Chapter Five

Should The Courts Determine Social Policy?

The Hon. Peter Connolly, CBE, QC

The answer to this question is so obvious that one hesitates to take up time answering it. Social values and policies and the attitudes of a society will be reflected in its laws, and the judges will play their part and play it well if they confine themselves to the task of applying and interpreting the law, leaving it to the other organs of democratic government to make the changes to our legal system for which they receive a mandate from the electorate.

This said, it is undeniable that our highest court has from time to time played a significant part in shifting the balance of the Constitution. In fairness to the Court, it must be said that it is an historical fact that in all federations the passage of time has seen a marked centripetal tendency. In this country the High Court had not been in existence more than 17 years before the seeds were sown for the transformation of the central government, from one of limited authority to one which dominates the federal system and the States which brought it into existence.

The centralist tendency of the Court is denied by no-one, and the water has been running under this bridge too long to dwell upon it. However, recent years have seen some extraordinary re-writing of history by the Court and, in the name of interventionism, a disregard for the legal system carefully built up by its predecessors and for the established rights of the Australian community.1

As an example of the re-writing of history, I take the Territorial Seas Case2 in which the Court held by a majority that the colonies before Federation had had no proprietary rights in the territorial waters which washed their shores, nor in the land below those waters. The notion was that the territorial sea remained under the dominion of the imperial government, and that it was not until Australia became an independent nation that dominion over the territorial seas accrued to the central government.

Sir Harry Gibbs, the President of this Society, in one of the most powerful judgments he has written, demonstrated that before Federation the various colonies had made laws for the establishment of harbours and the construction of wharves, jetties and breakwaters, the control of navigation and pilotage, the maintenance of lighthouses and lightships, the regulation of fishing, whaling and prawning, and of diving for pearl shell and b,che-de-mer and the grant of oyster leases and licences to get marine fibres and sponges, and to enable mining to be carried out below low water mark.

The validity of none of this legislation had ever been questioned in the courts or by the imperial authorities in London. Opinions had been given by the law officers in London, many of them lawyers of great distinction, consistently affirming the authority of colonial legislation in Australia and elsewhere, extending for three marine miles from low water mark.

But in the view of the majority of the Court, the views of the imperial authorities were simply misconceived. This is really breath-taking in its arrogance. But even worse, as will appear, it showed no understanding at all of reality. It was perhaps attractive to the centralist mind to see the Federation ringed about by a three mile belt of purely Commonwealth territory. This would serve as a symbol of the essential unity of the nation and of the essential subordination of the constituent States. The reality however was to be otherwise.

When it was realised that all of the functions in relation to the territorial seas and the land beneath them, which had been painstakingly performed by the several States, would now become the responsibility of the lilies of the field in Canberra, the enormity of the responsibility must have struck them. The Prime Minister of the day made a touching concession to what he described, I believe, as new federalism, Canberra being no more capable of administering the territorial sea regime than it is of any other of the useful and indeed essential but unexciting aspects of public administration in this country. The central government could not wait to offer the territorial sea regime back to the States, and this was achieved by legislation passed by the Commonwealth pursuant to a request in that behalf under s. 51(xxxviii) of the Constitution.

In other words, the Commonwealth, having established its sovereignty, for what that is worth, hastily passed the bread and butter problems back to the States, which alone were capable of handling them.

To return to the Court's decision, Sir Harry pointed out that the notion of dominion over the territorial seas of the various components of the British Empire being retained in London, which was not aware of this fact, is wildly improbable. It would be an extremely difficult task to perform, even with today's speed of communication. It was not even a possibility in colonial times. Those who administered the British Empire were above all pragmatists. Whatever else may be said of the High Court of Australia, pragmatism is not one of its characteristics.

However, weird theories are. In delivering the inaugural address to the Society last year, I pointed out that the notorious Mabo case, which unhappily is still very much with us, involved a realisation by the Court that the British, who had put together an empire upon which the sun never set, did not even understand the nature of the rights to land created by the settlement of a colony. In the view of the High Court of Australia, they did not even understand who, in their vast empire, had control of the territorial seas of the lands outside Great Britain over which the Union Jack flew. More modest minds might have paused to think again before reaching such a bizarre conclusion.

I pass over Cole v. Whitfield which deprived the people of this country of the right, which had been guaranteed to them by s. 92 of their Constitution, to trade inter-State without government hindrance which went beyond reasonable regulation. I pass over the infamous Tasmanian Dam3 decision in which the majority held that legislative power over external affairs involved power over the internal affairs of a State.

I return to Mabo. I am aware that a paper on this decision is to be delivered at this meeting, but it is a case which poses so many problems of principle (which is the proper concern of a lawyer), and of practical application for our great primary industries (a matter of concern for all Australians), that I feel constrained to refer to it, with apologies in advance to the other paper writer, if I unwittingly trespass upon his field.

Before doing so, I must make a short reference to the case of Dietrich decided by the High Court on 13 November, 1992.4 Dietrich was charged with the importation of heroin, quantities of which were found in plastic bags concealed in his flat. Further quantities similarly packaged had been excreted by him in the prison hospital after his arrest. He was not given free public defence and the Court could not, consistently with its previous decisions, hold that he was entitled to such defence as a matter of law. Certainly there could not have been any such right at common law, for there was a time, some 150 years ago, when a prisoner charged with a felony was not entitled to counsel at all. Mason J., as he then was, had said in McInnis v. The Queen5 that an accused in Australia does not have a right to present his case by counsel provided at public expense.

So far, we see the law being consistently applied. It is, after all, a matter for those who have to find the money whether a contested trial should be financed by the public where the case is overwhelming. With respect to the views expressed by their Honours, this was obviously such a

case. The State had been prepared to finance the retainer of counsel to appear for Dietrich on a plea of guilty, but this he declined to make.
What then was the solution found by the High Court? It was to say that while he had no right to counsel at public expense, his conviction should be quashed because he had not had such counsel! Is it any wonder that the courts are congested with unmeritorious criminal defences, and that the cost of legal aid is such a burden on society that increasingly it is not being provided? The implication would seem to be that, unless the people finance what are often long, tedious and hopeless defences, offenders must go scot free. On intellectual grounds, Dietrich seems indefensible, and on pragmatic grounds it is likely to prove disastrous.
At this stage I return to Mabo, if only to ask the question "What was wrong with the decision?". The first answer is that it was sheer invention or, if you prefer a politer word, sheer legislation. As Dr Colin Howard has observed,6 "The philosophy of the common law is, above all, evolutionary, not revolutionary. Mabo is, above all, revolutionary, not evolutionary". In order to emphasise this point, I shall hereafter refer to the decision as the legislation of 3 June, 1992.
Now, if we had a Bill of Rights, there might conceivably be something in it upon which to hang such legislation, but there was nothing.
My thesis is, and I regret to have to put it so bluntly, that this is naked assumption of power by a body quite unfitted to make the political and social decisions which are involved.
Next one must ask what the legislation of 3 June, 1992 actually says. The answer can only be that it is vague and uncertain, and that is clear from the fact that, plainly, it is causing the greatest difficulty for all involved to understand just what is intended by the expression "native title" which is invented by the decision.
The notion seems best identified by the words "usufructuary right" which appear in the judgment. It is a pity that the study of Roman Law has been largely discontinued. It should have been apparent that a usufruct was a right exercisable against the property of another.7 As used in the Canadian cases which deal with Aboriginal title, it was a right exercisable against the property of the Crown. But the majority deny that the Crown had any property in the law. Who then was this mysterious other? Perhaps Captain Phillip should have been negotiating with him?
But let that be. One form of usufruct was a right to take the fruits of the earth. Giving the widest meaning one can to what, in the circumstances, is a pretentious and inaccurate expression, what seems to be said is that, on first settlement, the Aboriginal population had collective "rights" to move across the land, collecting its fruits and the game they found. It is also an historical fact that they resorted to particular places for ceremonial purposes and, as a means to clearing undergrowth and allowing the grasses and young growth to shoot, thus encouraging the proliferation of game, they regularly and constantly set fire to the countryside.
If the right to carry on all of these activities is to be included in "native title", it is still difficult to see in this legislation any basis for suggesting that Aborigines were deprived by white settlement of anything other than the right to carry on the activities of palaeolithic man. In particular, they did not mine the earth.
Indeed, the use of the expression "native title" in the legislation has engendered in "Aborigines" (some of them blue eyed and fair haired) with 200 years experience of European-style title to land, the notion that the legislation of 3 June, 1992 has given them something resembling freehold title (and more, for they are claiming mineral rights which are vested in the Crown, at least until the goalposts are shifted again). At the time of writing, they are claiming the stock routes of Queensland as a means to charging tolls on passing stock. It is no wonder that the Mabo decision was described by one commentator as the High Court's coup d',tat.8
If the above is a reasonable approximation of the content of the right which the Aboriginal population is said to have lost as a result of white settlement, a right which is obviously

inconsistent with freehold title, and equally inconsistent with the law upon which the national parks of Australia are held, one must then turn to consider what is a fair recompense for the loss of the right.

In a properly ordered society, this sort of question is essentially one for the elected Parliaments. Parliament, whose business all this is, is equipped to balance competing considerations. If, on balance, some recompense is due to the descendants of the Aborigines, the writer, like all other decent Australians, would not begrudge it to them.

But how would a wise and just Parliament approach the task? It would surely first identify just what the Aboriginal population has lost, and then consider what is called for in justice to them. So far as one can read the legislation of 3 June, 1992 with confidence, "native title" was certainly nothing resembling freehold, or exclusive occupation of the great tracts of land over which the Aborigines roamed with the seasons. The "rights" which their descendants will have lost if "native title" is extinguished may, according to the circumstances, include:

(a) first and foremost, the right to enter on land to hunt for native game and to forage for food;

(b) the right to resort to ceremonial sites; and

(c) the right to set fire to the landscape, including the national parks.

As to (a), considerations which would weigh with a wise and compassionate Parliament would, one would think, be the economic hardship involved in having to buy one's food from the supermarket in common with the rest of Australia, instead of taking it for nothing (though this was no sinecure, for much human effort was involved, and the hunter-gatherer was at the mercy of our often harsh climate). The Parliament would, naturally, go on to consider whether the billion-odd dollars currently being given to the Aboriginal population each year or expended, allegedly on their behalf, was not some small recompense for this change in their circumstances.

As to (b), if it be demonstrated that extinguishment of native title excludes the relevant section of the Aboriginal population from a site, and that they genuinely desire to go to it for ceremonial purposes, the Parliaments might well consider whether it is consistent with public interest that they should be accorded a statutory right to do so.

As to (c), the purpose of firing the land was to improve and sustain the resources of game. If the monetary distribution by the Parliament supplies their need for food, a wise Parliament might consider that little real loss is demonstrated.

The Court, no matter how interventionist, has neither the role nor the resources to weigh such considerations. Its legislation, therefore, is broad-axe in character and incapable of addressing the problem as a whole.

Further, a Parliament worthy of the name would perforce consider the impact of the new law on the nation as a whole. It would need to consider whether it was timely to spring this burden on Australia at a time when we are close to bankruptcy. It would consider the impact on industrial development which the country needs for survival. Indeed, in the wake of Mabo the Premiers met with the Prime Minister in Canberra to discuss the impact of Mabo on the economies of the several States. According to the Premier of Western Australia,9 the Prime Minister said that the cost of compensating the Aborigines for loss of their ancestors' rights is to be borne by "industry".

This proved to be no comfort at all to Western Australia, whose Premier wishes to see the mineral wealth of that great State developed for the benefit of all its citizens. It is no comfort to Western Australia to be told compensation will be paid by the Commonwealth, if the Commonwealth proposes to recoup it from industry, for such a policy will obviously be a great disincentive to industry to establish in Western Australia, or indeed elsewhere, if the world offers a more rational alternative.

Indeed, if this was the Prime Minister's response, it confirms the worst fears of Western Australians that the legislation of 3 June, 1992 would provide a springboard for outrageous claims,10 which the government in Canberra would be too weak to resist.

By the same token, they would have been too weak to introduce such a chaotic situation. Politicians may not have the supreme wisdom of some judges, but they have a quality of inestimable value to a democracy, their sensitivity to public opinion. The slightest hint of a cool change in the electorate will be registered by politicians, even in Canberra. A raging gale would pass unnoticed in the glass palace opposite the National Art Gallery.

Another aspect of Mabo to which no attention has been given is that the views of the Justices (other than Dawson J.) are no more than gigantic obiter dicta. As Mr Walsh, the former Senator, has pointed out, the Murray Islanders were not nomads, they were settled on the islands and had been for generations. It follows that their interest in those lands would have been respected by colonial governments if their settlement had been on the mainland; and it is a simple historical fact that Queensland annexed these islands at the instance of a former Premier, Mr John Douglas, the Administrator at Thursday Island, to protect these settled inhabitants against incursions from the Pacific. They are not of aboriginal descent but Melanesians, not nomads but cultivators, millennia ahead of the palaeolithics in terms of social organisation.

The situation of mainland Aborigines was wholly irrelevant to the situation of the Meriam people, who indeed dislike being associated with them for administrative purposes by the bureaucracy. If Australia's politicians had any courage, they would say roundly that Mabo is not a binding decision in relation to mainland Aborigines, and that they do not propose to adopt the socio- political philosophy of the majority of the Court. Of course, a truly Aboriginal case could easily be mounted, but next time the States and even the Commonwealth would be forced off the fence to defend the rights of the nation as a whole.

Finally, as law, the decision is pitiful. The draftsman does not deny that the law in 1788 was as Sir Paul Hasluck has described in a passage so clearly and simply stated that I set it out in full in the Endnotes to this paper.11 The law from 1788 until 3 June, 1992 was that on first settlement, property in the wastelands of the Crown (i.e. the whole continent) passed to the Crown for the benefit, as the draftsman concedes, of the people and all of them. This had not been doubted until 3 June, 1992. There was a line of High Court decisions to this effect from 1913 to 1969. A spurious distinction is drawn in Mabo between political sovereignty and title to land, but this distinction had been rejected by the courts, including the High Court, since 1847. As Lord Reid, one of the most respected English judges of this century, remarked: "We cannot say that the law until yesterday was one thing, from tomorrow it will be something different. That would indeed be legislating."12 By what magic then is the property of the whole of the Australian people taken away and given to a small segment of the people?

The writer is acutely conscious of the seriousness of commenting in this fashion on the decisions of our highest court, and has no pleasure in doing so. The High Court has occupied a unique position in Australian society. For whatever reason, we have never given our unqualified respect to any of our institutions, with the sole exception of the High Court. It has presided over 70 years of change, of the shift of power from the constituent colonies to the central government, and all this largely without complaint or criticism. Yet these years saw cases of very great political importance. The writer has no doubt that the main reason why they were so accepted was the perception in the Australian community that the Court was adhering to Sir Owen Dixon's principle of strict legalism. The principle was stated by Dixon during his swearing-in as Chief Justice in the following words : "There is no other safeguard to judicial decisions in great conflicts than a strict and complete legalism".13

The Attorney-General of the Commonwealth, Mr Duffy, when criticism of Mabo first surfaced, deprecated it, saying that criticism of the Court may endanger its independence.14 With respect, however, even in the vast majority of cases, in which judges confine themselves to their judicial functions, the common law tolerates criticism of the courts. A fortiori must comment, indeed criticism, be permissible when the judge assumes the mantle of law giver, and places himself uninvited at the head of the political system. In that capacity he is entitled to no greater privilege than any other politician.

Moreover, once a court arrogates this role to itself, it is of vital importance to the society as a whole to know, before its judges are appointed, what their personal philosophy, religion, racial background, personal associations, and the like, are. This is precisely why senior judicial appointments are the subject of what seems to us indecorous scrutiny in the United States, where the Bill of Rights forces this role on judges. We, on the other hand, are accustomed to putting these personal factors to one side in the case of appointments to courts properly so called, trusting to the judge to accept the intellectual discipline of the great profession of the law, and to subordinate any personal views he may entertain to the demands of a rigorous legal approach.

Dixonian "strict legalism" brought the High Court into modern times in high respect, despite its having had to rule on numerous matters with intense political implications. This surely was because, in the words of Sir Harry Gibbs, Dixon possessed a dedication to principle from which neither expediency nor a temptation to reshape society would cause him to swerve.15 The Dixon doctrine is currently derided in high places, but time will tell whether "judicial activism" will serve the country and the Court as well as judicial self-discipline. Let Dixon himself have the last word. He said: "There is, I believe a general respect for the Queen's Courts of Justice ... and I believe there is a trust in them. But it is because they administer justice according to law."16

Is it fair to suggest that a majority of the Court is pushing its own brand of sociology and playing its own brand of politics? Not so long ago the thought would have been unworthy. Yet we have the controversial suggestion of one Justice, immediately after the equally controversial decision of the Court, that there was some implication in the Constitution that the Parliament could not ban electronic political advertising in the last days of an election, that the Court might "articulate the contents of the limits on parliamentary power arising from common law liberties" and, in that sense, "construct a Bill of Rights".17

This aroused a storm of protest, especially in political circles. Mr Justice Toohey's mistake was frankness. He was however not alone. Mr Justice Brennan, in a paper delivered in Canberra on 16 July, 1992 to a Human Rights Conference, has been equally frank. He is on record as saying, with apparent enjoyment, that a Bill of Rights would bring the courts "into the political process as a new and dominant force". Apologists for judicial activism might note that this view completely denies the proposition that the judges have "always" done what is currently occurring. A Bill of Rights, said his Honour, "judicialises questions of politics and morality", the very last thing, one would think, that any self-respecting judge would want to be involved in.

Again his Honour says, "Once the right is defined, the Court must weigh the collective interest against the right of the individual. This is the stuff of politics, but a Bill of Rights purports to convert political into legal debate, and to judicialise questions of politics and morality." Later in this paper, his Honour gives the reasons which commend the courts "as the repositories of a supervisory power over the political branches of government". Heady stuff indeed!

But, according to his Honour, Canadian judges are said to revel in the constitutional change brought about by a Bill of Rights, and he suggests that if this be so, "surely Australia and Australian judges might do the same". (Emphasis supplied). The explanation for the enthusiasm may lie in words attributed by his Honour to Madame Justice McLachlin: "The advent of the Charter in Canada has elevated judges from a position where they once toiled in relative

obscurity to the level of media figures." It may be questioned whether the Australian people want their judges to be media figures. They may well think that there are already more than enough of those worthies.

One cannot help asking oneself how the enthusiasm of judges (presumably of the High Court, for I should not think that Mr Justice Brennan would venture to speak for other judges) for a Bill of Rights squares with the obvious lack of concern of the Court for the interests of Australians generally. Reference has already been made to Cole v. Whitfield. The Mabo decision would deprive the Australian people, through their governments, of the capacity freely to dispose of the land of the nation (insofar as it has not yet been disposed of) for the benefit of the nation as a whole. A Bill of Rights, whether imposed by judicial invention or by parliamentary action, in reliance on the external affairs power, would amount to arrogant disregard of the will of the people, which they affirmed as recently as 1988 when a mini-referendum on this subject was overwhelmingly rejected.

The Court cannot be surprised if their inventiveness and emotionalism lead to unwelcome consequences. Thus they have been accused of empire building18, and of following precedent only when they feel like it.19 The suggestion would ordinarily be deprecated by those who value our legal system, but the language of Mr Justice Brennan, whose ipsissima verba are set out above, seems to justify the accusation. Moreover, some of Mr Justice Toohey's views would seem to involve a direct challenge to parliamentary democracy.

There are those in the other branches of government who see the unprecedented views being expressed by High Court judges as foreshadowing a long term power struggle between the judiciary and the other branches.20 Mr Justice Toohey would justify the novel idea that governments govern on the sufferance of the courts, by reference to "inalienable common law freedoms". But unless the goal posts are to be shifted at will, the common law knows nothing of "inalienable" freedoms, for the common law is subject to the Parliament. It would be reasonable to speak of the fundamental aspirations and beliefs of Australian citizens, which politicians interfere with at their political peril, but this is a far cry from rights which are not subject to the will of the Parliament.

Mr Justice Toohey argues21 that "judicial review ... can operate to frustrate the will of the parliamentary majority only in a way which protects and promotes individual liberty. Judicial review does not result in any greater restriction upon fundamental liberties than would prevail in its absence." This, with respect, is untenable. Enlargement of the rights of one citizen or group will of necessity trench upon the rights of the rest.

Back to Mabo. If the governments of Australia are so supine as to allow judges to strip from the Crown property rights which the Crown has held and exercised for 200 years for the benefit of the nation as a whole, and turn them over to a special interest group, this must diminish the capacity of governments to advance the interests, economic and cultural, of their people.

In the light of these considerations, can any rational mind doubt the wisdom of the dissenting Justice, Sir Darryl Dawson, who pointed out that the implementation of a new policy towards the mainland Aborigines involved a change in the law, and that this was "a matter for government rather than the courts"? Can it be seriously doubted that Mr Walsh was right in questioning the learned Justices' understanding of "social and political reality"?22 Is it surprising that talk of secession is rife again in Western Australia?23

Since this paper was prepared, the Chief Justice of Australia, Sir Anthony Mason, is recorded in The Australian Lawyer of July, 1993 as saying that "to put Mabo in perspective", the Court had "done no more than the courts have done in the United States, Canada and New Zealand", and that, "generally speaking, the recognition of rights of Aboriginal people in Australia with respect to land is akin to the recognition of indigenous title on the part of the indigenous inhabitants of"

those three countries. Any statement by the Chief Justice of this country, even an extra-judicial statement, is entitled to the highest respect, and one naturally goes to the sources for further enlightenment. One assumes that his Honour was referring to the authorities cited by Mr Justice Brennan24 as authority that a clear intention for the extinguishment of native title was required.

The first of them is Calder v. Attorney General of British Columbia.25 This case concerned the Nishga tribe who, the evidence disclosed, occupied a particular area and made intensive use of it. The evidence was that their territory was recognised by other tribes as territory of the Nishga tribe, that parts of it were used in common for obtaining logs and timber for houses, canoes, totem poles and so forth, and that other areas were allotted to or owned by family groups. There was, in particular, evidence that it was not correct to say that the Indians of this tribe did not own the land, but only roamed over the face of it and used it.

The next was Hamlet of Baker Lake v. Minister of Indian Affairs.26 This case concerned the Inuit people. Theirs was a common law claim of Aboriginal title. The headnote states that to establish such a title four elements must be proved:

(1) that they and their ancestors were members of an organised society;

(2) that the organised society occupied the specific territory over which they assert the Aboriginal title;

(3) that the occupation was to the exclusion of other organised societies; and

(4) that the occupation was an established fact at the time the sovereignty was asserted by England.

The third of the Canadian cases R. v. Sparrow27 involved the rights of members of the Musqueam Indian Band to fish with an outsize drift net, the defendant contending successfully that he was exercising an existing Aboriginal right, and that any restriction on net length was inconsistent with s. 35(1) of the new Constitution of Canada of 1982. The Musqueam Indian Reserve was on the site occupied by a Musqueam village for hundreds of years, and the Musqueam had lived within the area as an organised society long before European settlement.

Of the American cases cited, United States v. Santa Fe Pacific Railroad Company28 concerned the Walapai Indians of Arizona. The judgment of the Supreme Court was delivered by Douglas J., who said, at p. 345:

"Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapai, in the sense that they constituted definable territory occupied exclusively by the Walapai (as distinguished from lands wandered over by many tribes), then the Walapai had `Indian title' which, unless extinguished, survived the railroad grant of 1866."

The first of the United States cases cited, Lipan Apache Tribe v. United States29, affirms the proposition that Indian tribes acquired so-called Indian title to land which they exclusively used and occupied continuously for many years. In the same volume the Court of Claims held that proof of Indian title depends on a showing of actual exclusive and continuous use and occupancy for a long time by the Indian tribe in question: United States v. The Seminole Indians of the State of Florida.30

The New Zealand case which is cited is Te Weehi v. Regional Fisheries Officer.31 This case concerned a charge under the Fisheries Act 1983 of possessing undersized paua (a form of shellfish). By s. 88(2) it was provided that nothing in the Act should affect Maori fishing rights. Te Weehi was found to have been exercising a customary fishing right which had not been extinguished, and to have a good defence under s. 88(2). The fishing right was one limited to the Ngai Tahu tribe who occupied and exercised control over an area of the South Island, and in

particular exercised fishing rights in relation to the beach in question, permitting friendly neighbouring tribes to take fish from the beach.
Each one of these cases involved, not nomads, but indigenous people who occupied and exercised rights over defined areas of territory. Such rights as they had would have been recognised by the lawyers of the late 18th Century, and by the great judges of the High Court whose decisions were summarily disregarded in the Mabo case. Their situation was as far removed from those of the mainland Aborigines as was the situation of the Meriam people. That the writer is unable to see how it can be said that the Court has done no more than the courts in the United States, Canada and New Zealand, must be put down to his own defect of understanding.
The Chief Justice is also recorded as saying that the rejection of the doctrine of terra nullius by the Court is "entirely consistent with the rejection of that doctrine by the International Court in the Western Sahara Case".
The report of that case32 shows that Question 1 read : "Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain inherently belonging to no-one (terra nullius)?" The opinion of the court at p. 18, para. 15 classes the question as one of law. At p. 38, para. 77 the time of Spanish colonisation is identified as beginning in 1884. It appears at p. 22, para. 26 that the question arose because, in the words of King Hassan II of Morocco, the Spanish government claimed that the Sahara was at the relevant time res nullius, and that no power and no administration had been established over the Sahara, while Morocco claimed the contrary. At p. 38, para. 79 the court turned to Question 1, observing that it was to be interpreted by reference to the law in force at that period. Far from rejecting the doctrine, the court said:
"The expression `terra nullius' was a legal term of art employed in connection with `occupation' as one of the accepted legal methods of acquiring sovereignty over territory. `Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid `occupation' that the territories should be terra nullius – a territory belonging to no-one at the time of the act alleged to constitute the `occupation' ... In the view of the Court, therefore, a determination that Western Sahara was a `terra nullius' at the time of colonisation by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of `occupation'."
As the authoritative text is French and not English, I append
the French text of this passage.33 At p. 39, para. 81 of the advisory opinion, the Court refers to the evidence that Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them, and that by the Spanish Royal Order of 6 December 1884, far from treating the case as one of occupation of terra nullius, Spain proclaimed that the King was taking the Rio de Oro under his protection on the basis of agreements which had been entered into with the chiefs of the local tribes. The Court proceeded to reject not the doctrine of terra nullius, but Spain's claim that the Western Sahara in 1884 answered that description.
In this connection it should be noted that the minority opinion of Judge Ammoun cited by Mr Justice Brennan was not reflected in the advisory opinion of the Court and was a minority view.
In any case, Australians will be surprised to learn that the views of the International Court, whether expressed in an advisory opinion (as this was) or otherwise, entitle our courts to reverse law which has been settled for 200 years, and in reliance on which the affairs of the nation have been conducted.

It follows that the High Court's rejection of the doctrine in 1992 represents an ex post facto reversal of established law. Moreover, it is clear that, once again, an international authority relied upon by the High Court was in truth poles apart from the situation of the mainland Aborigines.

A point made by Sir Anthony in the same interview relates to the position of the Commonwealth in this unhappy matter. While not a mystery, it has not been apparent to most of us that the Commonwealth was at first a defendant, managed to extract itself from that position and become an intervener, and ultimately made no submission to the Court. In other words, the Commonwealth, instead of defending the interests of Australians generally, ran dead. There can be no doubt that it thereby accepted a share of responsibility for the outcome.

In conclusion, the writer offers two thoughts which epitomise the danger inherent in judicial activism. The first is from Burke's Reflections on the Revolution in France:

"It is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of utility before his eyes".

The second is from an address to the Holdsworth Club by Lord Goff of Chievely:

"Holdsworth was a convinced gradualist, believing in gradual and not in sudden or violent change - and so, I confess, do I, thinking that it is better to walk in the light than to leap into the dark".

Should our Courts determine social policy? The answer is "no", first because it is not their function, and second, because they do it so badly.

Endnotes:

1. See, e.g. Cole v. Whitfield (1988) 165 C.L.R. 360.
2. New South Wales v. The Commonwealth (1975) 135 C.L.R.337.
3. The Commonwealth v. Tasmania (1983) 158 C.L.R. 1.
4. Dietrich v. The Queen (1992) 109 A.L.R. 385.
5. (1979) 143 C.L.R. 575 at p. 581.
6. "The Consequences of the Mabo Case", I.P.A. Review, Vol. 46 No. 1.
7. Usus fructus est ius alienis rebus utendi fruendi salva rerum substantia: Institutes Lib.II Tit. 4.
8. Mr P P McGuinness, The Australian, 2.9.92.
9. Television interview conducted by Mr Paul Lyneham, "7.30 Report", 21.6.93.
10. See e.g. the statement of Mr Mick Dodson of the Northern Land Council that Mabo was "a goldmine", and that of Mr Galarrwuy Yunipingu: "When I win I will go to Nabalco and twist their arm and tell them to come to the party. If they try to ignore us I'll simply pack them up and sell them." (As reported by Mr B A Santamaria,"The high price of Mabo madness", The Australian Financial Review, 22.6.63).
11. "The discovery, exploration and settlement of the Australian continent by Europeans certainly meant that in the course of two centuries land once occupied by Aborigines was occupied by Europeans. The Aborigines were dispossessed. The view commonly held by the white settlers was that the act of possession, solemnly made on the occasion of discovery or first settlement, meant that all the land in Australia was at the disposition of the Crown, and the only title to own or to have the use of a particular plot of land was a title granted by the Crown and registered by one of the several Lands and Titles Offices in Australia. Land not so granted ("not alienated" was the formal term) remained as Crown land. Decisions regarding the alienation, allotment and use of land were made in the name of the Crown by the various governments which had been set up in Australia under the constitutional powers of the British Parliament. When these colonial governments became representative and then responsible,they acted in land matters (as in other phases of government) in keeping with the views and to serve the interests of

the Australian citizens. They made decisions from time to time to alienate more and more Crown land, to promote settlement, to develop communications and services, to facilitate prospecting and mining for minerals and to exploit forests. Australian legislatures made laws regarding land and Lands Departments administered these laws. Rights in land did not exist outside this process. The popular understanding of the history of the foundation of settlement in Australia was that the early colonists had moved into unoccupied land. A scant Aboriginal population was nomadic and there were none of those signs of occupation or ownership of land familiar to Europeans, such as permanent dwellings, villages, towns, farms, herds, cultivation, enclosures, ditches, hedges, earthworks or clearings. There had been no conquest or surrender of territory,but a gradual process of occupying land that was waste land in the sense that nobody was using it in the way in which Europeans used land. In any case, the greater part of the immigrant whites arrived in the continent during the second century of the history of settlement. These late-comers, attracted to Australia by the prospect of making a new life for themselves in a new land, found little in the southern half of the continent to remind them of the earlier inhabitants. As a matter of course they obtained their piece of land, whether a farm or a suburban building lot, by buying it on the open market or becoming an applicant under some scheme of government-promoted settlement. They were not aware that the vanished Aborigines had a prior right to the piece of land to which the immigrant had received the title deeds."
Sir Paul Hasluck, "Shades of Darkness" (1988), Melbourne University Press, pp. 101-2.
12. As cited by Lord Mackay of Clashfern L.C. "Can Judges Change the Law?", Proceedings of the British Academy LXIII at p. 297.
13. 85 C.L.R. p. xv (21.4.52).
14. Sydney Morning Herald, 29.10.92.
15. "Sir Owen Dixon : A Celebration" (1986), Melbourne University Press, p. 39.
16. 85 C.L.R., loc. cit..
17. Mr Justice Toohey, as reported The Australian Financial Review, 6.10.92.
18. Mr P P McGuinness, The Australian, 17-18.10.92.
19. Mr P P McGuinness, The Australian, 2.9.92.
20. e.g. Mr Peter Hartcher, Sydney Morning Herald, 9.10.92.
21. The Age, 12.10.92.
22. The Australian Financial Review, 22.6.93, "Mabo's potential havoc".
23. The Bulletin, 22.6.93.
24. 175 C.L.R. at p. 64.
25. [1973] S.C.R. 404.
26. (1979) 107 D.L.R. (3d) 513.
27. [1990] 1 S.C.R. 1075.
28. (1941) 314 U.S. at pp. 353-4.
29. (1967) 180 Ct.Cl. 487.
30. (1967) 180 Ct.Cl. 375.
31. [1986] 1 N.Z.L.R. 680.
32. Western Sahara, Advisory Opinion, ICJ Reports (1975) p.12.
33. "79. En ce qui concerne la question 1, la Cour note que la requŠte situe express,ment cette question au << moment de la colonisation par l'Espagne >>: il parait donc clair que les termes <> doivent ˆtre interpr,t,s eu ,gard au droit en vigueur … l',poque. L'expression terra nullius ,tait un terme de technique juridique employ, … propos de l'occupation en tant que l'un des modes juridiques reconnus d'acquisition de la souverainet, sur un territoire. L'occupation ,tant en droit un moyen originaire d'acqu,rir pacifiquement la souverainet, sur un territoire, autrement que par voie de cession ou de succession, l'une des conditions essentielles d'une occupation valable ,tait

que le territoire consid,r, f–t une terra nullius - un territoire sans maŒtre - au moment de l'acte qui ,tait cens, constituer l'occupation (voir Statut juridique du Gro‰nland oriental, C.P.J.I. s,rie A/B no 53, p.44 et 45, p. 63 et 64). Par cons,quent, de l'avis de la Cour, on ne peut d,terminer que le Sahara occidental ,tait terra nullius au moment de la colonisation par l'Espagne qu'en ,tablissant qu'… cette ,poque le territoire n'appartenait … personne, en ce sens qu'il pouvait ˆtre acquis par le proc,d, juridique de l'occupation."