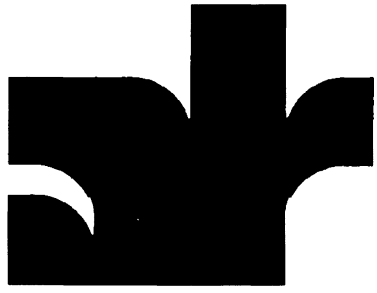

ARTICLES

The Hon. Sir Anthony Mason AC KBE[*]

LEGISLATIVE AND JUDICIAL LAW-MAKING: CAN WE LOCATE AN IDENTIFIABLE BOUNDARY?

ABSTRACT

In an era when Dixonian legalism no longer commands allegiance, it must be conceded that courts do make law. They do not, of course, enjoy the relatively unrestrained power of a legislature to translate policy into law. Judicial lawmakers are limited by the necessity to present their conclusions in reasoned judgements; the constraints of precedent and the prevailing conventions of argument by analogy. They are limited too, by prudential considerations, from venturing to resolve issues of policy in the absence of general community consensus. Sir Anthony explores the limits of judicial creativity and presents a typology of judicial law making in six categories before turning, in conclusion, to a brief consideration of the question whether it is open to Australian courts to recognise a general right of privacy.

I INTRODUCTION

The title to this lecture assumes that judges make law. My impression is that this assumption is not universally accepted. Some people evidently think that judges do not, or should not, make law and that, if judges make law, their law-making activity should be restricted to exceptional cases.

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Others may take the view that although judges make law, they should not change the law once it has been declared by judicial decision. This view is related to the application of precedent and the doctrine of *stare decisis*.

So it is convenient to begin discussion of the topic by exploring the reasons for the belief that judges don't or shouldn't make law. These reasons may come down to a belief that judges should not depart from the law as previously declared. Then it is necessary to establish that the judges have authority to make law as an incident of their power to adjudicate. Next, I move on to the point that there is no brightline distinction between legislative and judicial law-making. The difference is rather one of subject matter, scope and extent. With that point, I pass to the situations in which it is legitimate for judges to make and change the law.

After dealing with specific instances of judicial law-making, beginning with Sir Owen Dixon and the High Court in his time, and ending with instances taken from more recent times, I look at the question, by way of illustration, whether the judges, in an appropriate case, should develop the common law by creating a general right of privacy.

II THE POPULAR BELIEF THAT THE LEGISLATORS, NOT THE JUDGES, MAKE LAW

Many people appear to think that law-making is the exclusive business of the politicians (the legislators), that the adjudication of disputes is the business of judges and that law-making is not the concern of the judges. Yet, in earlier times, judges were regarded as law-makers. The modern reluctance to acknowledge this role coincides with the extension of the parliamentary franchise in the United Kingdom and the establishment of democratically elected legislatures in the British colonies, including the Australian colonies.[1]

There are several reasons for this failure to recognise that judges make law, if only incidentally. Historically, the image of the law-giver has been quite distinct from the image of the judge or adjudicator. The law-giver and the judge have been correctly seen as discharging functions which are substantially different, even if there is an element of overlap. Indeed, that proposition is a fundamental element in the doctrine of the separation of powers which is incorporated in the Australian Constitution.

This separation of the legislative and judicial functions is reinforced by the democratic election of legislators and the executive appointment of judges. The legislators are the elected representatives of the people. As such they have a

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[1] See Geoffrey Lindell, 'Judge(s) & Co.' (1998) 21 *University of NSW Law Journal* 268, fn 1.

mandate to act on behalf of the people and to make laws with the authority of the people. The judges have no comparable mandate. Their mandate is to exercise judicial power and, in so doing, to hear and determine controversies brought before them.

Yet another factor has been the reticence of the judges about their law-making role. The reticence of the judges is understandable. In earlier times the image of the judge carried more authority than the image of the legislator. So there was more respect for the judge than the legislator. Why compromise the authority of the judge by confusing the image of the judge with that of the legislator?

This was the point made by the leading English judge, Viscount Radcliffe, when he said:

> I do not believe that it was ever an important discovery that judges are in some sense law-makers. It is much more important to analyse the relative truth of an idea so far reaching; because, unless the analysis is strict and its limitations observed, there is real danger in its elaboration. We cannot run the risk of finding the archetypal image of the judge confused in men's minds with the very different image of the legislator. ... The truth is, in my belief, that the image of the judge, objective, impartial, erudite and experienced declarer of the law that is, lies deeper in the consciousness of civilisation than the image of the lawmaker, propounding what are avowedly new rules of human conduct. Each has a separate authority, and the appeal of each for men's obedience is fundamentally different.[2]

In other words, judges do make law but, according to Viscount Radcliffe, nothing is to be gained by advertising the fact. To do so would result in people calling into question the authority of the judge to make law and set at risk the community's willingness to accept judicial decisions and respect them. This risk is greater when a judicial decision changes the law. Then the law-making character of the decision becomes apparent. It is in such a case that the objection to judicial law-making is most strongly voiced.

Viscount Radcliffe's remarks were prophetic. One of the main criticisms made of the High Court decisions in *Mabo v Queensland (No. 2)*[3] and *Wik Peoples v Queensland*[4] was that non-elected judges were usurping the role of the legislature. Of course, the criticism was mistaken, as will appear.

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2 Lord Radcliffe, 'The Lawyer and his Times' in *Not in Feather Beds* (1968) 271–2.

3 (1992) 175 CLR 1.

4 (1996) 187 CLR 1.

III THE DECLARATORY THEORY OF JUDICIAL DECISION-MAKING

For a very long time the judges did more than fail to advertise the fact that they made law. They constructed a theory of judicial decision-making which was calculated to obscure, if not conceal, the reality of what they were doing. They invented the 'declaratory theory' of judicial decision-making. According to this theory, the common law has existed and exists 'out there' in perfect shape, so to speak, simply awaiting discovery and ascertainment by the judges. So, if the judges change their mind about a particular common law rule or principle, they are not changing the law. They are merely discovering or ascertaining the true rule or principle, their previous ascertainment having been erroneous. The declaratory theory was an artificial construct. But, because it asserted that the newly ascertained rule or principle had always applied, it involved no concession that the new decision changed the law.

IV SIR OWEN DIXON'S CONCEPT OF LEGALISM AND JUDICIAL METHOD

Associated with the declaratory theory of law were legalism and the judicial method which has been associated with Sir Owen Dixon. Legalism is a term used to describe an analytical approach to legal questions featuring abstract logical reasoning based on the text of the relevant law, to the exclusion of social, political and economic considerations which may inform either the interpretation of the text or the formulation of principle. In the interpretation of the Australian Constitution, Sir Owen Dixon advocated an approach based on 'strict and complete legalism',[5] while in common law matters he advocated 'strict logic and high technique', though he acknowledged that strict logic and high technique were not so strictly pursued in modern times.[6]

Sir Owen Dixon's conception of judicial method was based on the proposition that, within the body of authoritative legal materials (consisting of constitutions, statutes, judicial decisions and perhaps learned writings), as correctly understood, there is to be found 'true' principle and doctrine. The function of the courts is to ascertain 'true' principle and doctrine from that body of authoritative legal materials. The law, discoverable in this way, exists independently of its exposition, the materials being no more than evidence of the law. In this scheme of things, there is little place for policy considerations or policy choices. In conformity with this theory of judicial method, Sir Owen Dixon's judgments usually contain little discussion of policy considerations. This conception of judicial method is closely related to the declaratory theory of law and consequently avoids any acknowledgment that a judicial change in a principle of law involves judicial law-making. There is, on this

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5 On being sworn in as Chief Justice, 21 April 1952, (1951–2) 85 CLR, xiii-xiv.

6 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 469.

view, no more than a different perception of what the 'true' principle is. Just as there is little scope for policy considerations, there is little place for 'values'.

V THE DEMISE OF THE DECLARATORY THEORY AND THE RISE OF LEGAL REALISM

Windeyer J was the first Australian judge to expose the fallacy of the declaratory theory when, in the 1996 case of *Skelton v Collins*,[7] he said of our English inherited law:

> To suppose that this was a body of rules waiting always to be declared and applied may be for some people satisfying as an abstract theory. But it is simply not true in fact. It overlooks the creative element in the work of the courts. It would mean, for example, that the principle of *Donoghue v Stevenson*, decided in ... 1932 ... became law in Sydney Cove on 26th January 1788 or was in 1828 made part of the law of New South Wales by 9 Geo. IV c. 83, s. 25. In a system based, as ours is, on case law and precedent there is both an inductive and a deductive element in judicial reasoning ...[8]

Windeyer J went on to say: 'Here, as it is in England, the common law is a body of principles capable of application to new situations, and in some degree of change by development'.[9]

He continued by quoting Lord Reid's observation:

> The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in [the House of Lords] in old cases.[10]

In 1972, Lord Reid described the declaratory theory as a 'fairy tale'.[11] In 1988, Justice McHugh expressed the same view and pointed out that the judges had been making law for over 800 years.[12] In 1999, in *Kleinwort Benson Ltd v Lincoln City Council (No. 8)*,[13] the House of Lords rejected the declaratory theory.

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7 (1966) 115 CLR 94.

8 Ibid 134.

9 Ibid 135.

10 *Myers v Director of Public Prosecutions* [1965] AC 1001, 1021.

11 'The Judge as Lawmaker' (1972) *The Journal of Public Teachers of Law* 22.

12 'The Law-Making Function of the Judicial Process' (1988) 62 *Australian Law Journal* 15, 16; see also Justice M D Kirby, 'The Judges', *Boyer Lectures*, Australian Broadcasting Corporation, Sydney (1983) 58.

13 [1999] 2 AC 349.

Just as the declaratory theory became moribund, so modern judges, in describing the nature of the judicial function, have described it in terms which take it beyond the narrow conception which is the essence of Sir Owen Dixon's idea of judicial method. Take the statement by Lord Bingham of Cornhill, England's Senior Law Lord:

> The declaratory approach is radically inconsistent with the subjective experience of Judges, particularly appellate Judges, of the role which they fulfil day by day. They know from experience that the cases which come before them do not in the main turn on sections of statutes which are clear and unambiguous in their meaning. They know from experience also that the cases that they have to decide involve points which are not the subject of previous decisions, or are the subject of conflicting decisions, or raise questions of statutory interpretation which apparently involve genuine lacunae or ambiguities. They know and the higher the Court the more right they are, that decisions involve issues of policy. [14]

The relevance of values, especially moral values, in the determination of legal principle is nowhere more clearly demonstrated than it is in the majority and minority judgments in *Cattanach v Melchior*,[15] the High Court's recent decision on the recovery of damages from a doctor whose negligence resulted in the birth of a child and consequential expense. The minority view (Gleeson CJ, Hayne and Heydon JJ) was encapsulated in the following passage from the judgement of Heydon J:

> It is wrong to attempt to place a value on human life or a value on the expense of human life because human life is invaluable - incapable of effective or useful valuation. It is thus the policy of the law that the birth of a child is not to be discounted or devalued ... The child is itself valuable, not because it confers blessings or economic advantages or other advantages, but because it is life.[16]

The joint judgment of McHugh and Gummow JJ contained an extensive discussion of policy and values. They quoted[17] Windeyer J's observation that public policy 'after all is the bedrock foundation on which the common law of torts stands'.[18] Their Honours discussed the expressions 'public policy', 'legal policy' and 'policy of the law'. They ultimately concluded that the policy of the law should not be based upon the values relied upon by the plaintiffs and recognised by the minority judges because those values were not sufficiently certain to be accepted as a

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14 'The Judge as Lawmaker' in *The Business of Judging* (2000) 28.

15 (2003) 199 ALR 131.

16 Ibid 229 (Heydon J).

17 Ibid 150.

18 *Smith v Jenkins* (1970) 119 CLR 397, 418.

paradigm of social behaviour. Their Honours seem to suggest that, in the absence of legislative expression, it is very difficult to make broad assumptions as to what is acceptable as the paradigm of social behaviour in developing the common law,[19] at least in the context of *Cattanach v Melchior*.

The difficulty, it is suggested, has come about by reason of 'changes in the composition and attitudes of society' in the last century.[20] The problem, according to their Honours, is that there is no general consensus in today's community of values respecting the importance of life. The identification of values generally recognised by the community, which is a multi-cultural community, is, of course, a major problem. It is a topic which Chief Justice Doyle has discussed in some detail.[21]

The modern emphasis on the need for openness and transparency — 'the great principle is that of open justice', as it has been called by the House of Lords[22] — requires that the judge reveals all the matters which have been taken into account in the making of the decision. If the judge takes a value or a policy consideration into account then it should be revealed. It is not sufficient for a judge to state a major premise, if it is influenced by such a value or consideration, without stating that fact and why it has been adopted.

VI THE LEGACY OF JUDGE-MADE LAW

The legacy of judge-made law is massive. It occupies the 40-odd volumes of Halsbury's Laws of England and its Australian supplement. It spans the law of contracts, torts, equity, trusts, criminal law and substantial parts of administrative law. It extends also to constitutional law and the interpretation of statutes. Text books on the Australian Constitution deal at considerable length with the High Court's interpretation of the Constitution, the text of which usually occupies a few pages in an appendix to the text book. The skeleton text of the Constitution has been fleshed out in much greater detail by High Court judgments.

The recognition that judges do make law and that they do so by reference, in appropriate cases, to policy factors and values, makes it important that we explore, as far as we can, the boundaries of legitimate judicial law-making. My reference to 'appropriate cases' is an acknowledgment that in many cases judges make law

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19 (2003) 199 ALR 131, 155.

20 Ibid.

21 J Doyle, 'Implications of Judicial Law-Making' in C Saunders (ed), *Courts of Final Jurisdiction* (1995) 84.

22 *R v Brown* [1998] AC 367, 374 (Lord Hope of Craighead, citing Lord Taylor of Gosforth CJ in *R v Keane* [1994] 1 WLR 746, 750).

without the necessity of considering policy considerations or values. A court may overrule an earlier decision on the ground that the court which made the decision simply misunderstood the relevant principle.

To the extent that judicial law-making is legitimate, it constitutes an apparent exception to an absolute separation of powers. It is, of course, recognised that the separation of powers for which the Australian Constitution provides is not an absolute separation.

VII THE JUDGE'S AUTHORITY TO MAKE LAW

The authority given to the courts to hear and determine cases, whether the authority be given by Constitution or by statute, includes authority to determine the law which is relevant to the disposition of the case. The grant of authority to hear and determine cases includes authority to do all that is necessary and incidental to the hearing determination of a case. Determination of the relevant law is necessary and incidental to the disposition of a case. Absent such a determination or the application to the facts of the law as so determined, the decision of the case would be a discretionary, even an arbitrary, exercise.

Consequently, there can be no brightline distinction between legislative and judicial law-making. In *Woolwich Equitable Building Society v Commissioners of Inland Revenue*,[23] Lord Goff of Chieveley acknowledged that he was never quite sure where to locate the boundary between legitimate judicial development of the law and legislation. He noted that if the boundary were to be too firmly drawn, *Donoghue v Stevenson*, modern judicial review and *Mareva* injunctions would not have come about as they did.

VIII THE LIMITATIONS ATTACHING TO THE JUDICIAL PROCESS DISTINGUISH IT FROM THE LEGISLATIVE PROCESS

Judicial decision-making is principled, reasoned, informed by precedent and depends to a significant degree on analogical reasoning. Judicial reasoning sets great store by the traditions of consistency, coherence and continuity in the orderly development of the law. There is a place for policy but it is within the framework of precedent and the traditions just mentioned.

Legislative decision-making is unconstrained by limitations of this kind. It may extend, and often does, to compromise and expediency. It may involve the making of inquiries and the conduct of surveys which are foreign to the judicial process.

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23 [1993] AC 70, 172–3.

And it involves the uninhibited making of policy choices and the overt consideration of political considerations which are not reflected in the judicial process.

It follows that there are many issues which, for one reason or another, are better suited to the legislative process than the judicial process. It also follows that the judicial law-making function is much more limited than the legislature's law-making function.

IX JUDICIAL LAW-MAKING AND PRECEDENT

The permissible limits of judicial law-making are closely associated with the doctrine of precedent of which one element is *stare decisis*. *Stare decisis* obliges a court to give effect to its previous decisions. It is, however, subject to the qualification that the High Court of Australia is not bound by its previous decisions.[24] It is also subject to the qualification, accepted by the legalists, that a court is not bound to follow a decision which the court holds to be wrong. Shortly I shall refer to examples where the High Court in Sir Owen Dixon's time departed from earlier decisions which it held to be wrong. It is, of course, accepted that a court will only depart from an earlier decision when it is convinced that it is plainly wrong.[25] Moreover, it is undesirable that a question decided by the court after full consideration should be re-opened without strong reasons.

A conclusion that an earlier decision is wrong is not the end of the story. If the decision has given satisfaction and caused no difficulties in practice, that may outweigh the theoretical interests of legal science in insisting on purity of doctrine. The question whether a court should overrule an earlier decision 'is one of legal policy into which wider considerations enter than mere questions of substantive law'.[26]

John v Federal Commissioner of Taxation[27] identified four categories of earlier decision from which a court is justified in departing. They are:

(1) the earlier decision did not rest upon a principle carefully worked out in a series of cases;

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24 *Damjanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390, 395–6; *Queensland v Commonwealth* (1977) 139 CLR 585, 593–4, 602; *Baker v Campbell* (1983) 153 CLR 52, 102.

25 See *Queensland v Commonwealth* (1977) 139 CLR 585, 599 (Gibbs J).

26 *Geelong Harbour Trust Commissioners v Gibbs Bright & Co. Ltd* (1974) 129 CLR 576, 582–4 (Lord Diplock).

27 (1989) 166 CLR 417, 438–9.

(2) there was a difference in the reasons of the judges constituting the majority;
(3) the earlier decision led to considerable inconvenience; and
(4) the earlier decision has not been acted upon in a manner that militated against reconsideration.

Categories (2), (3) and (4) are cases in which the force of precedent is diminished. In category (3), there is a benefit to be gained from overruling the earlier decision. The four categories are neither prescriptive nor exhaustive, as appears from what follows.

In *State Government Insurance Commission v Trigwell*,[28] I said:

> If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency.

To this statement, Gummow J added:[29]

> it may emerge that the rationale of a particular fiction (eg an implied promise to pay) which should no longer be supported after the demise of the old forms of action.[30] In those cases, the perceived reason for change stems from alterations in the legal system itself. The procedural operation of the Judicature system may produce similar results.[31]

The reference in this passage to 'the legal system' should be understood as including related principles of law.[32]

Sir Garfield Barwick expressed a contrary view in *Dugan v Mirror Newspapers Ltd*.[33] There the Court held that the old common law rule providing that a prisoner serving a commuted sentence for a capital felony is incapable of suing in the courts was still part of the law of New South Wales. The question at issue was whether

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28 (1979) 142 CLR 617, 633; cited in *Wik Peoples v Queensland* (1996) 187 CLR, 180 (Gummow J).
29 Ibid.
30 *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 253–5.
31 *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242, 254–6.
32 See the discussion of *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274, below.
33 (1978) 142 CLR 583, 586.

Imperial statute required an application of the common law rule in Australia.[34] Sir Garfield expressed the view that, if that answer be given, as indeed it was, 'there is no authority in the Court to change that law as inappropriate in the opinion of the Court to more recent times during which a capital felony remained'.[35]

This view attributes an extremely restricted role to the courts in formulating common law principles and it fails to take account of the judgment of Windeyer J in *Skelton v Collins*. His Honour made the point there that the English common law made applicable by Imperial statute was inherently capable of judicial development here, as it was in England.

Constitutional and statutory interpretation involve special considerations. There are those who, like Sir Garfield Barwick, think that a Justice is bound to express his own view of what the Constitution means.[36] Others consider that precedent applies as it does elsewhere. It will be recalled how Kitto J deplored departure from the Dixonian interpretation of s 92.[37]

The case of statutory interpretation is similar. The responsibility of a court is to give effect to the legislative intention as expressed in the statute. If the court is convinced that its previous interpretation was plainly erroneous, the court cannot allow previous error to stand in the way of declaring the true legislative intent.[38]

Stare decisis has special force in the case of decisions affecting property and commercial transactions. Parties entering into such transactions rely on an understanding of the current law. Likewise, a court is generally reluctant to depart from a previous decision on criminal law when the departure would expose a person to a criminal liability which did not exist under the law as it stood when the alleged offence took place.[39] A court will also be reluctant to overrule a decision when government has organised its financial affairs in reliance on that decision.[40] And a court will usually leave taxation decisions to be dealt with by the legislature because the legislature regularly amends revenue legislation.[41]

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34 9 Geo IV, C 83, s 24.

35 Ibid 586.

36 *Queensland v Commonwealth* (1977) 139 CLR 585, 593–4, 610.

37 *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 30.

38 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9.

39 But cf *R v L* (1991) 174 CLR 379.

40 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311.

41 See Lord Radcliffe, 'Law and Order', above n 2, 216.

X RESTRAINTS ON JUDICIAL LAW–MAKING

Courts are extremely reluctant to depart from well settled principle. In *Mabo v Queensland (No 2)*, Brennan J acknowledged that recognition by the common law of the rights and interests in land of indigenous peoples 'would be precluded if the recognition were to fracture a skeletal principle of our legal system'.[42] Examination of the authorities in *Mabo (No 2)* revealed that the principle relied upon was far from 'well settled'. The authorities invoked to support it were divergent and flawed.[43]

It has also been suggested that a court will not depart from established authority when the reasons for departure are based on pragmatism rather than principle. It was on this footing that the minority in *Environment Protection Authority v Caltex Refining Co Pty Ltd*[44] dissented from the majority decision. The minority (Deane, Dawson and Gaudron JJ) considered that the arguments against applying the privilege against self-incrimination to corporations were essentially pragmatic and should not be acted upon. As the case for change was based on pragmatism, they considered that it was a matter for the legislature rather than the courts. The basis of this view is by no means clear. It may suggest that pragmatic judgment lies beyond the reach of judicial power (a reversion to Dixonian judicial method). Or it may mean that the question, being a matter of pragmatism resting on finely balanced considerations, was better left to the legislature.

A similar view was taken by four Justices in *Breen v Williams*,[45] where the question was whether a patient should have access to the records of her doctor relating to his diagnosis of the patient and her treatment. In *Breen v Williams*, the decision to leave change to the legislature was based on the view the existing law did not support the patient's claim and that the desirability of the change advocated on behalf of the patient was by no means self-evident.[46] In this situation, the resolution of the desirability of change or otherwise was best left to the legislature.

Other examples of leaving change to the legislature are *Hesperides Hotels v Aegean Holidays*[47] and *Dow Jones & Company Inc v Gutnick*.[48] In *Hesperides*, one question was whether the House of Lords should revise the rule in *British South*

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42 (1992) 175 CLR 1, 43.

43 For this reason and because the old principle was based on unacceptable values, the fact that the principle affected property was not an obstacle to its reconsideration.

44 (1993) 178 CLR 477.

45 (1996) 186 CLR 71, 99 (Dawson and Toohey JJ), 115 (Gaudron and McHugh JJ).

46 Ibid 99 (Dawson and Toohey JJ), 115 (Gaudron and McHugh JJ).

47 [1979] AC 508.

48 [2002] 210 CLR 575.

Africa v Companhia de Mocambique[49] to the effect that the court has no jurisdiction to entertain an action for the determination of the title to, or the right to possession of, any immovable situate in foreign land; or the recovery of damages for trespass to such an immovable. Although the rule had been strongly criticised and gave rise to difficulties, the House of Lords considered that, if change was to be made, it should be made by Parliament. Lord Wilberforce offered four reasons for taking this course:

(1) the rule was accepted with differing degrees of force and emphasis in other jurisdictions;
(2) there were possibilities of conflict with other jurisdictions and political questions of some delicacy;
(3) revision of the rule might necessitate some consequential changes in the law; and
(4) there had not been such a change of circumstances since the rule was formulated as to justify judicial change of the rule.[50]

In *Gutnick*, although cogent criticisms were made of the application of the law of defamation rules to publication on the Internet, Kirby J considered that it 'would exceed the judicial function to re-express the common law on such a subject ...'.[51] This was because the subject required the evaluation of many interests and considerations that a court could not be sure to cover. One possibility was that of international co-operative action.

To be contrasted with *Hesperides* and *Gutnick* is *John Pfeiffer Pty Ltd v Rogerson,*[52] to be discussed later, where the court revised the antecedent law.

XI EXAMPLES OF JUDICIAL LAW-MAKING

It is convenient to look at some examples of judicial law-making resulting, with one exception, in a change in the law.

A *Doctrinal or Interpretive Disagreement – A Previous Decision is Wrong*

A common instance of judicial law-making is where a court takes the view that earlier authority should not be followed because it was based on an erroneous statement of principle. I select two examples which feature judgments of Sir Owen Dixon.

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49 [1893] AC 602.
50 [1979] AC 508, 536–7.
51 Above n 48, 635.
52 (2000) 203 CLR 503.

Following the decision of the House of Lords in *Robert Addie & Sons (Collieries) v Dumbreck* ('*Addie*'),[53] it was accepted that the liability of an occupier of land to a trespasser for injury sustained on the land was liability for injury

> due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser.[54]

In two subsequent decisions, the High Court of Australia accepted and applied the principle as so expressed.[55]

Beginning, in 1953, with the judgment of Dixon CJ and Williams J and the judgment of Kitto J in *Thompson v The Council of the Municipality of Bankstown*,[56] the High Court, in a series of decisions, concluded that the specific proposition stated in *Addie* as applicable to a trespasser needed to be re-examined in the light of the re-orientation of the entire law of negligence brought about by the recognition of the general common law duty of care in *Donoghue v Stevenson*.[57] In *Cardy v Commissioner for Railways (NSW)* ('*Cardy*'),[58] the High Court held that the special duties owed by an occupier to an invitee and a licensee respectively should be seen as manifestations of the general duty of care recognised in *Donoghue v Stevenson*, with a different standard of care applicable to each category of entrant upon land, and also that a trespasser can be the occupier's neighbour in Lord Atkin's sense of that term as used in *Donoghue v Stevenson*. So the High Court rejected the House of Lords' statement of principle in *Addie* in favour of a principle newly minted by the High Court. The High Court considered itself justified in so doing because the basis of the law of negligence was re-shaped by the House of Lords in *Donoghue v Stevenson* after *Addie*. This is an established situation in which a court is justified in departing from a previous decision.

As it happened, the Privy Council, in *Commissioner for Railways v Quinlan*,[59] rejected the High Court's approach in *Cardy* on the ground that it was inconsistent with authority. Subsequently, however, in 1984, in *Hackshaw v Shaw*,[60] the High Court re-instated *Cardy*.

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53 [1929] AC 358.
54 Ibid 365.
55 *Lipman v Clendinnen*, (1932) 46 CLR 550, 555 (Dixon J); *Transport Commissioners of NSW v Barton* (1933) 49 CLR 114, 131–2 (Dixon J).
56 (1953) 87 CLR 619, 628–30, 642–3.
57 [1932] AC 562.
58 (1960) 104 CLR 274.
59 [1964] AC 1054.
60 1984) 155 CLR 614.

The second well-known example, also taken from the time when Sir Owen Dixon was Chief Justice, was *Parker v R.*[61] There the High Court refused to follow the House of Lords' decision in *DPP v Smith*,[62] where their Lordships applied the presumption that 'a man intends the natural consequences of his act'. Dixon CJ's judgment of the High Court makes it clear that criminal intent must be established, whether by direct proof or inference. It is not a matter of presumption. The High Court's disagreement with the House of Lords on this point was so strong that the High Court declared that it would not adhere to its long-standing policy of following House of Lords decisions at the expense of its own opinions.[63]

In the two examples I have given, Sir Owen Dixon, instead of accepting a precedent and applying it, decided to depart from it because he thought it erroneous. As the judgment in *Parker* makes clear, in other cases he had followed precedent even when it did not accord with his own views.[64] The tension between the desire to state the law correctly and the force of precedent was central to a number of his judgments.

Cole v Whitfield,[65] the landmark decision in 1988 on s 92 of the Constitution, which related to the constitutional freedom of interstate trade and commerce from discriminatory burdens of a protectionist kind, is another example of this category. Indeed, the history of s 92 is littered with decisions which were not subsequently followed. A similar comment can be made about s 90 and the excise cases.

B *Previous Decisions Based on Unacceptable Values*

Two decisions stand out as examples of this category. The first is *Mabo (No. 2)*. In that case, the High Court refused to follow *Cooper v Stuart*,[66] a Privy Council decision, which stated that Australia, at the time of settlement was 'practically unoccupied without settled inhabitants or settled law'.[67] This statement led to the conclusion that the indigenous peoples had no title to land in a settled colony such as Australia. The High Court decided not to follow this conclusion on the ground that the refusal to recognise the rights and interests in land of the indigenous

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61 (1963) 111 CLR 610.

62 [1961] AC 290.

63 It is not entirely clear whether the departure was confined to *DPP v Smith* or whether it was more general.

64 See, for example, *Hughes and Vale v State of NSW (No. 1)* (1953) 87 CLR 49, where he applied the principle of *stare decisis* and followed *McCarter v Brodie* (1950) 80 CLR 432, rejecting his own dissent in that case, though it expressed an opinion he had held for over 20 years that the *State Transport Acts* contravened s 92 of the Constitution.

65 (1988) 165 CLR 360.

66 (1889) 14 App. Cas. 286.

67 Ibid 291.

inhabitants of settled colonies was an unjust and discriminatory doctrine which had no place in contemporary Australia.[68]

The second decision is *R v L*[69] where the High Court held that old authorities did not establish that marriage involved the irrevocable consent of the wife to sexual intercourse with the husband. A majority of the Court considered that, even if the proposition was established by authority, 'th[e] Court would be justified in refusing to accept a notion that is so out of keeping with the view that society now takes of the relationship between the parties to a marriage'.[70]

On the same question, the House of Lords, taking the view that the old authorities did establish the proposition, refused to follow them on the ground that the common law fiction of the wife's implied consent was anachronistic and did not reflect the values of society.[71]

C *Previous Decisions Reflecting Settled Principle Which Has Been Eroded By Later Developments In The Law Or Has Been Increasingly Called Into Question*

Decisions falling into this category are *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad'* ('*Caltex*')[72] and *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd* ('*Trident*').[73] In *Caltex*, the High Court departed from the long-standing principle that damages are not recoverable for economic loss which is not consequential upon injury to person or property.[74] In this respect, the Court departed from a principle which had come under increasing challenge and had been overturned in other jurisdictions.

In *Trident*, the Court departed from the long-standing principle that a person who is not a party to a contract cannot sue on the contract, in order to enable a sub-contractor to sue on a contract of insurance to which his head contractor was a party. The contract of insurance was expressed to insure the interests not only of the head contractor but also the interests of the sub-contractor. *Trident* had been preceded by decisions of high authority in Australia and England in which the

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68 (1992) 175 CLR, 42 (Brennan J – with whom Mason CJ and McHugh J agreed). Note in *Wik Peoples v Queensland* (1996) 187 CLR 180–2, Gummow J explained *Mabo* by saying that the old doctrine 'rested upon past assumptions of historical fact, now shown then to have been false'. This explanation accords with the judgment of Deane and Gaudron JJ.

69 (1991) 174 CLR 379.

70 Ibid 390.

71 *R v R* [1992] 1 AC 599.

72 (1976) 136 CLR 529.

73 (1988) 165 CLR 107.

74 The problem with *Caltex* is that it is difficult to find majority support for a specific replacement principle.

courts had canvassed the possibility of qualifying the privity rule in the event that the legislature did not alleviate some of the injustices which it occasioned.

D *Previous Decisions Which Are Controversial And Have Plunged The Law Into Confusion*

Two very recent instances of this category are *Pfeiffer v Rogerson*[75] and *Regie National des Usines Renault SA v Zhang*.[76] The effect of these two decisions was to reject the double actionability rule deriving from *Phillips v Eyre*[77] and to prescribe the *lex loci delicti* as the common law choice of law rule, rather than the *lex fori*. The *Phillips v Eyre* conditions were by no means free from ambiguity and they were inappropriate rules to apply to intra-national torts. The previous decisions of the High Court, *McKain v R.W. Miller Co. Ltd*[78] and *Stevens v Head*,[79] had been heavily criticised. They had led to forum shopping and had resulted in limitation defences and limitations on the assessment of damages being treated as procedural and governed by the law of the forum. On any view, the High Court was entitled to treat these decisions as 'wrong' and overrule them.

Another, albeit slightly different example, was the overruling of the *R v Howe*[80] and *Viro v R* ('*Viro*')[81] version of self-defence by *Zecevic v Director of Public Prosecutions* ('*Zecevic*').[82] An important element in the Court's decision in *Zecevic* was that the instruction to the jury devised in *Viro* had generated considerable difficulties in cases coming before the criminal courts. Giving adequate instructions to the jury on this defence had always been regarded as problematic. The post-*Viro* experience confirmed the inherent difficulties and was an influential reason in contributing to the *Zecevic* decision.

E *Innominate Cases Where The Previous Decision Does Not Enunciate A Binding Principle*

The treatment of *Theophanous v Herald and Weekly Times Ltd* ('*Theophanous*')[83] in *Lange v Australian Broadcasting Corporation* ('*Lange*')[84] falls into this category. The *Lange* decision based the defence to an action of defamation arising from the

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75 (2000) 203 CLR 503.
76 (2002) 210 CLR 491.
77 (1870) LR 6 QB 1.
78 (1991) 174 CLR 1.
79 (1993) 176 CLR 433.
80 (1958) 100 CLR 448, 461.
81 (1978) 141 CLR 88, 146–7.
82 (1987) 162 CLR 645.
83 (1994) 182 CLR 104.
84 (1997) 189 CLR 520.

freedom of communication in matters of government and politics on qualified privilege rather than directly on the Constitution. At the same time *Lange* expanded the common law to reflect the constitutional requirement. The *Lange* defence departed from the *Theophanous* defence in certain respects, that is, the defence is defeated if the publication was actuated by malice; it is for the plaintiff to prove that the publication was so actuated and it is for the defendant to prove that its conduct in making the publication was reasonable in all the circumstances. The High Court departed from *Theophanous* because it considered that it was doubtful whether *Theophanous* amounted to a binding statement of principle. According to the Court in *Lange*, the reasons which prevailed in *Theophanous* were those of Justices who did not comprise a majority of the Court.

With respect to those who think otherwise, it is by no means self-evident that *Theophanous* was not a binding decision. Deane J expressed his agreement with the reasons of three members of the Court, his own preferred view having been rejected by all other members of the Court. There was therefore majority reasoning to support the decision. And, in any event, the decision itself was binding, subject, of course, to the High Court's power to reconsider it.

F *Deciding A Novel Question*

The classic category of judicial law-making is deciding a novel question, a question which has not previously arisen and is devoid not only of binding authority but also of strong guidance in the corpus of previous authority. The court, once its jurisdiction is invoked, is bound to exercise it and answer the question one way or the other. The court must give an answer and this it does by formulating a principle, generally by reference to policy factors or values. Instances of such cases are *Secretary, Department of Health and Community Services v VWB and SMB (Marion's case)*[85] (a case concerning the sterilisation of a young intellectually handicapped female), *Airedale NHS Trust v Bland*,[86] (a case concerning the withdrawal of life support to a patient who was no more than a vegetable), *McFarlane v Tayside Health Board*[87] (a case similar to *Cattanach v Melchior)*, *In re A (Children) (Conjoined Twins: Surgical Separation)*[88] (where the Court sanctioned an operation which would almost certainly save the life of one child but result in the death of other) and *Cattanach v Melchior.*[89] These were all cases involving 'new' areas of law where there was an inadequate body of existing principle to provide a solution to the case in hand.

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85 (1992) 175 CLR 218.
86 [1993] AC 789.
87 [2000] 2 AC 59.
88 [2001] 2 WLR 480.
89 (2003) 199 ALR 131.

XII THE MAIN OBJECTION IS TO JUDGES CHANGING THE LAW, RATHER THAN TO JUDICIAL LAW-MAKING AS SUCH

As indicated earlier, the main objection is to judges changing the law. Judicial law-making in relation to novel questions does not excite serious criticism, except in so far as there is disagreement with the particular outcome. Opposition to judges changing the law stands in a different position. Here we encounter the forces which lie behind the doctrine of precedent — the virtues of certainty, consistency and predictability in the law.

But this simple objection conceals a complication. What do we mean by a change in the law? Do we mean a change in the law as it has been understood by the community or by the legal community? Surely not, the community view may be mistaken. In any event, the Court may not be in a position to ascertain what that understanding is.

It would be more sensible to say that we mean a change in the law as it has been declared by the courts. But that statement may fail to take account of the fact that the law has relevantly been declared by lower courts and that the final court of appeal, having not previously pronounced upon that question, is free to express its own view. Is it to be constrained in doing so simply because a lower court has decided the question in a particular way? Surely not. The final court of appeal must exercise its jurisdiction. And, as we have seen, it is not simply a matter of concluding that a lower court decision is wrong. The ultimate course may involve a policy question.

XIII LEAVING CHANGE TO THE LEGISLATURE

There are, of course, a number of cases in which the High Court has applied an existing principle of law and has stated that it will leave any alteration of that principle to the legislature.[90] When the Court says that it is making a policy decision (or a value judgment), that change is better left to the legislature. Such a statement needs to be supported by a reason, otherwise it may appear that the Court has arrived at an unreasoned conclusion. The old distinction between stating the law as it is and stating the law as it ought to be is no longer as clear as it was once thought to be, now that it is acknowledged that judges do make law.

There may be a number of reasons for taking the view that change is better left to the legislature. The existing principle may be well settled. Change may trigger potentially difficult consequences that the court cannot deal with in the frame of a

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90 See, for example, *Craig v South Australia* (1995) 184 CLR 163; *Breen v Williams* (1996) 186 CLR 171.

single case. Change may be contentious. Change may be better handled by the political process or by a law reform agency.[91] The three last reasons are policy considerations. Indeed, the Court's decision to adhere to precedent instead of developing the law is itself a policy decision.

Behind these more specific reasons, lie more general but no less important considerations. In the areas of law which are largely judge-made, legislatures do not keep the law under continuing review. Generally speaking, judge-made law does not ignite electoral interest. So legislative activity will be confined to a response to a perceived crisis. The recent attempts to reform tort law in consequence of insurance problems is an example. Absence of legislative initiatives in areas of judge-made law does not mean that the existing law is satisfactory or that the legislatures consider it to be satisfactory.[92]

On the other hand, change brought about by judicial decision may excite criticism that the judges are usurping the role of the legislature. This criticism may have the potential to damage public confidence in the court system. The criticism often stems from a misunderstanding of the judicial function. But it is a factor to which attention must be given. Just how one identifies a community consensus in relation to matters of this kind remains obscure, yet the Privy Council considered that the High Court was in a better position to ascertain that consensus than the Privy Council in the days when an appeal lay from the High Court to the Privy Council.[93] No doubt the High Court was in a better position than the Privy Council but this does not tell us very much.

Once it is recognised that a decision to develop the law rather than leave the question to the legislature is itself a policy question, then a variety of considerations — many of them already traversed — will come into play. The possible existence of a community consensus as to the High Court's role has a relationship with public confidence in the administration of justice, a matter to which courts are giving increased attention. The controversy which has arisen in recent years as to the High Court's role bears directly upon this point. The problem, perhaps the major problem, is that the notion that there exists a community consensus in relation to the Court developing a particular principle of the common law in a particular way is an abstract fiction. That said, the Court cannot disregard the need to maintain public confidence in the administration of justice. This in turn may have ramifications because the potential for controversial criticism of the Court is, through no fault on the part of the Court, greater than it was in the past.

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91 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 633 (Mason J).

92 See Lord Radcliffe, above n 2, 215–6.

93 *Geelong Harbour Trust Commissioners v Gibbs Bright & Co. Ltd* (1974) 129 CLR 576.

XIV COULD THE COURTS BY JUDICIAL DECISION RECOGNISE A GENERAL COMMON LAW RIGHT TO PRIVACY?

I raise this question with a view to illustrating the considerations which have been discussed. Although the common law has not recognised a general right to privacy, it could be said that the law has been inching forward towards that goal. Such a right has been recognised in the United States, although it was said by Dean Prosser that invasion of privacy in the United States was properly to be regarded as consisting of four separate torts.[94] In any event, relevant to what has happened in the United States is an implied constitutional right to privacy.

Save for the judgment of Callinan J, the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* ('*Lenah Game Meats*')[95] gives no encouragement to the idea that Australian courts are likely to develop a cause of action for invasion of a general right of privacy. Development of the law is more likely to centre around existing forms of action. The High Court's treatment of the decision of the English Court of Appeal in *Douglas v Hello Ltd*[96] does not suggest that the way forward lies in recognition of a general abstract right of privacy.

It seems to me that for the courts to take this step would be to take a step too far. First, the courts have not qualified the proposition that the law gives no recognition to a general right of privacy.[97] Secondly, the law has not 'inched' far towards recognition of a general right of privacy.[98] Thirdly, the question whether such a general right should be recognised is a highly charged political question in which important stakeholders, such as the media and commercial interests would want to have their say. Fourthly, comprehensive inquiries would need to be made, not only to ascertain view of stakeholders, but also with respect to possible qualifications and exceptions to any general rule. All these concerns combine to suggest that within the frame of a single case it would be difficult to see how a court at this stage of the law's development could fashion a general right of privacy. Further, I do not think that the taking of such a step by the courts would fall within the consensus of which Lord Diplock spoke in *Geelong Harbour Trust.* On the contrary, it would attract the criticism that the court had plunged into the legislative mainstream.

If we had a Bill of Rights, entrenched or statutory, guaranteeing a right to privacy, that guaranteed right could provide a platform for the development of a common

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94 W L Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

95 (2001) 208 CLR 199.

96 [2001] 2 WLR 992.

97 See, for example, *Victoria Park Racing and Recreation Grounds Co. Ltd v Taylor* (1937) 58 CLR 479, 506–8 (Dixon J).

98 For a general discussion of the present state of the common law, see A Mason, 'Human Rights and the Law of Torts' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations* (1998) 24–9.

law right. In this respect, the United Kingdom experience under the Human Rights Act 1998 may be prove to be instructive. Short of a guaranteed right or legislative intervention, judicial recognition of a general right of privacy would seem unlikely.

There is considerable force in Callinan J's criticism in *Lenah Game Meats* of the decision in *Victoria Park Racing & Recreation Grounds Co. Ltd v Taylor* ('*Victoria Park*').[99] It was a divided decision in which the dissenting judgments of Rich J and Evatt J are persuasive. I doubt, however, that to reach the contrary conclusion in *Victoria Park* it was necessary to embrace a general right of privacy. On the other hand, if the courts were to move towards that goal, the reversal on its facts of *Victoria Park* would not be a bad starting point. Such a step would not shake public confidence in the administration of justice. Recognition of a general right of privacy is a problem of a different order and magnitude.

My final comment concerns the recent decision of the House of Lords in *Wainwright v Home Office* ('*Wainwright*'),[100] where a prisoner's mother and half-brother were strip-searched when they visited the prisoner in gaol. They sued for damages and failed both in the Court of Appeal and the House of Lords. The House of Lords rejected an invitation to declare a previously unknown tort of invasion of privacy. Lord Hoffmann pointed to the difference between identifying privacy as a value which underlies the existence of a rule of law (and may point in the direction in which the law should develop) and privacy as a principle of law in itself.[101] His Lordship referred to freedom of speech, stating that no-one has suggested that it is in itself a legal principle which is capable of sufficient definition to enable the deduction of specific rules to be applied in concrete cases. *Wainwright* was a pre-*Human Rights Act 1998* case. So the question whether the conduct complained of would have infringed Article 8 of the European Convention on Human Rights (the guarantee of a right of privacy) did not arise for decision.[102] The answer to that question remains uncertain.

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99 (1937) 58 CLR 479.

100 [2003] UKHL 53, 16 October 2003.

101 Ibid [31].

102 Ibid [51].