

The High Court and the Parliament Partners in law-making or hostile combatants?*

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The question of when a human life begins poses definitional and philosophical puzzles that are as familiar as they are unanswerable. It might surprise you to know that the question of when the High Court of Australia came into existence raises some similar puzzles,¹ though they are by contrast generally unfamiliar and not quite so difficult to answer. Interestingly, the High Court tangled with this issue in its very first case, a case called *Hannah v Dalgarno*,² argued—by Wise³ on one side and Sly⁴ on the other—on 6 and 10 November 1903, and decided the next day on a date that now positively reverberates with constitutional significance, 11 November.⁵

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¹ See Tony Blackshield and Francesca Dominello, ‘Constitutional basis of Court’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia*, South Melbourne, Vic., Oxford University Press, 2001 (hereafter ‘*The Oxford Companion*’): 136.

² (1903) 1 CLR 1; Francesca Dominello, ‘*Hannah v Dalgarno*’ in *The Oxford Companion*: 316.

³ Bernhard Ringrose Wise (1858–1916) was the Attorney-General for NSW and had been a framer of the Australian Constitution.

⁴ Richard Sly (1849–1929) was one of three lawyer brothers (including George, a founder of the firm of Sly and Russell), who all had doctorates in law. He later became a judge of the Supreme Court of NSW.

⁵ Michael Coper, ‘The Dismissal Twenty-Five Years On’ (2000) 11 *Public Law Review* 251.

The case began, as many cases do that raise important or interesting legal issues, in humble circumstances. On 9 August 1901, just eight months into the new Commonwealth of Australia, Robert Hannah was driving his hansom cab along Elizabeth Street in Sydney, when a Commonwealth telephone wire that was being repaired fell across an electric tramline and electrocuted the horse, damaged the cab, and injured Hannah. Hannah sued James Dalgarno, Deputy Postmaster-General for NSW, as a nominal defendant representing the Commonwealth, and was awarded £200 in damages in the Supreme Court of NSW (which was exercising federal jurisdiction under the *Claims against the Commonwealth Act 1902*). Dalgarno appealed to the Full Court of the Supreme Court of NSW on the ground that there was no evidence of negligence, but the appeal was rejected on 20 August 1903.

Five days later, on 25 August 1903, the Commonwealth's important *Judiciary Act*⁶ came into force, implementing the provisions of the Constitution of 1901 for the establishment of the High Court and providing for the appointment of a bench of three Justices. The long gestation period reflected some scepticism about the need for the High Court, notwithstanding Deakin's powerful advocacy for it when introducing the second reading of the Judiciary Bill on 18 March 1902.⁷ On 5 October 1903, the first three Justices were appointed—a fascinating story in itself⁸—and the Court, comprising Griffith, Barton and O'Connor, held its first sitting the next day, a ceremonial sitting in Melbourne, on 6 October 1903.

Dalgarno, *ex parte*, obtained special leave to appeal to the High Court nine days later on 15 October, and the case was argued in November on a motion by Hannah to rescind the grant of leave. Sly, for Hannah, argued that there could be no appeal to the High Court because the Court did not exist when Hannah secured his final judgment from the Supreme Court of NSW. Wise, for Dalgarno, argued that the Constitution brought the High Court into existence on 1 January 1901, and that an appeal could therefore be brought as soon as the Court was constituted by the Parliament. Chief Justice Griffith, speaking for the Court as he so often did in the early years, thought the question to be 'one of difficulty and importance',⁹ but managed to avoid having to decide whether it was better, as it were, to be Wise or Sly on this occasion, instead rescinding the order for leave on the ground that the substantive issue in the case—whether there was evidence of negligence, and the extent to which such evidence was necessary—was not a question of sufficient public importance.

I do not mean, by raking over the coals of this once-burning question of when the High Court came into existence, to cast any doubt on the appropriateness of the High Court centenary celebrations that are about to erupt all over the country next month (although I should perhaps add, as one of the editors of *The Oxford Companion to the High Court of Australia*, that we timed our publication of that weighty tome for the centenary of federation). Nor do I intend, by beginning at page 1 of volume 1 of the Commonwealth Law Reports, to take you laboriously through the next 200 volumes, one by one. Rather, I start with the fascinating case of *Hannah v Dalgarno* to make

⁶ Anthony Mason, 'Judiciary Act' in *The Oxford Companion*: 380.

⁷ For a particularly good account of this, see Zelman Cowen, 'Deakin, Alfred' in *The Oxford Companion*: 192.

⁸ See esp. Troy Simpson, 'Appointments that might have been' in *The Oxford Companion*: 23.

⁹ *Hannah v Dalgarno* (1903) 1 CLR 1, 12.

two points in the context of this lecture about the interconnections between the High Court and the Parliament, including the respective roles of these two institutions as law-makers.

First, whatever the resolution of the almost theological question of when the High Court came into existence, the case illustrates the interdependence between the Court and the Parliament. The Court could not operate until the Parliament legislated to give effect to the provisions of the Constitution (and the executive acted to appoint the judges). Yet once the Court was in place, the Parliament was subject to judicial scrutiny, and its legislation—including the *Judiciary Act*—was vulnerable to judicial second-guessing. I mention only by way of example (though it is one of my favourite examples), section 23(2)(b) of the *Judiciary Act*. In this section, the Parliament endeavours to provide a rule for resolving cases in the High Court where the Court is equally divided: other than in appeals from superior courts of sufficient status (in which case the appeal fails), a casting vote is given to the Chief Justice.¹⁰ Is this a legitimate procedural regulation of the judicial branch, or an unconstitutional interference with the independence of the judiciary? The question is unresolved, but I must say that I lean to the latter.

The second interesting aspect of *Hannah v Dalgarno* is the way in which the Court was able to dispose of the case and yet avoid the difficult constitutional issue. One of the time-honoured techniques for the containment of judicial law-making is for a court to take the narrowest ground necessary to decide a case. Part of the criticism levelled at the Court by Justice Dyson Heydon in his outspoken *Quadrant* article earlier this year was that, in its ‘activist’ phases, the Court lost sight of this principle.¹¹ This is an interesting debate, to which I return in a moment.

So *Hannah v Dalgarno* is worth remembering, and not just because this is the year in which we are celebrating the centenary of the High Court, at least in its full incarnation. But, curiously, 1903 was itself the centenary of a much more significant case, the great American case of *Marbury v Madison*.¹² This was the case that established judicial review in the United States, that is, the power of the courts to declare invalid the legislation of an elected legislature. This is the ultimate example of the interplay between the High Court and the Parliament, and as my use a moment ago of section 23(2)(b) of the *Judiciary Act* as an example of Parliamentary vulnerability may have suggested, the power of judicial review was simply taken for granted by the time the Australian Constitution was being drafted in the 1890s.¹³ This may surprise you, given our inheritance of British constitutional traditions and principles, including the notions of Parliamentary supremacy—which largely explains the absence from our Constitution of a Bill of Rights—and responsible government. But the framers of the Constitution were also familiar with the idea of judicially enforced limits on the powers of the colonial legislatures of the nineteenth century, and in addition to that, the American inheritance—especially of the notions of federalism, a written Constitution, and, at least by implication, judicial review—was

¹⁰ See generally Michael Coper, ‘Tied vote’ in *The Oxford Companion*: 671.

¹¹ Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ *Quadrant*, Jan–Feb 2003: 9; also published in (2003) 14 *Australian Intellectual Property Journal* 78.

¹² 5 US (1 Cranch) 137 (1803).

¹³ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 per Fullagar J.

at least as important as the British.¹⁴ So the High Court was born into a world in which its power to keep the Parliament within its constitutional limits, or in other words, to veto legislation that was judged to transgress those limits, was, although neither explicit¹⁵ nor inevitable, uncontroversial.

The politics of *Marbury v Madison*—the brilliant political strategy adopted in the case by Chief Justice John Marshall to establish judicial review in the face of a hostile Congress and President—are fascinating, but that is another story.¹⁶ Today we simply accept that the High Court will have the last word on the constitutional validity of legislation and executive action (or, strictly speaking, the penultimate word, as in theory we can amend the Constitution, if only we could bring ourselves to vote ‘yes’ at constitutional referendums).¹⁷ Moreover, Marshall’s logic seems unanswerable: constitutions impose legal limits, and it is simply the duty of the courts to line legislation and executive action up against those limits and to declare what the law is. Yet there were at the time other views that challenged what we now perceive as the inexorability of Marshall’s logic and the inevitability of his assertion of judicial review. His great rival Thomas Jefferson, for example, held a view of the separation of powers in which each branch of government would authoritatively interpret the Constitution in its own sphere.¹⁸ But Marshall’s view prevailed, and the stage was set for the High Court, in Australia and a century later, to become the policeman of the Constitution and, potentially, a combatant with the Parliament in the law-making process.

The story of the separation of powers, and how that notion emerged historically, is also a whole other story in itself.¹⁹ We are used to thinking these days in terms of a coherent, tripartite division of governmental functions amongst separate and coherent institutions—the legislature, the executive, and the judiciary—but, historically, the judicial function separated only gradually from the all-embracing power of the British monarch to make laws, execute them (and sometimes his or her loyal subjects as well), and dispense justice. Even today the idea of separation that we sometimes over-intellectualise or over-theorise is modulated—not necessarily compromised but certainly modulated—by a whole web of interconnections, interconnections relating to personnel, to mutual impact or interference, and to overlapping or intersecting functions. For example, and only by way of example, members of the executive are also members of the legislature; the executive appoints the judiciary; the legislature regulates, or purports to regulate, aspects of the exercise of the judicial function (as in the case of the *Judiciary Act*) and appropriates the funds necessary to its operation; the judiciary tells us what legislation really means, and, in some cases, whether it is

¹⁴ Michael Coper, ‘Currents, Cross-Currents and Undercurrents in the Turbulent Waters of Constitutional Interpretation in the High Court of Australia’ (2003) 77 *Australian Law Journal* 673, 677.

¹⁵ James Thomson, ‘Constitutional Authority for Judicial Review: a Contribution from the Framers of the Australian Constitution’ in Gregory Craven (ed.), *The Convention Debates 1891–1898: Commentaries, Indices and Guide*, Sydney, Legal Books, 1986: 173.

¹⁶ Michael Coper, ‘*Marbury v Madison*’ in *The Oxford Companion*: 453.

¹⁷ Michael Coper, ‘Amendment of Constitution’ in *The Oxford Companion*: 17.

¹⁸ See generally Richard Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic*, New York, Oxford University Press, 1971.

¹⁹ Fiona Wheeler, ‘Separation of powers’ in *The Oxford Companion*: 618; M.J.C. Vile, *Constitutionalism and the Separation of Powers*, New York, Oxford University Press, 1967.

constitutionally valid; and all three branches of government engage in law-making of one kind or another. It is the law-making function of the High Court,²⁰ and how that compares with the law-making function of the Parliament, that is the main focus of my remarks to you today.

Before I turn to that, and in deference to the centenary of the High Court, I just want to say a little more about the interesting interconnections between the High Court and the Parliament in terms of personnel.²¹ It is nearly 20 years since we have had on the High Court a judge who has also been a member of the Parliament (that is, not since Lionel Murphy died in 1986), or who had some other kind of similar political experience. Yet all five of the original Justices were in this category: Griffith, who had been Premier of Queensland, and Barton, our first Prime Minister, O'Connor, Isaacs and Higgins, who were all members of the first federal Parliament. Overall, 13 of the 44 Justices to date, or around 30 per cent, have served in state or federal parliaments, including five out of eleven, or just under half, of the chief justices (Griffith, Knox, Isaacs, Latham and Barwick) and six who have served as Commonwealth Attorney-General (Isaacs, Higgins, Latham, Barwick and Murphy, as well as Evatt, whose term on the Court, somewhat unusually, preceded his move into federal politics). This all now seems a long time ago; it is nearly 30 years since Murphy was appointed to the Court, and there are currently no cross-overs of this kind.

I do not propose today to enter into the debate about the merits or otherwise of having High Court judges with prior political experience, or indeed into the broader question of the desirable attributes of a High Court judge and the range of acceptable criteria for appointment.²² Some say that prior political experience injects into the Court an element of realism and pragmatism that enables the Court to better understand how government really works. Others say that the mindset of the politician is incongruent with the mindset of the judge and that it inhibits a full transition from one kind of law-making to the other. One thing is clear, and that is that there is as much diversity of opinion on the Court amongst the subset of former politicians, including the five founding fathers, as there is amongst the judges generally. In other words, it is not easy to discern a ready translation of political experience or political views into the resolution of particular disputed questions in the High Court.

I touch on the cross-over of personnel between the Parliament and the Court only to observe how much we abstract our thinking about institutions from the earthier question of who populates these institutions. We should never lose sight of the latter, but the former is a mark of the sophistication we bring to bear on our governance arrangements, especially in a federal system, which always adds another dimension of complexity. Understanding those governance arrangements, particularly the law-making part, does require us to think about the roles of institutions in the abstract—

²⁰ See esp. Anthony Mason, 'Law-making role: reflections' in *The Oxford Companion*: 422; and Harry Gibbs, 'Law-making role: further reflections' in *The Oxford Companion*: 424, as well as the further reading cited therein.

²¹ See generally Simon Evans, 'Appointment of Justices' in *The Oxford Companion*: 19; and Francesca Dominello and Eddy Neumann, 'Background of Justices' in *The Oxford Companion*: 48.

²² See Simon Evans, *ibid*, and the further reading cited therein; Michael Coper, *Encounters with the Australian Constitution*, North Ryde, NSW, CCH, 1987: 118–132.

leavened a little by the *realpolitik* of the human element in making these institutions work, but underscored by the very fact that we do reasonably expect the individuals who cross over to make some kind of transition from one mode of decision-making to another.

Let me return, then, to the advertised focus of my lecture: how does law-making by the High Court sit with the law-making responsibility of the Parliament? Is it legitimate, and does it complement or counteract the role of the Parliament? Is the High Court—to use what has become quite an emotive label—too ‘activist’?²³

For those of you who are not schooled in the jurisprudential debates of the last one hundred years or so, I really should pause to justify the proposition, rather than simply take it for granted, that the courts make law. It was once believed, and, in many ways, it remains convenient to believe, that the courts simply declare what the law is; that when the law is unclear, the courts hear argument about what the law really is and, with strict logic and high technique,²⁴ resolve that dispute with an authoritative declaration. The corollary of this position—once described by Lord Reid in the UK as a ‘fairytale’²⁵—was that any change in the law should be left to those who are elected to do that job and who are accountable for it, namely, the legislators. But the resolution of disputes about the law is more an act of creation than of discovery, and it is now well-accepted, and relatively uncontroversial, that in exercising the wide choices that are characteristically presented by the tangled skein of legal argument,²⁶ the judges are making the law rather than simply finding it. So I will not pause to justify that proposition; I rather take it as my starting point.

Having said that, the assertion that the role of the judges is simply to declare what the law is, is probably more fairly described as a half-truth rather than a total falsehood. Or, to approach the issue from the other end, the proposition that the judges make law would be misunderstood if it were taken to imply that this awesome power is unconstrained, or that the judges have some roving commission to make the world a better place, or that judicial law-making is indistinguishable from legislative law-making. The truth is that there are many constraints,²⁷ and a different kind of accountability, and it is more productive to engage with those more particular questions than to deal in the stereotypes of the two extremes.

I did say that in many ways it remains convenient to believe in the myth of judicial automatism. It has always been at the core of supporting the legitimacy of the judicial role to talk up the objectivity of finding the law and to downplay the subjectivity of exercising the personal choices that go into creating it. And the idea of just applying the law lies at the very heart of Chief Justice John Marshall’s justification for the very

²³ Ronald Sackville, ‘Activism’ in *The Oxford Companion*: 6.

²⁴ My use of this phrase, famously adopted by former Chief Justice Owen Dixon (see Owen Dixon, ‘Concerning Judicial Method’ in S.H.Z. Woinarski (ed.), *Jesting Pilate*, Melbourne, Law Book Co, 1965: 153, quoting the English legal historian F.W. Maitland) is not necessarily to equate Dixonian legalism (as to which see below) with a simple declaratory theory of law.

²⁵ Lord Reid, ‘The Judge as Lawmaker’ (1972) 12 *Journal of Public Teachers of Law* 22.

²⁶ See generally Julius Stone, *Legal System and Lawyers’ Reasonings*, Sydney, Maitland Publications, 1964.

²⁷ See esp. Kenneth Jacobs, ‘Lawyers’ Reasonings: Some Extra-Judicial Reflections’ (1967) 5 *Sydney Law Review* 425.

power of judicial review, so eloquently and so successfully asserted two hundred years ago in *Marbury v Madison*.²⁸ The real challenge lies in how the power is exercised and how the choices are made. In meeting this challenge, the judges have to steer a tricky course between the unpersuasiveness of totally self-denying automatism and the invidiousness of unbridled creativity.²⁹

This dilemma is not absent for courts in the hierarchy below the High Court, but it is greatest for the ultimate court in the hierarchy, which the High Court has been since appeals to the Privy Council were abolished successively in 1968, 1975 and 1986.³⁰ Moreover, the dilemma arises in slightly different ways across the three main areas of High Court endeavour: constitutional law, statutory interpretation, and the common law. In the arena of the Constitution, the High Court fixes the limits of the Parliament's law-making, and the Parliament is stuck with it; in statutory interpretation, the Court tells us what the Parliament really meant, and the Parliament can correct that if it believes the Court to have misconstrued its real intention; and in relation to the common law, the Court has the field to itself, although subject, as in the case of statutory interpretation, to legislative correction, revision, rationalisation or supersession.

If one were pushed to answer definitively the question posed in the title to my lecture—are the High Court and the Parliament partners in law-making or hostile combatants?—one would have to look separately at these three areas. The area of statutory interpretation is particularly fascinating,³¹ as the Parliament can endeavour to capture its collective intent in an appropriate form of words as many times as it likes and the Court can still purport to say what Parliament must really have intended. As Bishop Hoadly said in 1717, 'whosoever hath the power to interpret the law hath the power to make it.'³² Although complicated by a considerable constitutional dimension, the interplay between Court and Parliament in relation to Parliament's attempts to exclude the courts from reviewing administrative decisions is a good example.³³ All kinds of techniques are available to convert judicial submissiveness into robust assertiveness that sometimes even succeeds in being persuasive rather than merely sophistry.

It is in relation to the common law that the issues of judicial law-making come into sharpest focus.³⁴ The task of constitutional and statutory interpretation is shaped and bounded by the need to ascertain the meaning of a text, and the question of adherence

²⁸ 5 US (1 Cranch) 137 (1803).

²⁹ Michael Coper, 'Interpreting the Constitution: a Handbook for Judges and Commentators' in Tony Blackshield (ed.), *Essays in Honour of Julius Stone*, Sydney, Butterworths, 1983: 52.

³⁰ *Privy Council (Limitation of Appeals) Act 1968* (Cth) (abolishing appeals in federal and constitutional matters), *Privy Council (Appeals from the High Court) Act 1975* (Cth) (abolishing remaining appeals from the High Court), and the *Australia Acts 1986* (UK, Cth & States) (abolishing remaining appeals direct from state courts); Tony Blackshield, Michael Coper, and John Goldring, 'Privy Council, Judicial Committee of the' in *The Oxford Companion*: 560.

³¹ Dennis Pearce, 'Statutory interpretation' in *The Oxford Companion*: 641.

³² See Julius Stone, *Social Dimensions of Law and Justice*, Sydney, Maitland Publications, 1966: 687.

³³ Ian Holloway, 'Privative clauses' in *The Oxford Companion*: 559; *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454.

³⁴ Gerard Brennan, 'Common law' in *The Oxford Companion*: 117.

to earlier judicial precedent,³⁵ although significant (and occasionally quite dramatic), is accordingly overshadowed—especially in constitutional law, where the Parliament, being bound by the Constitution and its judicially revealed meaning, lacks the power to correct perceived judicial error. The High Court will generally feel less constrained, therefore, in correcting its own perceived error in decisions on the Constitution than in doing so where Parliament can change the law, and can do so prospectively. The common law has traditionally developed from precedent to precedent, with the application of existing rules to serially unique fact situations, the adaptation of existing principles to new circumstances, and incremental rather than abrupt change, with wholesale change being left to the legislature. A classic example of this, and one that is constantly cited by critics of the alleged activism of the Mason Court from the late 1980s to the mid-1990s, sometimes evidently in an endeavour to embarrass Justice Mason, is the case of *State Government Insurance Commission v Trigwell*,³⁶ decided in 1979. In that case, a majority of the Court (Justice Murphy dissenting) held that the long-standing common law rule that absolved property owners for liability in negligence for damage caused by their animals straying on to an adjoining highway should be affirmed, notwithstanding how anachronistic that rule might seem in modern conditions. Justice Mason, as he then was, observed that the Court was ‘neither a legislature nor a law reform agency’ and that its facilities, techniques and procedures were not adapted to the functions of those bodies.³⁷

Yet the law reports are replete with examples of modernisation of the common law by the High Court, largely, though certainly not wholly, since the High Court could no longer be second-guessed by the Privy Council, and particularly, though certainly not exclusively, by the Mason Court, that is, the High Court of which Sir Anthony Mason was Chief Justice from 1987 to 1995.³⁸ I have time today only to mention a few examples: contraction of the doctrine of privity of contract;³⁹ expansion of the doctrine of promissory estoppel;⁴⁰ abolition of the distinction between money paid under mistake of law and money paid under mistake of fact;⁴¹ abolition of the rule that a husband could not commit rape in marriage;⁴² reformulation of the general law of negligence to subsume many of the earlier special rules;⁴³ and, of course, the recognition in *Mabo* of native title.⁴⁴

Interestingly, *Mabo* became the most controversial of all of these decisions, partly in its own terms and partly because many of the other decisions appeared to concern technical ‘lawyers’ law’, notwithstanding their immediate impact on the parties concerned and their potential impact on many others. Yet it has always seemed to me

³⁵ Tony Blackshield, ‘Precedent’ in *The Oxford Companion*: 550.

³⁶ (1979) 142 CLR 617.

³⁷ (1979) 142 CLR 617, 633.

³⁸ Michelle Dillon and John Doyle, ‘Mason Court’ in *The Oxford Companion*: 461; Cheryl Saunders (ed.), *Courts of Final Jurisdiction—The Mason Court in Australia*, Sydney, The Federation Press, 1996.

³⁹ *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

⁴⁰ *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

⁴¹ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

⁴² *R v L* (1991) 174 CLR 379.

⁴³ *Rogers v Whitaker* (1992) 175 CLR 479, *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

⁴⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

an overstatement to regard *Mabo* as having wrought an abrupt change in the law. The question had never arisen in the High Court for final determination as a part of Australian law, there were powerful precedents in other jurisdictions, and attitudes and values had developed considerably, nationally and internationally, in the 200 years since colonisation. *Mabo* perhaps disturbed settled expectations about the state of the law, at least in some quarters, rather than changed the law itself.

Mabo illustrates two further points about judicial law-making. First, this law-making is always in the context of settling a particular dispute between particular parties, and however broadly the Court may formulate the rules for the resolution of that dispute—that formulation being the quintessential part of its law-making role—they are unlikely to provide a comprehensive code for the future regulation of all of the incidents of the dispute. Whatever one thinks of the aftermath of *Mabo* and the developments in native title over the past decade,⁴⁵ it was no surprise that the Parliament acted in 1993 to introduce a detailed legislative regime for the recognition and handling of native title claims. Given the interaction since of legislation and judicial decision, one might well draw the lesson from this area that the courts and the Parliament are inevitably partners in the law-making process, but, like all partners, are not always in perfect harmony.

The second point I want to make about *Mabo* and the law-making process is how complex and varied are the issues that arise in the High Court under the general rubric of ‘the common law’. Some of the examples I cited of radical change can be seen, on closer examination, to have elements of continuity with the past, and the extent and implications of the change may be open to debate; in other words, the line between incremental and moderate change and abrupt and more radical change is not always easy to draw. Conversely, over time the common law has developed considerably in any event, as an inevitable consequence of the application of the law to new circumstances, and the art—and it is an art—of ‘distinguishing’ earlier precedents. Indeed, it is this subtle blend of continuity and change that has been regarded as the genius of the common law. In all but cases involving the most routine application of existing principle to familiar facts—cases of a kind now most unlikely to come to the High Court—the courts are, as I indicated earlier, regarded as making law. But sometimes issues arise that are quite novel, and really underline the Court’s law-making role, rendering the label ‘activist’ even more unhelpful than usual.

One of these arose just two months ago in the case of *Cattanach v Melchior*,⁴⁶ the case in which the High Court had to decide whether damages were recoverable by parents for the cost of raising a healthy child born after a failed sterilisation procedure involving negligent advice on the part of the surgeon. The Court decided by a majority of four (Justices McHugh, Gummow, Kirby and Callinan) to three (Chief Justice Gleeson and Justices Hayne and Heydon) that damages of this kind were recoverable. The separate judgments in the case run to a transcript of over 150 pages, so there is no way that I can do it justice here today. It is sufficient to say that the majority saw its decision as the logical consequence of the ordinary principles of negligence, whereas the minority saw that view as either an unwarranted extension of

⁴⁵ Peter Russell, ‘*Mabo*: political consequences’ in *The Oxford Companion*: 450.

⁴⁶ (2003) 77 ALJR 1312.

those principles (especially in the area of economic loss,⁴⁷ the recovery of which the law has traditionally contained) or as contrary to public policy⁴⁸ (because it treated the birth of a healthy child as harm or damage rather than a blessing; to do so, so it was said, was contrary to the parents' duty to nurture their children, and indeed could damage the child and the parent-child relationship).

The decision occasioned considerable comment, and some trenchant criticism from members of the Australian Parliament. The critics clearly agreed with one of the views amongst the minority judges that there was something repugnant, even morally repugnant, about allowing the recovery of damages for the cost of raising a healthy child. For a politician to take this essentially result-oriented stance is entirely understandable—that is what politicians do. For a judge to do so raises more difficult questions for the nature of the judicial process. Indeed, if there is merit in the view that the opinion of the majority in the case was more consistent with the existing principles of negligence, then there are two criticisms that might be levelled at the minority: that not only did they arguably implement their own personal social values, but in doing so they were the stronger candidates for the label 'activist'.

Justice Callinan, in the majority, made an interesting comment:

I cannot help observing that the repeated disavowal in the cases of recourse to public policy is not always convincing ... it would be more helpful for the resolution of the controversy if judges frankly acknowledged their debt to their own social values, and the way in which these have in fact moulded or influenced their judgments rather than the application of strict legal principle.⁴⁹

Similarly, Justice Kirby, also in the majority and long an advocate of the transparent recognition of policy considerations in judicial decisions, observed that judges, although responsible for developing the common law

have no authority to adopt arbitrary departures from basic doctrine. Least of all may they do so, in our secular society, on the footing of their personal religious beliefs or 'moral' assessments concealed in an inarticulate premise dressed up, and described, as legal principle or legal policy.⁵⁰

The truth is—and this is evidenced by the striking diversity of judicial opinion on the issue all around the world—that *Cattanach v Melchior* could have been decided either way, on reasonable grounds. The majority view, though equally with the minority grounded in policy, is arguably more consistent with existing legal principle, yet the law of tort in general, and of negligence in particular, has always had to set boundaries to the extent to which a wrongdoer must make reparation. These boundaries are rarely to be found in legal principle; indeed, it is the logical consequences of legal principle that so often challenge the boundaries. The boundaries are to be found in policy. If the policy commands sufficient support, and is

⁴⁷ See the judgment of Gleeson CJ.

⁴⁸ See the judgments of Hayne and Heydon JJ.

⁴⁹ (2003) 77 ALJR 1312, 1369.

⁵⁰ (2003) 77 ALJR 1312, 1339.

asserted sufficiently successfully, it may be celebrated and legitimated as ‘public policy’. If it fails to command support, it is liable to be castigated as ‘judicial policy’. But whether it has a veneer of objectivity, or a patina of subjectivity, it is judge-made law, and it is heavily influenced by the judge’s own social values.

So who should be making this kind of law, the courts or the Parliament?

Parliaments have, as you would know, made all kinds of incursions into the law of tort, especially recently. In some jurisdictions, such as New Zealand, the common law has been supplanted by statutory schemes for compensation. Justice Kirby observed in *Cattanach v Melchior* that legislation setting the boundaries of tortious liability, especially in relation to caps and exclusions, was apt to be arbitrary and dogmatic, and that the case-by-case and incremental nature of the judicial process was better adapted to this task.⁵¹ Be that as it may, there will always be areas of law that fall to be developed primarily by the judges, and questions of law that turn primarily on policy considerations. *Cattanach v Melchior* posed a novel question for the High Court, and accordingly was perhaps as transparent a case of judicial law-making as one can get, but it would be misunderstood if it was thought to be different in kind rather than different in degree from the law-making task characteristically presented to the High Court. The Court cannot avoid and grapples as best it can with policy considerations,⁵² which are fed into the judicial meat-grinder and extruded as legal principle.

Where the Court is presented with a clear choice between maintaining an existing rule that is thought to be no longer appropriate and abandoning it in favour of a new rule, there are many arguments in favour of maintaining the existing rule, especially those arguments that turn on the values of certainty, stability, and respect for precedent, as well as arguments that question the capacity of the judges to frame a new rule that takes account of interests not represented in the litigation. Yet the implied call here for legislative intervention to change the rule is a double-edged sword. It can also be called in aid to correct the consequences of judicial misadventure, if that be how an instance of overt judicial change is perceived. As obvious and as strong as the arguments are for the judges to maintain the status quo, there is also much to be said for the judges in an appropriate case to unmake as well as make the law, safe in the knowledge that their efforts may be second-guessed by the Parliament if they miss the mark. In either case—in the case, that is, either of legislative intervention to compensate for judicial quiescence or legislative correction of judicial misadventure—it seems to me that the Court and the Parliament may be regarded as partners in law-making. The real issue, it seems to me, is, when is it appropriate for a court to take one course rather than the other? It would be doctrinaire to lay down a single rule always disavowing or always embracing change. It would be more profitable to try to tease out the relevant factors that might impinge on the choice: for example, the likelihood of Parliamentary interest in the rule at issue, the clarity and contestability of the proposed new rule, the likely impact of the change on the community generally, and how that impact might be best assessed. Sir Anthony Mason has frankly admitted the difficulty of making the choice.⁵³

⁵¹ *ibid.*

⁵² Anthony Mason, ‘Policy considerations’ in *The Oxford Companion*: 535.

⁵³ Anthony Mason, ‘Law-making role: reflections’ in *The Oxford Companion*: 422 at p. 424.

I would not be surprised if, at this point, many of you were thinking that I have made things rather over-complicated, that I posed some pretty simple questions to lure you into this lecture and have given you some pretty complicated answers. The fact is that judicial decision-making is a complex and subtle part of human endeavour, especially in the highest court in the land. The common law can throw up questions that might be viewed as involving the extension of existing principle to new circumstances, or the overthrow of existing principle, or the creation of a new principle to cater for an entirely novel situation, with disagreement not only over the resolution of questions within these categories, including disagreement over the nature and formulation of the existing principle, but also over which of the categories is apt to describe the dispute in question. The law of the Constitution adds another dimension altogether, but with similar conundrums about the inconclusiveness of legal principles and yet our unease, in terms of legitimacy, about the judges going beyond them.⁵⁴

This, as I hinted earlier, is indeed the dilemma for the High Court in its law-making role. The proponents of what is sometimes called ‘legalism’⁵⁵ face the criticism that, at least in the High Court, answers are rarely compelled by legal considerations, but in truth turn on choices between competing policies.⁵⁶ The proponents of what might be termed, in opposition to legalism, ‘pragmatism’, face the criticism that policy considerations are for the legislative process to weigh and balance. So legalism is inadequate and pragmatism is invidious. And worst of all, many would claim, is the judge who uses legalism as a cover for pragmatism, or, in other words, who is in truth pragmatic but not openly so.⁵⁷ The legitimacy sought by adherence to legalism is, so the critics would say, a spurious and shaky kind of legitimacy if its foundation is in dishonesty.

Unsurprisingly, given the activism of the Mason Court, Sir Anthony Mason has been a critic of legalism. In an address earlier this year, he said that legalism

is an incomplete and inadequate approach to judicial methodology. It conceals rather than reveals the reasoning process. While this may divert attention away from what are the more debatable aspects of judicial reasoning, thereby possibly lessening the prospect of criticism, the judicial obligation is to state the reasons and that means to state them fully.⁵⁸

Yet in the same address, Sir Anthony said of former Chief Justice Sir Owen Dixon, with whom the methodology of legalism is most often associated, that ‘he was and remains Australia’s finest lawyer.’⁵⁹ To me this contrast says two things. First, it

⁵⁴ Michael Coper, *Encounters with the Australian Constitution*, North Ryde, NSW, CCH, 1987: 400–422.

⁵⁵ Stephen Gageler, ‘Legalism’ in *The Oxford Companion*: 429.

⁵⁶ Leslie Zines, ‘Legalism, realism and judicial rhetoric in constitutional law’ (2002) 5(2) *Constitutional Law and Policy Review* 21.

⁵⁷ See, eg, Greg Craven, ‘The High Court and the ethics of constitutional interpretation: honesty is the best policy’ (2003) 28(2) *Alternative Law Journal* 52.

⁵⁸ Anthony Mason, ‘Centenary of the High Court of Australia’ (2003) 5(3) *Constitutional Law and Policy Review* 41.

⁵⁹ *ibid.*

suggests that Dixon is misunderstood if he is taken to be some cardboard cut-out or one-dimensional adherent to the purity of legal reasoning. Secondly, it suggests that the notion of legalism itself is misunderstood if it is too easily identified, even equated, with the judicial philosophy and methodology of Dixon. In truth, judicial decision-making contains elements of legalism and pragmatism, and can be neither wholly one nor the other.

I am not suggesting that this is necessarily a resolution of the dilemma; indeed, it may only compound it. If Sir Anthony Mason's criticism of legalism is correct, and I think it is, then we must develop a more mature understanding of the task confronted by the High Court, especially since 1984 when the *Judiciary Act* was amended to ensure that appeals could come to the Court only by special leave, thus making it likely that almost every case coming before the Court would be at the cutting-edge of legal development and would require difficult choices.⁶⁰ What, then, would that mature understanding entail?

In my view, it would entail at least an understanding and acceptance of the following:

1. In the various senses already explained, the High Court makes law: unavoidably, endemically, and not inappropriately.
2. As the highest court in the hierarchy, it has a responsibility not only to resolve the dispute before it but also to frame general propositions of law that will guide lower courts, legal advisers, and the community generally.
3. In making law and in framing these general propositions, it is rarely compelled by legal principle but faces hard choices between competing principles and their underlying policy considerations.
4. The need for certainty, stability and adherence to precedent is itself a policy consideration, but it competes with other policy considerations related to the justice, wisdom, practicality, or other substantive merits of the competing outcomes of the case at hand or of the principles at stake in the case.
5. In weighing all of the considerations in a case, different judges may reasonably differ, including on whether a particular development of the law is better undertaken by the Court or the Parliament.

A mature understanding of what the High Court does, based on these five simple propositions, still leaves many unanswered questions. In fact, it probably generates more than it answers. If the judges are to grapple transparently with policy, how should they ascertain what the relevant policy considerations are? Are counsel up to the task of arguing transparently in these terms? When the Court opts for or vindicates a particular policy, why should that persuade those who would prefer a different policy? How is the Court accountable?

The answer to the last question is not as hard as it looks. Accountability is not simply a matter of electoral recall; indeed, that would be the antithesis of the pivotal notion in our system of government of judicial independence. The accountability of the High

⁶⁰ *Judiciary Act 1903* (Cth) ss 35, 35A; David Jackson, 'Leave to appeal' in *The Oxford Companion*: 425.

Court⁶¹ lies more in the superficially mundane fact that it performs its work in open court and publishes its reasons for decision. This makes these reasons open to scrutiny, debate, appraisal and criticism. They have to be persuasive in the marketplace of ideas. Open dialogue about these ideas is, in my view, the cornerstone of the very justification of judicial review in a democracy—not, dare I say it, the justification grounded in legalism first offered by Chief Justice John Marshall in *Marbury v Madison*,⁶² however instrumental and politically savvy that justification was in establishing judicial review and however much the notion of legalism, though far from the whole story, contains a kernel of truth.

If we are to have a proper dialogue about the merits of High Court decisions, certain conditions need to be observed. It would be useful, for example, if the critics read the decisions first. On the other hand, it would also be useful if the Court facilitated that obligation by keeping its audience in mind and not making unreasonable demands on the reader. This is a call neither for joint rather than separate judgments,⁶³ nor for pitching to the lowest common denominator, but for clarity, transparency, avoidance of undue repetition, and avoidance of undue length.

There are many interconnections between the High Court and the Parliament. It would have been fascinating, for example, to explore with you not only the impact of the Court's work on the products of the Parliamentary process, but also the law relating to intervention of the courts in the process itself.⁶⁴ I have confined this lecture to the respective law-making functions of the High Court and the Parliament, and made a plea for better understanding of the former.⁶⁵ The Court and the Parliament are indeed partners in the law-making process, although their respective roles can bring them into conflict. In particular, they act as a brake on each other, the Court interpreting and even invalidating the legislation of the Parliament, and the Parliament modifying and even abolishing parts of the common law when it finds the Court to have been too bold or not bold enough. The interaction of these two great institutions, the constant confluence of independence and interdependence, has all the hallmarks of a complex political ecosystem.

In the cycle of life all things return from whence they came, and I conclude by returning to the occasion of the High Court's debut in 1903, the humble but instructive case of *Hannah v Dalgarno*.⁶⁶ You will recall that the Court managed to avoid the more difficult issue thrown up by the litigation. The courts undoubtedly make law, as I have said repeatedly in this lecture, but judicial law-making is different from parliamentary law-making, and sometimes discretion is the better part of valour. The High Court makes law in the context of particular disputes, and whether a particular dispute is judged to be an appropriate vehicle for a sweeping proposition or grand decree can be a chancy thing. The Court's law-making is intermittent, and, as the lawyers love to say, interstitial. Yet it is a great power, the exact nature of which

⁶¹ Michael Coper, 'Accountability' in *The Oxford Companion*: 3.

⁶² 5 US (1 Cranch) 137 (1803).

⁶³ Michael Coper, 'Joint judgments and separate judgments' in *The Oxford Companion*: 367.

⁶⁴ Gerard Carney, 'Parliamentary process, intervention in' in *The Oxford Companion*: 523.

⁶⁵ See generally Patrick Parkinson, *Tradition and Change in Australian Law*, 2nd ed., Pyrmont, NSW, LBC Information Services, 2001: 178–199.

⁶⁶ (1903) 1 CLR 1; Francesca Dominello, '*Hannah v Dalgarno*' in *The Oxford Companion*: 316.

has exercised many minds over many decades, if not centuries. If we have a serious interest in the nature of democratic government in Australia, as I deem all of you to have by your very presence here today, then my message to you is that the law-making role of the High Court deserves to be better understood.



Question — What about the vexed issue of the representativeness of the judges of the High Court? We have no women judges, for example.

Michael Coper — The short answer is that the judges are not there as ‘representatives’ in any capacity. They are there to perform an independent and supposedly objective function, notwithstanding what I have said about the subjectivity of the process. But they are not there as representatives of any particular interest. However, having said that, I think many would concede these days that there is a case for the community to feel as if there is some participation in the operation of the highest court in the land through a spread of expertise and background, and that applies to geographical considerations, as much as to gender. So you have this argument on the one side between those who say it is simply a matter of merit and legal ability and capacity, and those on the other who say that is a fiction, because, as I’ve said today, it is not simply legal considerations that affect the outcome of cases, and amongst the best lawyers, there are those with diverse characteristics, including where they come from and what gender they are. I think the balance of opinion today would be that there is a strong case for the court not to be representative, but to be more diverse.

Question — When you say that judges may differ legitimately, do you think that in *Cattanach* the cost of raising a child should be able to be seen more uniformly as either harm or damage? And which of the judges do you think was correct in that case? Were any of them correct? If none of them could come up with a simple answer about whether or not the costs of raising a child were damages or harm in the common law, do you think that there is a fundamental problem in the making of the law and the transparency, if something as fundamental as the legal obligation of paying for a child couldn’t be at least agreed on? Not whether public policy determines it, but the fact that there wasn’t even a clear majority on where it fell in terms of the principles and elements?

Michael Coper — I have to say I’m not an expert on the law of torts. But I would say that, first of all, the whole idea of reparation in damages is an uncertain thing, because you can’t exactly quantify or compensate for the loss that has been suffered. It is always going to be difficult, whether it is personal injury or anything else. Putting a monetary amount on it is difficult and elusive, and ‘second best’ to the injury not occurring in the first place. Looking at it in that context, it is not surprising that there might be disagreement or difficulties in quantifying what the nature of the loss was following the negligence of the doctor in relation to the sterilisation operation.

It does seem to me that the majority view in *Cattanach v Melchior* was the view that was more consistent with existing legal principle, although it is a time-honoured technique to come up with reasons to contain the logical consequences of existing principle. It's just that I think the majority were saying the minority were not persuasive in the reasons that they came up with.

Although it can be seen somewhat emotively—in terms of a child being regarded as ‘harm or damage’, rather than a blessing—I think that is just a misleading way in which to frame the question.

Question — I meant ‘harm/damage’, versus ‘damages’. Not just the difficulty of quantifying the damages, but the characterisation of the type of damages, for example, was it economic loss? They didn't seem to frame it in terms of her capacity to earn income, whether or not other cases might have.

Michael Coper — There was a lack of agreement in relation to that as well, whether it was pure economic loss, or economic loss following from other kinds of physical events. I think in this area of the law there are always different ways of framing the facts and framing the question, and that's what influences the outcome. It is not surprising that the judges disagree.

Question — In your earlier remarks you referred to both the American and the English antecedents for the High Court of Australia. Would it be reasonable to say that the instances of judicial law-making in Australia are somewhere between those two, up to the present time? Or is that an over-simplification?

Michael Coper — That is a good observation, because the United States Supreme Court is certainly much more openly pragmatic and openly prepared to engage in debate on policy considerations. The British courts traditionally have been much more legalistic. I say ‘traditionally’, because things are always in a state of change, and the introduction of a Human Rights Act in the UK may compel the judges to take a somewhat different approach. But I think your observation is valid—the High Court has struggled to fit somewhere between those two ends of the spectrum, with different judges at different times being closer to one or the other.

I was talking mainly today in terms of the Court as a whole, but if you drill down and look at individual judges, of course you'll get a much broader range and difference of opinion. If you compare the style of Justice Lionel Murphy on the one hand, with many of the more legalistic judges on the other, it becomes more complicated. So yes, I think the High Court is somewhere in between those two, but I wouldn't say necessarily that the Supreme Court of the United States or the British courts are really at either extreme. The Supreme Court of the United States will recognise the relevance of doctrine as well as policy considerations, and the British courts will also, of necessity, for the reasons I have given, need to take into account policy considerations. So it's all a matter of balance, I think.

Question — Regarding the relationship between the executive and the judiciary, do you think attacks by the executive on certain High Court decisions—focussing often on particular judgments—is just part of the debate between these two arms of

government? Or do you think it undermines the independence and separation of powers between the courts and the lawmakers?

Michael Coper — If there is to be debate and dialogue, there has to be criticism. We all would prefer criticism to be fair criticism, but that doesn't always happen, especially in the political arena. It does give rise to questions about the extent to which the judges should respond in the debate to answer criticism or just be content for their judgment to be out there and to speak for itself. And we've seen over the past few years different views on the role and responsibility of the Attorney-General in relation to defending the judges—the current Attorney taking the view, consistently over a long period, that it is not the job of the Attorney-General to defend the judges. Others take a different view.

But if there is to be debate, there has to be pretty free-wheeling criticism. It would be nice to develop a set of ground rules, such as I stated in my lecture—for example it would be good for people to read the decisions before they criticise them. But the High Court doesn't make that easy. I wouldn't be surprised if many of you today think that *Cattanach v Melchoir* sounds like an interesting case, but it is a big read with 150 pages of transcript and a lot of unnecessary repetition. But the judges are discharging their individual responsibility as they see it, to be true to their judicial oath and to state their own view of how they would answer the question, and not necessarily collapse it into a uniform or multiple joint view of the Court.

So whether it is the executive or anybody else, people should endeavour to be responsible in their criticisms, but that doesn't always happen, so we have to then think about how the criticisms are handled and responded to. And that brings in academic commentary, and it brings in the media. The various aspects of the media need to take an interest in these debates, and that's happening more and more. So, the short answer is that criticisms are inevitable, and are sometimes inappropriate, but need to be responded to.

Question — I refer to your central question of whether law-making by the High Court complements or counteracts that of the Parliament. You made observations about former members of parliament who have been appointed to the High Court. Could you let us know whether we are likely to see more former members of parliament, or members of parliament, appointed to the High Court, and whether or not that has made it a closer working partnership or indeed widened the gulf?

Michael Coper — It is always hard to predict, but certainly over the last 20 or 30 years the fashion has been to gravitate towards those who already have judicial experience, especially in state supreme courts. It is hard to pin down a single reason for that, there are so many factors that go into judicial appointments. The appointers would say that they want the best person for the job—the person of the highest calibre, whether they are in Parliament or not—and it is a little superficial to think of it that way because there are so many competing characteristics of good judges. Gender and all of those other considerations that I mentioned before come into it as well. It is very hard to predict, but the trend has certainly been more toward people with a traditional lawyer's law background rather than those with a parliamentary background.

Question — Given that the key institutions of democratic government—the Parliament, the executive and the judiciary—are actually institutions not designed for democracy but pre-dating it, and that the idea of the institutions being built on the real foundation of democratic principle—the equality of all human beings—is just a distant vision, what things do you think we can do to make the High Court better understood? And when the law-making function does become better understood, how do we avoid problems like the huge backlog of applicants to the registry, especially unrepresented applicants? It seems to me that quite a widespread reform is necessary.

Michael Coper — To answer your question on how the courts handle the volume of litigation, one thing that's worth remembering is that you have to have a pretty exceptional case to get into the High Court. The High Court, although it is the highest court in the hierarchy now, really doesn't deal with cases unless there is some special reason to take them beyond the full court or the court of appeal of the supreme courts. I referred to the special leave provisions, whereby you can't get a case to the High Court unless the Court recognises it as raising some exceptional point or principle. For most purposes it is the Supreme Courts or the Federal Court of Australia that is the end of the line for most litigants, unless there is some exceptional principle at stake.

This technique that the High Court has to control litigation is not unlike the way other courts have to process people who are entitled to knock on the door, and that is that they can pick and choose the cases they take. That is the same in the United States Supreme Court, as well. As I hinted in the paper, that has brought quite a dramatic change to the way in which the High Court approaches these questions and sharpens the focus on the law-making function of the High Court quite considerably, because the series of difficult cases is unrelenting.

Having said that, there are, amongst the litigants before the High Court, a fair proportion of unrepresented litigants, and the High Court has to deal with those in a fair and equitable way, in the same way it deals with any other represented litigants. That has been a particular issue for the High Court. But again, the unrepresented litigant has to get through the hurdle of special leave, like any other litigant does. So the short answer to your question is that most courts face the problem of controlling and dealing with the volume of litigation but it is a peculiar problem in the High Court because they only take a narrow range of cases to start with.

On the broader question of understanding the Court, I think it is just a matter of working on a number of fronts at the same time, and this goes to the question of public or popular participation in how our democratic institutions work. The Senate sponsoring lectures like this is one fragment of the activity that goes on in bringing the discussion to the public.

But I think there is a range of things that we need to work on simultaneously. The media has an important role to play. Newspapers have gone hot and cold over the years on their interest in things legal and especially the High Court, sometimes running special supplements or sections on the law and sometimes not. There will be a flurry of activity in the next few weeks on the centenary of the High Court, but that will come and go.

We wrote the *Oxford Companion* specifically to bring understanding of the High Court to a broader audience.

Question — We can challenge politicians for the laws that they make. Do you think we should be able to question and challenge judges over the laws that they make?

Michael Coper — Well we do, and that is done in a variety of ways, not least in commentary in the media and in academic articles and journals. I only referred very briefly to this idea of dialogue about decisions being a key part of the courts' accountability, but of course it only works if it is sustained and the court listens, and it has some role to play. And if you look at things empirically, I can think of examples where sustained criticism has led to a change in the law, with the Court eventually seeing the merits in the criticism that was being made.

A good example of that is an area close to my heart, and that is section 92 of the Australian Constitution, which I think for many years went off the rails, but under sustained criticism both academically and in the courts from dissenting judges, the court changed its view. There are many other examples where it hasn't, and one can draw whatever conclusion one likes from that. One of the things to keep in mind that it is not always clear what the correct view is. In fact I shouldn't even use the language of 'right' and 'wrong' or 'correctness' and 'incorrectness', it is really a matter of which is the better view, having regard to all these difficult circumstances and factors. But people get disillusioned about having to read seven separate judgments in the High Court rather than a single statement through a joint opinion, especially because of the contrast to Parliament, which speaks only with once voice; one set of legislation is passed, not 150 different views on what it should be. But the Court operates in a different way, and one of the merits of that is the flow of dissenting opinion and diversity which allows for the dialogue to continue about which is the better view. It is not pre-empted for all time. I only sketched this in my talk, but I think the whole concept of having proper dialogue and debate about High Court decisions is the key to moving forward.

