unreal ... illusory guides formerly treated with undue respect.²⁷

One needs to bear in mind that Dixon was speaking extra judicially and in a high minded way. He was wanting to challenge some aspects of a changing, post-second war world. He was plainly wanting to place a brake on what he saw as dangerous, or at least unthinking, deviations of the historical development of the law.

Lord Denning was oft criticised in England and elsewhere in the common law world, for his apparent lack of adherence to precedent. The House of Lords chided him more than once. Academic lawyers, though, were in seventh heaven. Such high level disputation over legal judicial method was manna from heaven in their circles.²⁸ However, Lord Denning was

²⁷ Ibid 251-2.

²⁸ See, eg, Michael J Kirby, 'Lord Denning and Judicial Activism' (1999) 14(1) *The Denning Law Journal* 127; Editor, 'Lord Denning and Judicial Reform' (1980) 20 *Australian Law Reform Commission Reform Journal* 115; E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2009) 94-5.

something of a popular hero in the law and may be considered the ultimate victor in this dispute. Lord Wilberforce, himself a reformer of the law, later observed that 70% of Denning's decisions were upheld in the House of Lords, as were 70% of his dissents!²⁹

The same broad debate over policy, values, justice and settled principles has continued in Australia. The Mason High Court during the 1980s shifted away from what were seen to be the strictures of the strict logic and high technique of the common law approach to judging.³⁰

In *State Government Insurance Commission v Trigwell and Others*³¹ in 1979, Sir Anthony Mason gave a clear indication that in an appropriate case the High Court:

can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances.³²

In that case, though, he and other members of the court considered there was no justification for it to review the inherited common law rule that occupiers of land are under no duty of care to prevent stock from straying onto public roads. They pointed out that the sort of question before them was one best left for parliaments to change, if it were to be.

The *Mabo* decision of the Mason court then followed 13 years later in 1992. Here the court took the opportunity to remedy an historic wrong and effectively accepted that only it could declare the common law and did not choose to leave the question of recognition of indigenous land rights to the parliaments of Australia.

Native title indeed provides the example par excellence of judicial law making. The High Court ultimately had no difficulty in finding that native title survived the coming of the new British sovereign in Australia. Since the subsequent passage of the *Native Title Act* in 1993, it has fallen to the courts to give its provisions practical meaning. The courts, from trial judges to the Full Federal Court and the High Court, have put flesh on the bones of the Act. They have decided what it means for an indigenous person to maintain a "connection" with their country "by traditional law and custom", terms used in s 225 of the Act.³³ They have decided

29 Attributed to Lord Wilberforce in an obituary: 'Lord Wilberforce', *The Telegraph* (online), 18 February 2003 <<http://www.telegraph.co.uk/news/obituaries/1422358/Lord-Wilberforce.html>>.

30 Gerard Brennan, 'A Tribute to Sir Anthony Mason' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 10, 12-3.

31 (1979) 142 CLR 617.

32 Ibid 633.

33 *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

(2017) 19 *UNDALR*

when extinguishment, whole or partial, occurs.³⁴ They are collectively in the process of deciding how compensation paid under the Act should properly be assessed.³⁵

I might here make the point that because parliaments can amend the legislation they have earlier made, courts in the modern era, when interpreting statutes, may be seen to be relatively “bloodless” when doing so. The text of the statute is paramount.³⁶ Judges should not decide what they think the parliament meant to say, and then interpret the Act accordingly. If an outcome is inconvenient from a public policy point of view, so be it. Parliament can alleviate the inconvenience. If a particular construction seems to deny justice, parliament can right the wrong.

The decision of the full court of the Federal Court in *McGlade v Native Title Registrar*³⁷ (of which full court I was a member), in relation to the effectiveness of an agreement made by the State of Western Australia with the Noongar People of the South West of the State, is a case in point. The court found the agreement was not one recognised as an Indigenous Land Use Agreement under the *Native Title Act*. The inconvenience was manifest. The Commonwealth Parliament immediately moved to amend the Act largely with bipartisan political support.³⁸

So I come to the end of the lecture.

The lessons I have conveyed to you tonight about the judicial function, arise from my learning them over the course of a 15 year judicial career.

Reassuringly, I have found over this time, while my judicial colleagues around Australia on superior courts have arrived on their courts from a variety of professional backgrounds and usually without any formal training as judges, they share an abiding commitment to the concepts of the rule of law and equality before the law.

They accept the strictures of statutory interpretation I have referred to, but understand that the general law is always evolving, just as the High Court demonstrated in *Hewett v Court*.

34 *Western Australia v Ward* (2002) 213 CLR 1; *Western Australia v Brown & Ors* (2014) 253 CLR 507.

35 *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 (Mansfield J); *Northern Territory of Australia v Griffiths* [2017] FCAFC 106; applications for special leave to appeal to the High Court have been filed, but are yet to be decided.

36 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46 [47].

37 [2017] FCAFC 10.

38 See *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth).

DO JUDGES MAKE LAW?

While judges are not free to make law as legislators, based on their personal views of the dictates of justice, justice finds its way into the calculus that sees the general development of legal rules and principles over time.

I consider that David Malcolm's career in the law, as a lawyer and as a judge, clearly bears out these observations.