FUTURE DIRECTIONS IN AUSTRALIAN LAW

SIR ANTHONY MASON*

Now that the *Australia Acts* 1986[1] have severed the residual constitutional links between Australia and the United Kingdom we are, as we have never truly been before, the masters of our own legal destiny. Henceforth, the authority of the Parliament of the United Kingdom to make laws for Australia is a matter of history. So is the appeal from Australian courts to the Privy Council.

The termination of the authority of the United Kingdom Parliament to make laws for Australia, though symbolically significant, has limited practical importance. The Parliament at Westminster had abstained from exercising its authority for so long that we had come to think that it would never be exercised. And the irony of it is that when the Parliament finally exercised its power by enacting the *Australia Act* 1986 (U.K.) it acquiesced in the termination of its power. In this respect the *Australia Acts* brought legal and constitutional theory into line with reality.

DEVELOPMENT OF A DISTINCT AUSTRALIAN LAW

One element of that reality is that for the past twenty years at least, our statute law, unlike our judge-made law, has been largely original and not derivative. Our Parliaments, instead of following English legislative models, have pursued indigenous solutions adapted to Australian conditions and circumstances, sometimes after taking careful account of American experience.

1. The Impact of English Precedents on Australian Judge-made Law

The elimination of the vestigial remnant of the Privy Council appeal – the appeal from the Supreme Courts of the States – began to cast its shadow well before 1986. After the appeal from the High Court of Australia was finally abolished in 1975,[2] the High Court decided that it was not bound by

*The Honourable Sir Anthony Mason, K.B.E., Chief Justice of the High Court of Australia

[1] *Australia (Request and Consent) Act* 1985 (Cth); the *Australia Acts (Request) Act* 1985 passed by the Parliament of each State; and *Australia Act* 1986 (U.K.).

[2] *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth). The jurisdiction of the High Court to grant a certificate under section 74 of the Constitution is now obsolete: *Kirmani* v. *Captain Cook Cruises Pty. Ltd. (No. 2)* (1985) 59 A.L.J.R. 480.

Privy Council decisions.[3] Now other Australian courts are no longer bound to follow Privy Council decisions given after the commencement of the *Australia Acts.*[4] Nor are they bound by the decisions of other English courts, though they will accord particular respect to House of Lords decisions before that date, in recognition of the powerful influence they had in the development of Australian law. Even so, the freedom of Australian courts, including the High Court, to depart from settled principles of our common law is qualified by the doctrine of *stare decisis*. Although the doctrine has been criticized on the ground that it unduly fetters a judge's capacity to update the law, *stare decisis* promotes consistency, coherence and predictability. Without these qualities the law would cease to command public confidence. Fortunately *stare decisis* is so flexible, for much depends on what is "settled principle", that we can preserve a balance between the demands for law that is predictable and law that is adaptable and therefore responsive to social necessity. Unfortunately precedent is sometimes transformed from legal doctrine into an attitude of mind, so that the search for an answer to a legal question begins and ends with the quotation of a Delphic utterance by another judge on another occasion directed to another question.

Of course Privy Council decisions are no more than the tip of our common law iceberg. Lying beneath the surface of these decisions there remains the vast body of common law[5] rules and principles, evidenced by the existing decisions of Australian and English courts. Although Australian courts were not formally bound by decisions of English courts other than the Privy Council, Australian judge-made law has, certainly until very recent times, been largely derived from English judicial precedent. Given that the Privy Council was the ultimate court of appeal from Australia for so long and that it could be expected to reflect established judicial values in the United Kingdom, it was only natural that our courts were strongly influenced by English judicial decisions even when they were not binding. This natural tendency was reinforced by statements made by Justices of the High Court, as recently as 1975, asserting that Australian judges, in the absence of High Court authority, should follow decisions of the English Court of Appeal as well as the House of Lords.[6]

In the result we have brought into existence a large corpus of Australian judge-made law in the belief that conformity with the common law as declared

[3] *Viro* v. *The Queen* (1978) 141 C.L.R. 88.

[4] *Cook* v. *Cook* (1986) 68 A.L.R. 353, 362–363. But note that McHugh J.A. in *Hawkins* v. *Clayton* (1986) 5 N.S.W.L.R. 109, 136–137, considered that Australian courts are no longer bound by Privy Council decisions whether given before or after the commencement of the *Australia Acts.* See also *R.* v. *Judge Bland; ex parte Director of Public Prosecutions* (1987) V.R. 225, 230–2.

[5] For the most part I have used the expression "common law" in its widest sense to comprehend judge-made law as distinct from statute-based law.

[6] In *Public Transport Commission (N.S.W.)* v. *J. Murray-More (N.S.W.) Pty. Ltd.* (1975) 132 C.L.R. 336 Barwick C.J. stated (at p. 341) that, absent a High Court decision on the point, the Supreme Court at first instance and on appeal should as a general rule follow a decision of the English Court of Appeal. Gibbs J. went even further when he said (at p. 349) that the N.S.W. Court of Appeal should have treated a decision of the English Court of Appeal as binding.

in England was a virtue, if not a necessity. In so doing we have accepted ready-made solutions from the United Kingdom instead of evolving answers for ourselves. I doubt that we would have shaped our law in a very different way, had we been the masters of our own legal destiny at an earlier time. Yet the High Court and English courts have not always adopted the same approach to common law questions. Significantly the differences have become more noticeable since the High Court ceased to be bound by Privy Council decisions.

2. An Emerging Australian Common Law

Occupiers' liability and negligence have been fertile breeding grounds for conflicting views. The initiative shown by the High Court in *Commissioner for Railways (N.S.W.)* v. *Cardy*[7] in devising a general duty of care towards the plaintiff who was a trespasser was snuffed out by the Privy Council in *Commissioner for Railways (N.S.W.)* v. *Quinlan*,[8] only to be resuscitated by our later decision in *Public Transport Commission (N.S.W.)* v. *Perry*.[9] We have consistently refused to accept the proposition seemingly expressed by the House of Lords in *London Graving Dock Co. Ltd.* v. *Horton*[10] that knowledge and appreciation of the risk by the invitee excludes liability on the part of the invitor.[11] Since then we have moved to the position that the occupier's duty to an invitee, formerly a matter of classification into categories, is but an instance of the ordinary common law duty to take care.[12] We have not adopted the House of Lords' formulation of the common law duty of care in *Anns* v. *Merton London Borough Council*[13] and its prescription for the liability of a local authority which fails to exercise, or to exercise adequately, its power to inspect buildings in course of erection.[14] Nor have we accepted the view of the English Court of Appeal in *Nettleship* v. *Weston*[15] that an experienced learner driver always owes to his instructor or passenger the degree of skill expected of an experienced and careful driver,[16] preferring instead the approach adopted earlier by the High Court in *Insurance Commissioner* v. *Joyce*.[17] In the exceptional circumstances of that case, the plaintiff being aware of the driver's intoxicated condition, the standard of care was that of a driver almost totally devoid of skill and experience.

[7] (1960) 104 C.L.R. 274.
[8] [1964] A.C. 1054.
[9] (1977) 137 C.L.R. 107; esp. 146-147.
[10] [1951] A.C. 737.
[11] *Commissioner for Railways (N.S.W.)* v. *Anderson* (1961) 105 C.L.R. 42.
[12] *Australian Safeway Stores Pty. Ltd.* v. *Zaluzna* (1987) 69 A.L.R. 615. See also *Papatonakis* v. *Australian Telecommunications Commission* (1985) 156 C.L.R. 7.
[13] [1978] A.C. 728.
[14] *Sutherland Shire Council* v. *Heyman* (1985) 157 C.L.R. 424; *Jaensch* v. *Coffey* (1984) 155 C.L.R. 549.
[15] [1971] 2 Q.B. 691.
[16] *Cook* v. *Cook* (1986) 68 A.L.R. 353.
[17] (1948) 77 C.L.R. 39.

Likewise, in the realm of negligent mis-statement we have in large measure restored[18] the majority judgment of the High Court in *Mutual Life & Citizens' Assurance Co. Ltd.* v. *Evatt*[19] which was reversed by the Privy Council,[20] thereby recognizing the existence of a general duty of care in the making of statements on which a person has reason to rely. On the related and troublesome topic of recovery for economic loss, no general principle acceptable to both Australian and English courts has yet emerged.[21] In criminal law Sir Owen Dixon's historic refusal in *Parker* v. *The Queen*[22] to follow the objective test of intent in murder stated in *D.P.P.* v. *Smith*[23] was very recently vindicated by the Privy Council's overthrow of that test in *Frankland* v. *The Queen*.[24]

In the controversial field of administrative law we have not yet abandoned the distinction between an error as to the existence of jurisdiction and an error in the exercise of jurisdiction. In abandoning this distinction the courts in the United Kingdom have opened a Pandora's box of problems for administrative law.[25] Though lagging behind in some situations to spell out an obligation to accord natural justice,[26] we have broken new ground by requiring an Executive Council to accord natural justice[27] and we have subjected a decision made by a Minister or representative of the Crown to judicial review.[28]

In *Commercial Bank of Australia Ltd.* v. *Amadio*,[29] *Taylor* v. *Johnson*[30] and *Legione* v. *Hateley*[31] we have invigorated the equitable concept of unconscionable conduct, even to the extent of granting relief against the rescission by a vendor of a contract for the sale of land on the ground that the purchaser had failed to complete, time being of the essence.[32] These initiatives have no parallel in recent decisions of the House of Lords. Indeed, *National Westminister Bank Plc.* v. *Morgan*[33] and *Scandinavian Trading*

[18] *Re San Sebastian Pty. Ltd.* (1986) 68 A.L.R. 161; see also *Shaddock & Associates Pty. Ltd.* v. *Parramatta City Council* (1981) 150 C.L.R. 225.
[19] (1968) 122 C.L.R. 556.
[20] (1970) 122 C.L.R. 628.
[21] *Caltex Oil (Australia) Pty. Ltd.* v. *The Dredge "Willemstad"* (1976) 136 C.L.R. 529; *Re San Sebastian* (1986) 68 A.L.R. 161; but cf. *Junior Books Ltd.* v. *Veitchi Co. Ltd.* [1983] 1 A.C. 520; *Candlewood Navigation Corporation Ltd.* v. *Mitsui O.S.K. Lines Ltd.* [1986] 1 A.C. 1; *Leigh and Sillivan Ltd.* v. *Aliakmon Shipping Co. Ltd.* [1986] 2 W.L.R. 902.
[22] (1963) 111 C.L.R. 610.
[23] [1961] A.C. 290.
[24] [1987] 2 W.L.R. 1251.
[25] G. L. Peiris, "Jurisdictional Review and Judicial Policy: the Evolving Mosaic" (1987) 103 L.Q.R. 66.
[26] *Salemi* v. *Mackellar (No. 2)* (1977) 137 C.L.R. 396; *The Queen* v. *Mackellar; Ex parte Ratu* (1977) 137 C.L.R. 461.
[27] *F.A.I. Insurance Ltd.* v. *Winneke* (1982) 151 C.L.R. 342.
[28] *The Queen* v. *Toohey; Ex parte Northern Land Council* (1981) 151 C.L.R. 170.
[29] (1983) 151 C.L.R. 447.
[30] (1983) 151 C.L.R. 422.
[31] (1983) 152 C.L.R. 406.
[32] Ibid.
[33] [1985] A.C. 686.

Tanker Co. A.B. v. *Flota Petrolera Ecuatoriana*[34] point in the opposite direction.

Contract itself has not generated such a lively difference of opinion, no doubt because contract cases at the appellate level are a much smaller proportion of our work. Perhaps this has been a windfall. One result has been that we have adhered to the principle that exclusion and limitation clauses should be naturally construed according to their language in the context of the entire contract,[35] without being distracted, as was the House of Lords, by the now discredited doctrine of fundamental breach.[36] In this respect, unlike the House of Lords,[37] we have drawn no distinction between an exclusion and a limitation clause.

The general principles of English contract law are set in the large commercial cases decided by the House of Lords. Whether these general principles are entirely suited to Australian contract law which, as we are not an international commercial or maritime centre, is much more consumer oriented, is open to question. No doubt this difference explains why we have been more inclined to grant equitable relief in contract. The new section 52A of the *Trade Practices Act* 1975 (Cth) and the *Contracts Review Act* 1980 (N.S.W.), by giving the courts power to grant relief in contract where the terms are unfair, unjust, unconscionable or the operation of the contract is oppressive, will reinforce, if not stimulate, this tendency.

Divergent opinions have surfaced in recent taxation cases. This is significant because, as Professor Parsons noted in his 1986 Fullagar Lecture,[38] even in the matter of statutory interpretation, Australian law came to be influenced by notions derived from the United Kingdom Income Tax Acts. *Federal Commissioner of Taxation* v. *Whitfords Beach Pty. Ltd.*[39] suggested that not all that was said by the Privy Council in *McClelland* v. *Federal Commissioner of Taxation*[40] could be accepted because their Lordships failed to differentiate between the United Kingdom and Australian systems of arriving at taxable incomes and introduced the concept of an adventure in the nature of trade which has no place in our legislation. And in *Federal Commissioner of Taxation* v. *Myer Emporium Ltd.*[41] we held that a lump sum consideration received for an assignment of the right to receive future payments of interest payable on a loan amounted to income, being no more than a conversion of future into present income, an approach adopted by

[34] [1983] 2 A.C. 694.
[35] *Darlington Futures Ltd.* v. *Delco Australia Pty. Ltd.* (1986) 68 A.L.R. 385.
[36] *Suisse Atlanique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; but cf. *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] A.C. 827; *Ailsa Craig Fishing Co. Ltd.* v. *Malvern Fishing Co. Ltd.* [1983] 1 W.L.R. 964; *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] 2 A.C. 803.
[37] *Ailsa Craig* [1983] 1 W.L.R. 964–970.
[38] R. Parsons, "Income Taxation – An Institution in Decay?" (1986) 12 *Mon. U.L.R.* 77.
[39] (1982) 150 C.L.R. 355, esp. 367–368, 379; see also *Commissioner of Taxation* v. *Myer Emporium Ltd.* (1987) 61 A.L.J.R. 270, 273.
[40] (1970) 120 C.L.R. 487.
[41] (1987) 61 A.L.J.R. 270.

the United States Supreme Court,[42] in preference to that apparently taken by the English Court of Appeal in *Inland Revenue Commissioners* v. *Paget*.[43]

This short sketch of the differences between Australian and English law, most of them arising since the High Court ceased to be bound by Privy Council decisions, is not intended to suggest that our law is likely to take a very different path from English law. But, as recent developments indicate, some significant differences will arise as we proceed to develop a coherent common law that is specifically suited to our needs.

When legal formalism was at its height lawyers believed in a universal common law which was somehow out there, awaiting discovery and declaration. As Traynor C.J. noted:

> "The legal profession came under the spell of Blackstone's vision of the common law as a completed formal landscape graced with springs of wisdom that judges needed only to discover to refresh their minds for the instant case".[44]

These myths have long since been dispelled.[45]

The American experience is instructive. There is a surprising similarity in the substantive principles of the common law as settled by British and United States courts, despite the absence of any link between them for over two hundred years. The principal dissimilarity lies in the differing judicial approaches to the elaboration of the common law. The common law as it stands in the United States today is very much the product of American legal thinking, owing no particular debt to parallel development in the United Kingdom.

Because our legal separation from the United Kingdom was so harmonious and so recent we have no reason to distance ourselves from the continuing evolution of the law in that country. It would be a denial of our legal heritage if we were to do so. There is, however, every reason why we should fashion a common law for Australia that is best suited to our conditions and circumstances. In deciding what is law in Australia we should derive such assistance as we can from English authorities. But this does not mean that we should account for every English judicial decision as if it were a decision of an Australian court. The value of English judgments, like Canadian, New Zealand and for that matter United States judgments, depends on the persuasive force of their reasoning. Of course, I do not overlook the valuable assistance now available to us in the wealth of academic writings here and overseas.

The record of recent years indicates that, in the tradition of continuity, we are developing an Australian common law. In the pursuit of this goal

[42] *Commissioner of Internal Revenue* v. *P.G. Lake Inc.* [1958] U.S. 260, 266-267.
[43] [1938] 2 K.B. 25.
[44] Roger J. Traynor, "Statutes Revolving in Common Law Orbits" (1968) 17 *Catholic University Law Rev.* 401, 402.
[45] *Australian Consolidated Press Ltd.* v. *Uren* [1969] 1 A.C. 590; *Geelong Harbour Trust Commissioners* v. *Gibbs Bright & Co.* (1974) 129 C.L.R. 576, 583-585.

we must necessarily depart, in some respects at least, from the philosophy of legalism or legal formalism which, so it is said, the High Court followed in past years. So enduring is this philosophy in Australia and so striking is its impact on the judicial function that it requires some consideration.

THE SHIFT AWAY FROM LEGAL FORMALISM

1. The Doctrine of Legal Formalism

Sir Owen Dixon's statement on the occasion of his swearing-in as Chief Justice that "there is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism", has been taken as an unqualified affirmation of the virtues of legalism or legal formalism. There is much in his essay "Concerning Judicial Method"[46] to support this assessment. There Sir Owen spoke approvingly of the "strict logic and high technique" which, according to Maitland, characterized the dynamic development of the common law, though acknowledging, regretfully, that neither strict logic nor high technique was pursued as rigorously as it had been and that the spirit of the age was no longer sympathetic to a system of fixed concepts, logical categories and prescribed principles of reasoning. His Honour went on to refer to the principles of law as being deducible from precedents and to maintain as a basal tenet that a judicial decision is "correct" or "incorrect" according to whether it conforms to ascertained legal principles.

Sir Owen expressed his view of the judicial function in this passage:

> "It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former . . . is a process by the repeated use of which the law is developed . . . The latter means an abrupt and almost arbitrary change."[47]

The essential characteristics of the judicial technique outlined in this way are the characteristics of legal formalism.[48] Yet in some respects his Honour's outline resembles an elegantly constructed mansion in which some of the windows have been deliberately left open. The message is not so much an injunction against reasoning by reference to considerations of justice and social utility as a proscription of the judge who, in defiance of the great tradition of legal continuity, turns his back on the accumulated wisdom of the

[46] Sir Owen Dixon, *Jesting Pilate* (Melbourne, Law Book Co. Ltd., 1965) p.152.
[47] Id. 158.
[48] Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, 1979) p. 388; Nonet P. and P. Selznick, *Law and Society in Transition: toward responsive law* (New York, Harper and Row, 1978) Ch. III "Autonomous Law", pp. 53 et seq.; J. Wallace and J. Fiocco, "Recent Criticisms of Formalism in Legal Theory and Legal Education" (1980-81) 7 *Adelaide Law Rev.* 309, 313-314.

past and overthrows well settled doctrine in order to reach the result which he considers just in the particular case.

Perhaps the strongest assertion of the philosophy of legal formalism was made by Kitto J. in *Rootes* v. *Shelton*:[49]

> ". . . 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', 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 waters of the common law — in which, after all, we have no more than reparian rights."

The virtues of legal formalism are continuity, objectivity and absence of controversy, attributes calculated to induce public confidence in the administration of justice and respect for the law. Legal formalism provides a mantle of legitimacy for the non-elected judiciary in a democratic society. If the principles of law are deducible from past precedents, there is no place for the personal predilections and values of the individual judge, and there is less scope for controversy about the law that the judge is to apply. What the law should be is a matter not for the courts but for Parliament, in conformity with the doctrine of parliamentary supremacy which has been just as influential here as in the United Kingdom, notwithstanding that our Parliaments are legislatures of limited powers. In its most extreme form legalism required a complete separation of law from politics and policy, partly on the ground that the law is a self-contained discipline and partly on the ground that exposure to politics and policy would subject the law to controversy.

2. Legal Formalism in Practice

Many past judgments of the High Court were classic examples of formal legal reasoning. The Court's interpretation of the conception of trade and commerce among the States in section 51(i) and section 92 of the Constitution supplies perhaps the best illustrations. Take the distinction between essential and incidental attributes of interstate trade,[50] the emphasis given to the width of the expression "with respect to" in section 51(i) so as to give the head of legislative power a greater area of operation than the constitutional guarantee,[51] the so-called "criterion of operation" and its companion the "circuitous device",[52] along with the distinction between burdens which are direct and immediate, and those which are indirect, consequential and remote.[53] They all led to the exclusion from the decision-making process of the practical effect of the particular legislative restriction on interstate trade.

[49] (1967) 116 C.L.R. 383, 386-387.

[50] *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55; *Beal* v. *Marrickville Margarine Pty. Ltd.* (1966) 114 C.L.R. 283.

[51] *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55, 77.

[52] *Hospital Provident Fund Pty. Ltd.* v. *Victoria* (1953) 87 C.L.R. 1, 16-17.

[53] *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55; *R* v. *Anderson; Ex parte IPEC-Air Pty. Ltd.* (1965) 113 C.L.R. 177.

The Court took much the same approach in the interpretation of section 90 with the result that in *Dennis Hotels Pty. Ltd.* v. *Victoria*[54] in which a liquor licence fee calculated by reference to purchases of liquor made for sale under that licence for the period of the licence was held to be an excise whereas, so interpreted, section 90 was easily circumvented by simply stipulating that the licence fee for the period of the licence should be calculated by reference to the volume of purchases (or sales) in an earlier period.

A similar approach, in accordance with English authority, was evident in the law of torts and administrative law. The classification of occupiers' liability in accordance with the character of the entrant on premises and the rigid distinction between administrative and judicial or quasi-judicial decisions as a criterion of the availability of judicial review by prerogative writ are typical illustrations.

But the myriad of cases on the federal judicial power, reaching their zenith in the *Boilermakers' Case*,[55] provides possibly the most striking illustration. That decision largely insulates our system of federal courts from the controversial world of industrial arbitration. It does so by excluding from the judicial power industrial arbitration as well as administrative and legislative functions. Barwick C.J. strongly criticized the decision for its technicality and because it produced practical inconvenience.[56] Nevertheless, in conformity with the *Boilermakers' Case*, the Court has held that where a discretion is to be exercised wholly by reference to industrial or administrative standards,[57] or by reference to non-legal standards, that is standards which are neither ascertained nor ascertainable,[58] it travels beyond the judicial power.

3. The Relaxation of Strict Formalism

In recent years the High Court has been less inclined to pursue formal legal reasoning so far. As I mentioned, the particular duties owed by an occupier to different entrants on his premises have been submerged in the general duty of care.[59] The rigid distinction between the administrative and the judicial or quasi-judicial decision is no longer the touchstone of judicial review. The distinction has been eroded by statute[60] as well as judicial comment.[61] *Dennis Hotels*[62] is now virtually an island in the sea of cases on section 90 of the Constitution.[63] The formal conception of "duties of excise" is elsewhere being discarded its artificiality depriving it of any useful function or

[54] (1960) 104 C.L.R. 529.
[55] *The Queen* v. *Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254; affirmed (1957) 95 C.L.R. 529.
[56] *The Queen* v. *Joske; Ex parte Australian Building Construction Employees' & Builders' Labourers' Federation* (1974) 130 C.L.R. 87, 90.
[57] *The Queen* v. *Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 C.L.R. 277, 289, 311.
[58] Id. 290–291.
[59] See note 12.
[60] *Administrative Decisions (Judicial Review) Act* 1977 (Cth).
[61] *F.A.I. Insurances Ltd.* v. *Winneke* (1982) 151 C.L.R. 342, 360.
[62] (1960) 104 C.L.R. 529.
[63] *Evda Nominees Pty. Ltd.* v. *Victoria* (1984) 154 C.L.R. 311.

purpose, a highly purposive interpretation being preferred.[64] Likewise, the formal conception of interstate trade, both as a head of legislative power and the subject of a constitutional guarantee, especially the "criterion of operation" and the "circuitous device" has been strongly criticized.[65] What is more, there has been an increasing tendency to take account of the practical effect on interstate trade of legislative restraints.[66] The recent interpretations of the external affairs power are based to a significant extent on policy arguments.[67] And the practical inconvenience caused by the *Boilermakers' Case*[68] has been softened by the recognition that many functions cannot be neatly labelled "judicial" or "administrative" and that their nature will depend on the character of the tribunal in which they are reposed.[69] Moreoever, it has been said that a court may be called upon to take account of considerations of industrial policy in exercising a judicial discretion.[70] The emphasis is on substance instead of form, whether it be the substance of a constitutional provision[71] or the substance of a transaction between parties.[72] Likewise, the emphasis is on purposive interpretation, a matter to which I shall shortly refer, literal interpretation being a hallmark of formalism.

4. Legal Reasoning

It is not surprising that current legal reasoning extends beyond the narrow confines of legal formalism. It is now accepted that, at the appellate level at least, judges do make law when they extend, qualify or re-shape a principle of law. Equally we accept that the courts have a responsibility "to develop the law in a way that will lead to decisions that are humane, practical and just", to repeat the words of Sir Harry Gibbs.[73] Judges do not carry out this responsibility in a vacuum, by shutting their eyes to contemporary conditions. They must have an eye to the justice of a rule, to the fairness and the practical efficacy of its operation in the circumstances of contemporary society. A rule that is anchored in conditions which have changed radically with the passage of time may have no place in the law of today.

It is unrealistic to interpret any instrument, whether it be a constitution, a statute, or a contract, by reference to words alone, without any regard to

[64] *Hematite Petroleum Pty. Ltd.* v. *Victoria* (1983) 151 C.L.R. 599; *Gosford Meats Pty. Ltd.* v. *N.S.W.* (1985) 155 C.L.R. 368.

[65] *Miller* v. *T.C.N. Channel Nine Pty. Ltd.* (1986) 67 A.L.R. 321, 329-333, 365-369.

[66] See, for example, *North Eastern Dairy Co. Ltd.* v. *Dairy Industry Authority of N.S.W.* (1975) 134 C.L.R. 559.

[67] *Koowarta* v. *Bjelke-Petersen* (1982) 153 C.L.R. 168; *The Commonwealth* v. *Tasmania ("The Tasmanian Dam Case")* (1983) 158 C.L.R. 1.

[68] (1956) 94 C.L.R. 254.

[69] *Cominos* v. *Cominos* (1972) 127 C.L.R. 588, 605, 606-607.

[70] *The Queen* v. *Joske; Ex parte Shop Distributive & Allied Employees' Association* (1976) 135 C.L.R. 194, 217.

[71] *Dickenson's Arcade Pty. Ltd.* v. *Tasmania* (1974) 130 C.L.R. 177, 186; *Hematite Petroleum Pty. Ltd.* (1983) 151 C.L.R. 599, 630, 662-665; *Gosford Meats Pty. Ltd.* (1985) 155 C.L.R. 368, 383-384; *Queensland* v. *Commonwealth of Australia* (1986) 69 A.L.R. 207, 221.

[72] *Secured Income Real Estate (Australia) Ltd.* v. *St Martins Investments Pty. Ltd.* (1979) 53 A.L.J.R. 745, 748-749; *AMEV-UDC Finance Ltd.* v. *Austin* (1986) 68 A.L.R. 185, 195, 204; *Acron Pacific Ltd.* v. *Offshore Oil N.L.* (1985) 59 A.L.J.R. 782, 784.

[73] On the occasion of his swearing-in as Chief Justice of the High Court on 12 February 1981.

fundamental values. By values I mean those that are accepted by the community rather than those personal to the judge. When the judge takes values into account, he should acknowledge and identify them. They are then an element in his reasons which he should disclose. Unless disclosed, the decision cannot be correctly evaluated on appeal, in later cases or even contemporaneously by the public. The decision will have force as a precedent without anyone appreciating that its force depends upon hidden values.

Legal reasoning, it is sometimes said, differs from ordinary reasoning. Why this should be so is not at all clear. No doubt precedent and *stare decisis* give legal reasoning a distinctive quality. It is reinforced by the detailed discussion of authorities. So the intelligent layman concludes that an obsessive preoccupation with precedent afflicts the process of legal reasoning.

Of course the legal issues for decision in a particular case often do not correspond with the real issues underlying the case as the public sees them. A court must necessarily deal with the legal issues. But undue emphasis on formalism promotes a lack of correspondence between the legal issues and the real issues as the public perceives them. And a similar emphasis on formalism diminishes public confidence in the administration of justice in an age in which confidence in the courts and respect for the law cannot be taken for granted. Nowadays an informed and influential section of the community is anxious to understand, evaluate and, if need be, criticize court judgments. Judges should write with this in mind rather than court the criticism that the law is an esoteric mystery administered by a priestly class.

At the same time reasons for decisions, especially at the appellate level, cannot be explained shortly and simply. In a complex society the law is naturally a complex discipline. Just look at the Capital Gains Tax and the Fringe Benefits Tax legislation. The reasons for a particular decision may depend partly on history, partly on conceptual analysis and partly on functional factors. If law is to be responsive to the current needs of society, the functional operation of rules calls for greater attention. Yet we must maintain a prominent place for conceptual analysis, if only for the reason that law is necessarily expressed in terms of concepts.

The application of *stare decisis* is a matter critical to the evolution of the law. In an era of rapid social change, as we move away from legal formalism, the influence of precedent becomes more contentious. Witness the spate of recent cases.[74] Whether a court should follow its previous decision depends upon a variety of factors. There is a question of "legal policy into which wider considerations . . . than mere questions of substantive law"[75] intrude. The retrospective effect of overruling and satisfactory or unsatisfactory operation of the existing rule are important factors to be weighed against the theoretical interests of legal science. In some instances, as in our

[74] *The Queen* v. *Bolton; Ex parte Beane* (1987) 70 A.L.R. 225; *Babaniaris* v. *Lutony Fashions Pty. Ltd* (1987) 71 A.L.R. 225; *Jones* v. *The Commonwealth of Australia and Others* (1987) 71 A.L.R. 497; *Zecevic* v. *D.P.P. (Vic.)* (1987) 71 A.L.R. 641.

[75] *Geelong Harbour Trust Commissioners* v. *Gibbs Bright & Co.* (1974) 129 C.L.R. 576, 582.

very recent decision, *Zecevic* v. *Director of Public Prosecutions*,[76] where we declined to follow the earlier prescription in *Viro* v. *The Queen*[77] concerning a verdict of manslaughter in cases of excessive self-defence, the unsatisfactory operation of the rule may be the crucial factor that tips the scales.

Underlying the operation of *stare decisis* is the tension between the need for continuity and certainty and the need for adaptability.[78] In resolving this tension the court must make a judgment about the appropriate limits of the law-making functions of a non-elected judiciary. Such a judgment calls for an evaluation of the community consensus or underlying philosophy as to the proper balance between the legislature and the judiciary as lawmakers.[79]

5. Statutory Interpretation

The time of the courts is increasingly devoted to the interpretation of statutes rather than the elucidation of common law principle. And statute law continues to make inroads into the common law, undermining such traditional notions as freedom of contract. It is inevitable, as Pound suggested almost eighty years ago[80] and as Calabresi strongly urged more recently,[81] that these legislative initiatives will erode the formal separation of common and statute law. One feature of that formal separation has been the undue deference accorded in the interpretation of statutes to the antecedent common law.[82] Indeed, the failure of the courts to adapt the common law in the light of statutory policy is both a reflection of judicial reluctance to make use of policy arguments and a ground for the accusation that the law is excessively legalistic. There are strong arguments for treating statute law as well as existing judicial decisions as a platform for future elaboration of the common law. This, as I have mentioned, is likely to occur in contract where statute law has extended equitable grounds for relief. In this way statute law will buttress the willingness of the courts to adapt old doctrine, in conformity with its historic purpose, so as to give it an operation in factual situations which, according to currently accepted standards of fairness and justice, call for relief.

[76] (1987) 71 A.L.R. 641.

[77] (1978) 141 C.L.R. 88.

[78] B. Wilson, "Decision-making in the Supreme Court" (1986) 36 University of Toronto L.J. 227, 230–233.

[79] *Geelong Harbour Trust Commissioners* v. *Gibbs Bright and Co.* (1974) 129 C.L.R. 576, 584–585.

[80] R. Pound, "Common Law and Legislation" (1908) 21 *Har. L. R.* 383, 385–386; see also Roger J. Traynor, "Statutes Revolving in Common Law Orbits" (1968) 17 *Catholic University Law Review* 401.

[81] Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass., Harvard University Press, 1982) p.85 *et seq.*

[82] There is Australian authority for a presumption that a statute alters the common law only so far as it is necessary to give effect to the express provisions of the statute: *Hocking* v. *Western Australian Bank* (1909) 9 C.L.R. 738, 746; *Potter* v. *Minahan* (1908) 7 C.L.R. 277, 304; *Bishop* v. *Chung Bros.* (1907) 4 C.L.R. 1262, 1273. But this may put the position too strongly, at least in the case of consolidated or codifying statutes: *Brennan* v. *The King* (1936) 55 C.L.R. 253, 263; *Gamer's Motor Centre (Newcastle) Pty. Ltd.* v. *Natwest Wholesale Australia Pty. Ltd.* unreported, 24 July 1987.

Greater recognition of statutory policy in the construction of statutes would match the emphasis on purposive construction of the Constitution and of statutes which is seen at work in recent decisions such as *The Queen* v. *Coldham; Ex parte The Australian Social Welfare Union* [83] and *Re Cram; Ex parte N.S.W. Colliery Proprietors' Association Limited* [84] in which the Court refused to accept the suggestion, supported by earlier judicial comment, that we should read into the jurisdiction of an industrial tribunal with respect to "industrial matters", a limitation excluding disputes over matters described as matters of managerial prerogative, for example the manning and recruitment of employees. The same tendency is evident in other areas of statutory interpretation. This tendency is reinforced by the enactment of provisions such as section 15AA of the *Acts Interpretation Act* 1901 (Cth). Recent taxation cases have been seen as emphasising purposive construction at the expense of literal construction. This is an over-simplification. In accordance with the underlying tradition of legal formalism, The Court had been giving emphasis not to literal construction but to a long established rule of interpretation applicable to a taxing Act – that it be strictly construed in favour of the taxpayer – so that no tax is imposed in the absence of clear and unambiguous words.

6. Law and Politics

Nowadays we are disinclined to place law and politics in distinct watertight compartments. But this disinclination cannot disguise the fundamental dissimilarity between the political process and the judicial decision-making process. This difference, aided by the separation of powers doctrine and the traditional notion that law is divorced from politics, has led to the view that courts cannot decide political questions. A similar strand of thinking lies at the core of the concept that a question must be "justiciable" before a court can deal with it and at the heart of the doctrine in the *Boilermakers' Case.*[85] The notion of a "political question" and that of justiciability made rather more sense at a time when we thought that legal questions were invariably determined by the application to the facts as found of a pre-existing and predetermined standard. However, we live in a different era when courts such as the Family Court make discretionary judgments, applying broad criteria. Take, for example, the making of financial orders intended to constitute a reasonable allocation of the parties' property in the light of relevant factors. Although this function of balancing interests is very different from the traditional concept of the judicial function, we have managed to force it through the accepted tests and to conclude that it amounts to an exercise of judicial power.[86] The legislative tendency to confer jurisdiction on courts to resolve the rights of parties by balancing their interests and expectations, in prefer-

[83] (1983) 153 C.L.R. 297.
[84] (1987) 72 A.L.R. 161.
[85] (1956) 94 C.L.R. 254.
[86] *Cominos* v. *Cominos* (1972) 127 C.L.R. 588.

ence to applying pre-determined formulae, is likely to gather strength. Popular opinion moulded by media concentration on the circumstances of particular cases, demands the just outcome even if it means loss of rationality and predictability in point of legal principle. Despite criticism of the "palm tree" quality of this approach, it will create its own pressure for relaxation in the concepts of judicial power and justiciability.

Locus standi, though likewise a force limiting the exercise of jurisdiction, rests on rather different foundations. Its importance lies in the field of public law. Hitherto it has served the purpose of protecting the courts and interested parties from the zeal of the officious busybody. Perhaps we should see in the enforcement of public law an even higher purpose. One of our problems has been the absence of parties having an interest or a willingness to enforce compliance with public law. Maybe meddlesome interference by a busybody is a price that we should be willing to pay. After all in other areas of the law the "floodgates" argument has invariably proved to be an ineffectual menace.

Judicial review of administrative decision-making continues as a topic of lively debate in Australia. To what extent, if at all, courts and tribunals should review administrative policy is too large a subject to discuss on this occasion. There is much to be said for the view, conceptually based, that, consistently with the doctrine of separation of powers, the courts should not review policy. But policy tends to be an all-embracing word and we need to be rather more precise when we say the courts should not review policy.

7. Fundamental Rights

Protection of fundamental rights in Australia is still in a state of flux. Although the Federal government decided not to proceed with the proposal for a non-constitutional Bill of Rights based on the U.N. Covenant on Civil and Political Rights, the Constitutional Commission has the matter under consideration, the Individual and Democratic Rights Advisory Committee having published its recommendations. Past experience does not instil much confidence in the electorate's enthusiasm for wide-ranging constitutional reform. But it is possible that a more limited proposal for entrenchment of some basic rights would attract support.

Even in the absence of an entrenched or statutory Bill of Rights, there is still a role for the courts to play in enforcing and protecting fundamental rights where Parliament fails to do so. Historically the judges have protected individual rights by interpreting statutes so that they do not trench upon interests by which the common law set great store, such as liberty of the individual and natural justice. Comformably with this approach we can interpret statutes so that they do not infringe basic fundamental rights. In this way we would give solid content to Dicey's notion of the Rule of Law by compelling legislatures to be quite specific if they wish to cut across such rights.[87] Our endless quest for that elusive will of the wisp, legislative

[87] T. R. S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 Camb. L.J. 111.

intention, is often unavailing. Members of Parliament cannot predict how an Act will be interpreted by the courts. Insistence on specific exclusions will assist them and others by promoting clear expression of legislative intent.

At the same time we would enhance the democratic process. Our evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will. It embraces a notion of responsible government which respects the fundamental rights and dignity of the individual and calls for the observance of procedural fairness in matters affecting the individual. The proper function of the courts is to protect and safeguard this vision of the democratic process.