

## Disabling discrimination legislation: The High Court and judicial activism

Margaret Thornton\*

This article takes issue with detractors of judicial activism, such as Australian High Court judge Dyson Heydon, who claim that it undermines the rule of law. It is argued that all judging necessarily involves an activist element because of the choices that judges make. Their reliance on values is starkly illustrated in the area of discrimination law, where there may be no precedents and judges are perennially faced with interpretative crossroads. The neoliberal turn and a change in the political composition of the Australian High Court post-*Wik* underscore the activist role. With particular reference to the disability discrimination decisions handed down by the court in the last two decades, it is argued that it is not so much the progressive judges as the conservatives who are the rogue activists engaged in corroding the rule of law because of the way they consistently subvert legislative intent.

### Introduction

Australian High Court judge Dyson Heydon, in a provocative paper (2003) postulating the death of the rule of law, is anxious to restrain the subjectivity of judges, which he equates with arbitrariness. He reserves the strongest disapprobation for the 'activist judge' who invokes judicial power 'for a purpose other than that for which it was granted, namely, doing justice according to law in the particular case' (2003, 113). However, the assertion is weakened by the ambiguity besetting the terms he uses and the way they are shaped by the epistemological standpoint of the speaker. Justice Heydon would certainly not go as far as Iain Stewart (2005) in describing law as a 'dark performative' that has no meaning of itself other than that which is constituted through the act of speech, but he does concede that the rule of law possesses a 'range of meanings' (Heydon 2003, 111). He does not qualify judicial activism in the same way, although it has been described as lacking defined content

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\* Professor of Law and ARC Professorial Fellow, Australian National University. Email: <margaret.thornton@anu.edu.au>.

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(Cross and Lindquist 2006). What these observations underscore is that the search for clear meanings is likely to be fruitless because these terms are always politically contestable (see Campbell T 2003).

Judicial activism is nevertheless a useful phrase which reminds us that judges are perennially engaged in what Robert Cover calls a 'jurisgenerative' process — that is, the creation of meaning (1983, 11); activist judging is not an idiosyncratic act undertaken by a few radicals. Julius Stone also draws attention to the fact that, within their particular hermeneutic universe, judges are compelled to exercise what he famously calls the 'leeways of choice' at every step of the adjudicative process (1968, 325–30 et passim). Furthermore, activism is central to the role of appellate courts:

Courts of final appeal are properly activist. To suggest otherwise would require the suspension of reality in face of the facts — why else have a second layer of appeal if the role of such a court is not to make law? [Wheeler and Williams 2007, 65; see Kirby 2006.]

To deny the importance of the activist role comports with the well-known positivist myth that judges do not make law — a myth that judges themselves tend to perpetuate (Mason 2007, 60).

I do not propose to embark upon a thoroughgoing critique of Justice Heydon's position, which has been ably undertaken by others (for example, Hutchinson 2003; see also Gava 2007), but to use it as a springboard for examining the Australian High Court's approach to discrimination legislation. Thus, rather than focus on either constitutional or common law adjudication, the more conventional sites of the critique of judicial activism, I turn the spotlight on statutory interpretation. I argue that an ostensibly formalistic approach, far from revealing deference to the rule of law, may actually frustrate legislative intent — although it is acknowledged that ascertaining the meaning of legislative intent is itself contestable (Stoljar 2001, 271). Indeed, I turn Heydon's notion of activism on its head and suggest that the judges of the High Court post-*Wik v Queensland*, 1996, particularly those of the Gleeson court (1998–2008), who are associated with what has been termed 'rampant conservatism' (Dickson 2007), are insidious activists in contrast to the moderate social liberals of the Mason court (1987–95) (Wheeler and Williams 2007, 65), who acknowledged their activism. Leslie Zines (2000, 397) notes the more democratic approach of the High Court, at least so far as constitutional adjudication was concerned, that followed the passage of the *Australia Act 1986* (Cth).

Anti-discrimination law could be described as a paradigm of social liberalism because the legislation that first emerged in the 1970s and 1980s is designed to

promote equality between all citizens regardless of sex, race, sexuality, disability, age or other characteristic of identity (Thornton 1990). While the legislation is not entrenched and is riddled with exceptions, it is the nearest thing to a bill of rights in most Australian jurisdictions, which heightens its sensitivity to changes in the political climate. The neoliberal swing rightwards that began in the 1980s became pronounced in the 1990s. The key characteristic of neoliberalism is the adulation of the market, although it is accompanied by a constellation of politically and morally conservative values that are supportive of the market, including the privileging of employer prerogative over employee rights, administrative convenience, efficiency, the maximisation of profits and promotion of the self. Correspondingly, we see a resiling from broad human rights principles. These changes are reflected in the values of the court, although they are subtle and evocative, rather than overt, as the adjudicative process is cloaked by a carapace of technocratic rules.

### **The activism of interpretation**

Kent Roach (2001) argues that activist judging is a 'loaded and slippery term', which has emerged from a two-century debate in relation to the role of the United States Supreme Court and the American Constitution (Cross and Lindquist 2006). The debate focuses on whether judges should be free to interpret the Constitution as they think fit, or whether they should exercise restraint and be more deferential to the legislature (Dworkin 1986, 369ff). It is this Americanocentric critique, Roach argues, that has spread like an epidemic around the globe, and extended from constitutionalism to statutory and common law adjudication (2001, 98).

It would seem that the neoliberal turn induced Australian conservatives to adopt the populist North American understanding of judicial activism, which avers that because judges are not elected, any 'lawmaking' they do must necessarily be undemocratic (Roach 2001, 99). This very point was made by conservative newspaper columnist Janet Albrechtsen, shortly before the 2007 Australian federal election. Fearing the prospect of a Rudd Labor government, she denigrated Rudd's team for what she claimed would be its likelihood of favouring the appointment of judges with little time for 'democratic traditions' (2007, 16). That is, Labor-appointed judges would want to make law themselves rather than defer to the legislature.

When we turn to discrimination legislation, we see that the aims are clearly articulated in terms of effecting equality between all persons and eliminating discrimination. Of course, these aims are expressed at a high level of abstraction and require creativity on the part of judges to interpret them meaningfully in light of the facts of the instant case, but the positive injunction is undeniable. When conservative judges focus on statutory construction and disregard the objects of the legislation,

it would seem that they are committing the very sins that critics such as Justice Heydon and Janet Albrechtson deplore. The aims of anti-discrimination legislation are grounded in a democratic political system and, as Tom Campbell points out, if the objects are reasonably clear, citizens have a right to expect statutes to mean what they say (2001, 291).

The attacks on so-called activist judges are most vociferous when there is a victory by litigants from outside the ranks of the socially powerful, as in the case of Indigenous communities (for example, *Mabo v Queensland*, 1992; *Wik*). In other words, when the political pendulum swings away from formal justice, a conceptualisation that favours the hegemony of the powerful, to substantive equality, which recognises the inequitable position of the less powerful and seeks to redress it, the backlash is sharp and furious. As Wheeler and Williams clearly show in their considered analysis of the attack on the Mason court for its 'judicial activism', the attacks were motivated by the substantive outcomes in landmark cases, rather than by the court's adjudicative style (2007, 29).

Conservatives reserve a particular animus for the progressive judge who is concerned with substantive equality, as can be seen in the disparagement of the judgments of the late Justice Murphy by Justice Heydon as a 'series of dogmatic, dirigiste and emotional slogans' (2003, 122), which lend support to the view that criticisms of judicial activism are ideologically based and analytically unhelpful (Coper 2006, 562, 573; see Cross and Lindquist 2006). The epistemology of standpoint is crucial here. While conservative commentators suggest that judicial activism is the improper usurpation of the role of the legislature by progressive judges, conservative judges who subvert legislative intent are depicted as exercising restraint (Schwartz 2002). A value-free neutrality simply cannot be supported in adjudication (Mason 2007, 81). It is a fiction designed to mask the political, which is yet another category of illusory reference (Stone 1968). While 'the political' may broadly encompass all aspects of citizen-state relations, on the one hand, or be restricted to the party-political, on the other, I am more interested in the political philosophies that underpin adjudication.

I am not sure that I would go as far as Allan Hutchinson (2003) and assert that law *is* politics, as there are always powerful steadying factors at work in appellate courts that arise from acculturation in law (Stone 1968, 322). Nevertheless, the competing views of judicial activism are undoubtedly shaped by the prevailing political philosophy of the court, despite the rhetoric averring judicial autonomy. Wendy Brown (1995) suggests that a concept of *ressentiment* (Nietzsche 1969, 127) inheres within liberalism, the dominant political philosophy of the Western world, because of the way liberalism simultaneously promises both freedom and equality:

A strong commitment to freedom vitiates the fulfilment of the equality promise and breeds *ressentiment* as welfare state liberalism — attenuations of the unmitigated license of the rich and powerful on behalf of the ‘disadvantaged’. Conversely, a strong commitment to equality, requiring heavy state interventionism and economic redistribution, attenuates the commitment to freedom and breeds *ressentiment* expressed as neo-conservative anti-statism, racism, charges of reverse racism, and so forth. [Brown 1995, 67.]

I suggest that these pendulum swings in the contemporary political realm are obliquely reflected within the adjudication of the court, despite the formalistic facade and the myths of objectivity. The fluctuations on the political continuum and the subjectivity of the judge are further disguised by the powerful discourse of merit that surrounds judicial appointments, which avers that the best person for the job is appointed (Thornton 2007).

### Swings and roundabouts

When decisions that upheld the human rights of Indigenous people (*Koowarta v Bjelke-Petersen*, 1982) and women (*Ansett v Wardley*, 1980) began to be handed down for the first time, the *ressentiment* of the right began to manifest itself through agitation against progressive decisions, most notably those of *Mabo* and *Wik*. The court’s upholding of native title against the property interests of powerful landholders was viewed by detractors as an arrant manifestation of judicial law-making (Barwick 2007, 398; Zines 2000, 406–08; Marr 1999). The attack on the court in the wake of *Wik* parallels the trenchant attack by conservatives on the United States Supreme Court under Chief Justice Warren, following what is probably the court’s most famous decision, *Brown v Board of Education* (for example, Carter 1973).

*Wik* coincided with the election of Prime Minister John Howard in 1996, signalling a sharp swing to the right and the embrace of the neoliberal political agenda (Thornton 2000). A dramatic manifestation of the Howard government’s intention following *Wik* was the announcement by the then Acting Prime Minister, Tim Fischer, that the government would appoint ‘Capital C Conservatives’ to the court to replace retiring High Court judges (Savva 1997). The six new appointments to the High Court (out of seven), including Murray Gleeson as Chief Justice in 1998, were intended to reflect the neoconservative turn and, as in the US, a major transformation was initiated through a ‘right-wing phalanx’ (Dworkin 2007). While all the judges may not identify themselves as ‘Capital C Conservatives’, the High Court’s style of adjudication changed markedly. Wheeler and Williams describe the return to legalism as ‘a recalibration of doctrine in key areas suggestive of a desire to check the perceived activism of the Mason era’ (2007, 58). Most significantly, I suggest, it retreated from an inchoate

rights-based jurisprudence that recognised women and disfavoured 'Others', including people with disabilities.

In all the discrimination appeals decided by the High Court during the decade of John Howard's tenure as Australian Prime Minister (1996–2007), the complainants lost, in sharp contrast with comparable cases in the preceding decade. It is noteworthy that in light of the conservative outcry against *Mabo* and *Wik*, none of these decisions dealt with race; instead, one dealt with sex (*New South Wales v Amery*, 2006; Thornton 2008), one with age (*Qantas Airways v Christie*, 1998) and three with disability (*IW v City of Perth*, 1997; *X v Commonwealth*, 1999; *Purvis v New South Wales (Department of Education and Training)*, 2003). In each instance, the majority judges interpreted the legislative texts in ways that undermined the proscriptions against discrimination. Justice Kirby, consistently in dissent, reminds us that anti-discrimination legislation is beneficial legislation that requires regard for its aims that can only be frustrated by narrow technical readings (*New South Wales v Amery* at 213). Far from being the rogue activist out on a limb, however, I suggest that Justice Kirby was the only judge, with the possible exception of Justice McHugh, who exercised restraint in the Howard years by deferring to legislative intent in the terms ostensibly favoured by Justice Heydon.

Justice Heydon is dismissive of 'talk of policy and interests and values' (2003, 119). However, anti-discrimination law does not lend itself easily to a technocratic approach without distorting legislative intent, for it is an area of law necessarily shaped by 'policy and interests and values'. It is not enough to enjoin judges simply to 'apply the law', as recommended by another conservative commentator, John Gava (2007, 81). Historically, the common law did not recognise the non-discrimination principle at all, and law itself was engaged in reifying the inequitable status of women and disfavoured Others vis-à-vis Benchmark Men (the white, Anglo-Celtic, heterosexual, able-bodied, middle class, male standard that underpins discrimination complaints). An injunction in favour of 'strict and complete legalism' (Dixon 1952, xiv; 1965) makes little sense in novel areas of law where there may be no precedents or other signposts. In such cases, judges must draw on their own subjective values and those of the normative universe they inhabit (Cover 1983; Graycar 1995, 262; Thornton 2008). Beneath the seemingly neutral guise of technocratic 'black letter' law, conservative judges may be engaged in a hermeneutic process that is deeply political. Hence, I suggest that they may be the rogues, not those denigrated as activists or 'hero judges' (Gava 2001, 747).

Discrimination litigation typically arises from a failure to conciliate a complaint, whereupon one of the parties initiates a formal hearing within a tribunal or court. The greater the degree of formalism, the more favourable to the respondent the process

becomes. Formalism exercises an ideological role in three ways: first, by favouring points of procedure and sloughing off the merits; second, by deterring appeals by other complainants because of the prospect of paying a respondent's costs, as well as their own; and third, by formally orienting the jurisprudence towards a respondent perspective. The result is a rather skewed notion of justice.

In the war of attrition waged by respondents to resist a finding of discrimination, there may be multiple hearings before a matter reaches the High Court, although most complainants fall by the wayside, either abandoning their claims through exhaustion or lacking the resources to persevere. Cost is relatively unproblematic for corporate respondents, whether they are government departments or private sector corporations, as they either have recourse to the public purse or can pass the costs on to consumers. The juridification of discrimination disputes augments the inequality of bargaining power between what is typically a powerless individual and a powerful corporate respondent. The latter, with the aid of a substantial legal team, usually has to do little more than raise a procedural point in order to deflect attention away from the merits of the case, which then assumes a life of its own with little chance of success for the complainant. Legal formalism not only occludes the merits, it allows a discriminatory rationalisation to be adduced in respect of the impugned conduct, as will be seen. It is therefore in the interests of corporate respondents to remove a complaint from an administrative or quasi-judicial body to a formal court at an early stage.

The discrimination jurisdiction is a paradigm of Marc Galanter's analysis in his 1970s iconic essay, 'Why the "haves" come out ahead' (1974–75). Applying his typology, the complainant is the one-shotter (OS) who may be interacting with the legal system for the first time and is baffled by its disregard for justice — that is, justice in a substantive sense. In contrast, the repeat player (RP) is typically a corporate respondent whose knowledge, homologous relationship with lawyers, and virtually unlimited resources enable it to wear down the complainant by focusing on procedural justice. A snapshot of recent age and discrimination jurisprudence in the High Court shows how an ostensibly formalistic adjudicative style invariably favours the RP, who is exonerated when the court finds that no discrimination occurred or, if it did, it was justifiable.

### **The litmus test of discrimination**

I first consider the discourse of judicial activism by taking a pair of disability discrimination cases and comparing them. I take the first from the period when social liberalism was in the ascendancy and the second from the period following the neoliberal turn post-*Wik* to reveal contrasting views of activism in light of the human rights aims of the legislation. I then consider another pair of cases, dealing with age

and disability, from the latter period, which address the inherent requirements of a job where the High Court privileges employer prerogative over human rights. A final case dealing with HIV, like one of the other disability cases, underscores the idea that a neoconservative morality accompanies the neoliberal turn.

### *Two facets of activism: for and against disability*

#### *Waters v Public Transport Corporation*

*Waters v Public Transport Corporation*, 1991 represented the high point of social liberalism in the early 1990s, and may be contrasted with the harsher direction in disability discrimination cases evinced at the turn of the millennium. The case was brought under the *Equal Opportunity Act 1984* (Vic) (EOA) by and on behalf of people with various physical and intellectual disabilities who alleged that the removal of conductors from trams and the introduction of scratch tickets constituted indirect discrimination against them. While there were differences of opinion between the judges regarding the elements of indirect discrimination that included the imposition of a requirement or condition with which a disproportionate percentage of the complainant class were unable to comply, and the vexed standard of reasonableness, the seven judges (Mason CJ and Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) were unanimous — a rare feat — in finding for the complainants (for an analysis of the case, see Patmore 1999).

Of course, the judges of the High Court were making law because they were confronting and having to determine the ambit of the legislative proscription against disability discrimination in the provision of services for the first time, but they deferred to the intention of the legislature, not corporate power or bureaucratic convenience. The inference is that legislation proscribing discrimination on the ground of disability is regarded as a positive initiative by the court: 'A measure of the civilisation of a society is the extent to which it provides for the needs of the disabled' (Brennan J at 372). A narrow technocratic view of the rule of law may have paid more attention to the exception under EOA, s 39(e)(ii) regarding compliance with another Act. In this case, the respondent had endeavoured to argue that it was not bound by the EOA because it was acting under the *Transport Act 1983* (Vic) s 31(1). However, the court read down the provision and held that the respondent could not rely on it if there was no specific duty to remove the conductors from trams or to do away with scratch tickets (Mason CJ and Gaudron J at 370).

The familiar legal standard of 'reasonableness' also could have proved a sticking point (for example, Bowen CJ and Gummow J in *Secretary, Department of Foreign*



*Affairs and Trade v Styles*, 1989 at 263), as its open-endedness provides a fertile field for jurists. Julius Stone (1965, 328) describes reasonableness as a concept that is ‘slippery and even treacherous’. However, the reasonableness criterion was not interpreted in *Waters* in a way that favoured the corporate respondent. Justices Brennan (at 379), Deane (at 383), Dawson and Toohey (at 395–96) and McHugh (at 410) construed the terms so as to encompass all the circumstances of the case, including the financial situation of the respondent, whereas a more restrictive view was articulated by Mason CJ and Gaudron J, who determined that it be ascertained by reference to ‘the scope and purpose of the Act’ (at 362); in other words, legislative intent was privileged over financial exigencies. The issue of reasonableness, since it is treated as a matter of fact, was remitted to the Victorian Equal Opportunity Board for determination.

There is a significant disjuncture between the high level of generality contained in the wording of the legislative proscription of discrimination in access to goods and services and the specific example in *Waters* — namely, the removal of conductors from trams and the introduction of scratch tickets, signifying the jurisgenerative scope for interpretation. In *Waters*, the court reconciled the law and the facts by deferring to legislative intention, which would seem to accord with Justice Heydon’s views. Mason and Gaudron JJ (Deane J agreeing) go further, however, and stress the increased importance of legislative intention in the discrimination context because of the human rights focus:

[T]he principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation the courts have a special responsibility to take account of and give effect to the statutory purpose. [At 359, drawing on English and Canadian jurisprudence.]

This is a powerful sentiment, but it was soon nipped in the bud by the neoliberal turn.

In subsequent cases, the court discards the purposive approach in its interpretation of the legislation in favour of a narrow view that conforms with the orthodox and positivistic approach that has prevailed in the interpretation of anti-discrimination statutes in Australia (Gaze 2002, 332). The interpretive role seems to be directed towards contracting the human rights perspective in the name of efficiency or administrative convenience, the effect of which inevitably favours corporate respondents and frustrates legislative intention. The activism emerges not from a progressive approach to human rights legislation, as the detractors claim, but from a regressive approach, which relegates the broad aims of the legislation to the periphery, or casts them off altogether. By way of illustration, I contrast *Waters*

with *Purvis*, a disability case heard by the court 12 years later that has been widely criticised (Edwards 2004; Rattigan 2004; Campbell J 2005; Campbell C D 2007; Smith 2008).

*Purvis v New South Wales (Department of Education and Training)*

*Purvis* involved a boy with intellectual disabilities who had been accepted into a mainstream high school. His violent behaviour led to several suspensions before he was excluded, whereupon his foster father lodged a complaint under the *Disability Discrimination Act 1992 (Cth)* (DDA). At the initial hearing, the Human Rights and Equal Opportunity Commission (HREOC) held that the behaviour of the boy, Daniel, arose from his disability (*Purvis on behalf of Hoggan v State of New South Wales (Department of Education)*, 2001). This decision was overturned on appeal by a single judge of the Federal Court who held that Daniel was excluded because of his behaviour, not because of his disability (*New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission*, 2001). Emmett J adopted a literal approach to the phrase 'in circumstances that are the same or not materially different' (DDA s 5(1)), without regard to 'the scope and purpose of the Act' that had carried such weight in *Waters* (Mason CJ and Gaudron J at 362). The narrow conceptualisation of disability, which severed the linkage between the disability and the behaviour, was upheld by the Full Court of the Federal Court (*Purvis v New South Wales (Department of Education and Training)*, 2002) and then by a majority of the High Court (Gleeson CJ, Gummow, Hayne, Heydon and Callinan JJ). McHugh and Kirby JJ (dissenting) held that Daniel's behaviour was a manifestation of his disability and formed part of his disability for the purposes of the DDA.

The severance of the linkage between the disability and the behaviour paved the way for the majority to conceptualise the appropriate comparator in direct discrimination complaints as a person without a disability who engages in the same conduct as a complainant with the disability (Gleeson CJ, Gummow, Hayne and Heydon JJ at 160 [220]). They concluded that any other student who had behaved like Daniel would have been suspended and discrimination could be found only if the hypothetical student were not suspended. This narrow conceptualisation of equal treatment not only allowed the school to suspend Daniel in an attempt to protect staff and other students, but sloughed off the allegation that it had acted in a discriminatory manner by expelling him. In other words, the rationalisation of the action by the school relating to safety erased altogether the issue at the nub of the case — that is, the disability and the less favourable treatment that flowed from it. The approach pulled the rug from beneath the feet of complainants alleging direct discrimination (the basis of the preponderance of complaints), not only on the ground of disability (eg *Zhang v University of Tasmania*, 2009; *Collier v Austin Health*, 2009) but potentially

other grounds as well (Smith 2008), including pregnancy (*Dare v Hurley*, 2005) and age (*Virgin Blue Airlines v Stewart*, 2007). DDA ss 5(2) and 6(2) have since been amended to enable the definition of discrimination to include a failure to make reasonable adjustments for a person with a disability.

McHugh and Kirby JJ (dissenting) held, following Commissioner Innes in the original HREOC decision (*Purvis on behalf of Hoggan v State of New South Wales (Department of Education)*), that Daniel's treatment by the school had to be compared with that of a student without a disability and without his disturbed behaviour (at 112 [48]). This view is based firmly on established jurisprudence, Sir Ronald Wilson having made the same point some 15 years earlier:

It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment ... could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act. [*Sullivan v Department of Defence*, 1992 at 79,005, cited by McHugh and Kirby JJ at 131 [119].]

The application of a strict equal treatment standard dilutes the provisions regarding accommodation of the disability. While the DDA did not impose positive duties on educational institutions at the time of *Purvis*, there was an implied recognition in the objects of the Act that such duties might be undertaken (DDA s 3). The prospects of addressing discrimination and effecting rights to equality before the law for persons with disabilities could otherwise never be realised through recourse to the DDA. Consistent with their dissent, Justices Kirby and McHugh stress the remedial nature of the legislation:

The international developments reflected in the Act have the high object of correcting centuries of neglect of, and discrimination and prejudice against, the disabled. It would be wrong and contrary to the purpose of the Act to construe its ameliorative provisions narrowly. [*Purvis* at 103 [18].]

These human rights aims were accorded short shrift by the majority of the High Court who, like the judges of the Full Court of the Federal Court, were more concerned with economic rationality from a perpetrator perspective. They believed that a finding for the complainant would have 'draconian consequences' for the Department of Education (*Purvis*, 2002). The 'activism' of the majority is thereby exposed in casting aside the legislative prescripts, as well as the formalistic canons of interpretation and respect for precedent, in the face of bureaucratic convenience and cost for the respondent of accommodating a student with a disability.

Where is the deference to the legislature in *Purvis* that Justice Heydon and the critics of judicial activism extol? Indeed, it would seem that the narrow approach to comparability endangers the viability of the legislation (see Campbell 2007, 128). If corporate convenience and cost had been invoked in *Waters* as the primary consideration, the inability to catch a tram without a conductor or scratch a ticket may well have been held to be irrelevant and people with disabilities told to take taxis. The bad behaviour of the complainant in *Purvis* — kicking schoolbags, as well as a teacher's aide — is not only regarded as serious conduct, it is discussed by Chief Justice Gleeson in the context of criminality (*Purvis*, 2003 at 98 [5]), rather than as conduct explicable in terms of intellectual disability. What we appear to be seeing is a judicial manifestation of the conservative morality that often goes hand in glove with neoliberalism. Importing notions of potential criminality and health and safety into the definition of direct disability discrimination has no firm basis in law; the legislation includes no test of reasonableness or justifiability (see Smith 2008).

To devise a new test involving the reading down of the comparator to mean a person without a disability but who evinced the same conduct, as opposed to a person without a disability *simpliciter*, entailed an overt act of judicial activism, which effectively vitiated the value of the DDA. As Jacob Campbell concludes, *Purvis*, in sharp contrast to *Waters*, gave little encouragement to people with disabilities: 'It carries a message of exclusion rather than inclusion, which undermines the usefulness of the Act as a mechanism for social change' (2005, 220).

A common standard for statutory judicial activism in the American literature is the striking down of a statute but, as Cross and Lindquist suggest, interpreting a statute in a manner that is contrary to legislative intent may be an even more egregious form of activism:

Instead of leaving a blank legislative slate (as in the case of invalidating a law), such a misinterpretation leaves in place a statute that means what the judges wish, not what the legislature wishes. This truly is judicial legislation. [Cross and Lindquist 2006.]

An interpretation that has the effect of negating virtually any possibility of a complainant pursuing a remedy successfully under anti-discrimination legislation, as occurred with Daniel Hoggan, instantiated a new meaning. As mentioned, very few discrimination cases reach the High Court, but those that are heard become important precedents not just for courts and tribunals below, but for the conciliation arena also, as the effect of decisions from the most authoritative level percolates down to the informal base of the dispute resolution hierarchy, beyond which few complaints proceed.

Of course, the court can change the meaning it has accorded the comparator in the future, but few complainants have either the tenacity or the financial resources to persevere against powerful corporate respondents. Hence, what Cross and Lindquist refer to as 'judicial legislation' may stand for some time. Indeed, the very idea that it exists is likely to have a chilling effect on prospective litigants not only because of the risk of having the ruling confirmed, but also because of the possibility also of having to pay the respondent's costs as well as their own.

*Purvis* is not the only dubious instance of judicial activism in the field of discrimination since the court has taken a conservative turn. The favouring of corporate respondents over complainants in employment cases has become a *modus operandi*, as illustrated in the next cases.

### *The inherent requirements of the job — judges know best*

The inherent requirements of a job may be invoked by a respondent as a defence to an allegation of unlawful discrimination, primarily on the basis of disability. There are two decisions I turn to where the conservative majority makes law by determining the inherent requirement of employment in questionable ways — one dealing with age and the other with disability arising from HIV. In the process of actively deferring to employer prerogative, the majority judges again appear to frustrate the intention of anti-discrimination legislation.

### *Qantas Airways Ltd v Christie*

The *Qantas Airways Ltd v Christie* litigation was initiated by a pilot who was dismissed on his 60th birthday but who wished to keep on flying international aircraft. The relevant legislation was the *Industrial Relations Act 1988* (Cth) s 170DF, which rendered it unlawful to terminate employment on the basis of age. The case did not turn on the actuarially greater likelihood of heart attack, stroke or other factor associated with age, as might be expected, although 'potential disability' lies at the heart of the case. Some countries to which Qantas flew precluded the flying of international passenger aircraft by pilots over 60, which meant that the only overseas routes available were short-haul flights to Indonesia, New Zealand and Fiji. Because short flights were in limited supply, pilots had to bid for them in order to make up their rosters. Qantas claimed that it could not accommodate all pilots who wished to continue to fly after reaching the age of 60; it argued that for a pilot to be under the age of 60 was an inherent requirement of the job (*Christie v Qantas Airlines*, 1996).

The physical and mental skills and aptitudes necessary to perform a particular job are normally regarded as its inherent requirements, but the standing of

operational requirements is uncertain (Bailey 2009, 560–64). A majority of the High Court (Brennan CJ, Gaudron, McHugh and Gummow JJ) was of the opinion that administrative convenience was an inherent requirement of the job of an airline pilot in that a pilot needed to be able to fly to a reasonable number of destinations. Justice Gummow conceptualised the inherent requirement as the complainant being available for duty as required by Qantas in any part of the world (at 319 [117]) — a requirement that seems to possess only a tenuous connection with age, albeit arising from the contract of employment. Indeed, if the complainant were able to fly jumbo jets internationally to Denpasar, Fiji and New Zealand, it could not be said that age (as a proxy for the rostering system) was an inherent requirement of the job of being an international pilot, as the majority judges, Gray and Marshall JJ, had argued in the Industrial Relations Court (*Christie v Qantas Airlines*). Construing administrative convenience as an inherent requirement of a job is another example of activist judging, as it clearly transcends the core elements associated with the ability and aptitude to pilot jumbo jets internationally.

Kirby J, in dissent, would undoubtedly agree with this criticism, for he stressed the importance of a purposive approach when interpreting discrimination legislation to which various international conventions on discrimination were appended (at 332 [152]). These instruments, he argued, have to be given the same meaning as dedicated instruments proscribing discrimination (at 333 [152]). Elevating ‘operational issues’ and administrative convenience to the status of the inherent requirement of a job, as he points out, means that such an exception could be perennially relied upon in respect of sex, family responsibilities and pregnancy, for example (at 343 [164]). Elaborating on the point, Marshall J in the Full Bench decision hypothesised that Qantas could dismiss a female or gay pilot if one or more foreign countries refused the airline permission to fly into their airports (*Christie v Qantas Airlines* at 39).

An inherent requirement of a job is a matter of fact to be determined by the relevant tribunal. However, as Ronald McCallum points out, the concept does not work well as the sole determinant of employability (1997, 217). While the absence of legislative guidelines provides space for activism, the intention of the DDA is to prohibit discriminatory terminations unless continuation would require accommodation that was clearly unreasonable (see McCallum 1997). Extending the concept beyond the ability of a person to perform the job so as to include administrative convenience is always going to skew the outcome in the interests of the respondent employer. In *Qantas Airways Ltd v Christie*, therefore, we once again see a clear instance of the court making law by deferring to corporate convenience rather than to the relevant legislative and international instruments.

By elevating administrative convenience to the status of an inherent requirement, no space is left in which to manoeuvre; it operates as a form of rational discrimination that trumps the proscription of age discrimination. The activist approach to determining the inherent requirements of a job leaves the way open for ever more expansive interpretations in accordance with the revived notion of employer prerogative that has prevailed since the Howard years at the expense of workers' rights (Forsyth and Stewart 2009). Since *Wik*, the influence of neoliberalism can be clearly discerned within the court, although there is no bright line of demarcation as a number of the same judges sat on both *Waters* and *Qantas Airways Ltd v Christie*. Justice McHugh, in *Qantas Airways Ltd v Christie*, for example, acknowledged the importance of the prohibition against discrimination in the legislation, but was nevertheless prepared to cast aside its precepts in the context of 'a free enterprise system of industrial relations where employers and employees have considerable scope for defining their contractual rights and duties' (at 307 [79]–[80]). This sentiment would seem to echo a rhetoric averring equality of bargaining power between management and individual workers that typified the 19th-century law of contract, where employer prerogative was all-important. In *Qantas Airways Ltd v Christie*, the definition of contractual rights by the employer authorised rational discrimination based on business convenience. Since *Waters*, it would seem that the values of neoliberalism have insidiously seeped into the court's adjudicative style so as to trump consistently the non-discrimination principle.

### *X v Commonwealth*

A second case dealing with the inherent requirement of a job reveals an even more idiosyncratic manifestation of judicial activism on the part of the High Court. *X v Commonwealth* involved a soldier who was discharged from the army in accordance with Australian Defence Force (ADF) policy when found to be HIV-positive. He lodged a complaint of discrimination under the DDA. In its defence, the ADF relied on the inherent requirements of the job, expressly recognised by DDA s 15(4). Under this section, discrimination is not unlawful if a person is unable to perform the job because of their disability, and to employ them would 'impose unjustifiable hardship on the employer' in providing appropriate services and facilities. While physical capacity and knowledge of soldiering indubitably constitute inherent requirements, the question to be resolved, at the initiative of the respondent, was whether the ability to 'bleed safely' was also an 'inherent requirement'.

In the first instance, the complainant was found by HREOC to be in excellent health, to be symptom-free and to be able to carry out the soldiering role for which he had been prepared (*X v Department of Defence*, 1995). An order of review was conducted before a single judge of the Federal Court and dismissed (*Commonwealth*

*v Human Rights and Equal Opportunity Commission*, 1996). Relying on Mason CJ and Gaudron J in *Waters*, Cooper J (at 85) stressed that DDA s 15(4) was to be construed in light of the objectives of the Act. He acknowledged that the inherent requirements meant the ability or capacity consistent with the common law duty of care to avoid risk of loss or harm to others (at 87). Nevertheless, it was not a finding of fact that 'bleeding safely' was an inherent requirement of the job of soldiering. This interpretation was rejected by the Full Bench of the Federal Court (*Commonwealth v Human Rights and Equal Opportunity Commission*, 1998), which held that an inherent requirement of employment as a soldier included the ability to 'bleed freely'. The court rejected the view of HREOC and the lower court as too narrow: 'The inherent requirements of a particular employment are not to be limited to a mechanical performance of its tasks or skills' (Burchett J at 519). The issue of safety then became central, but from whose perspective is it to be assessed — that of the soldier, fellow employees or others? This was the question that Mansfield J (at 546) of the Full Bench of the Federal Court had perceptively posed, which underscores the leeways of choice confronting judges. The High Court granted special leave to the complainant to appeal and upheld the Federal Court decision.

Gummow and Hayne JJ, with whom Gleeson CJ and Callinan J agreed, accepted the expansive construction of the inherent requirement articulated by the Federal Court. McHugh J also accepted the broad interpretation, but expressed scepticism regarding the Commonwealth's insistence that the ability to bleed safely was the relevant inherent requirement (at 220 [72]). He would have allowed the appeal and remitted the matter to HREOC for a clear finding of fact regarding the precise nature of a soldier's employment. Curiously enough, the majority appear to have made their decision in the absence of sound evidence as to just what were the essential skills and aptitudes of soldiering. There seemed to be more concern with the prognosis for HIV. Gummow and Hayne JJ (Gleeson CJ and Callinan J agreeing) found that it leads to AIDS, which is fatal (at 206 [96]), whereas McHugh J found that it *usually* leads to AIDS. While McHugh J was of the view that it was legitimate to have regard to the health and safety of others, he noted that the Commonwealth had not availed itself of DDA s 48 (at 194 [52]; see *X v Department of Defence*, 1995 at 78,375), an express exception pertaining to infectious diseases.

In *X v Commonwealth*, we see stereotypical assumptions about health and safety in relation to someone who is HIV-positive being actively read into the interpretation of the inherent requirement of soldiering, just as administrative convenience had been read into the inherent requirement of piloting international planes in *Qantas Airways Ltd v Christie*. As Cooper J pointed out (at 91), injury resulting in bleeding is by no means peculiar to soldiering.



Kirby J (dissenting) was of the opinion that there was no error of law on the part of HREOC and the appeal should be allowed. He sought to restrict the inherent requirements of the job to those factors that are ‘essential, permanent and intrinsic’ to its performance (at 85). He was the only judge to advert to the broader social role of the legislation and to the fact that, as remedial legislation, it should be construed beneficially (at 222 [146]). He specifically adverted to the way the typical discrimination complainant succeeds in the first instance, only to have victory subsequently snatched away as an error of law (at 211 [114]). Yet again, we see how rational discrimination is able to be invoked to relegate the merits of a case and legislative intent to the periphery in the interests of a powerful respondent. In this case, it was the state itself that had embarked on a course that undermined its own legislation. This is a familiar scenario within the discrimination jurisdiction, as seen also in *Purvis, Amery and Victoria v Schou*, 2004.

Once the High Court has determined that the inherent requirement of a job is not limited to the skills and capacity associated with its performance, as occurred in *Qantas Airways Ltd v Christie*, it is difficult to contain, as Kirby J (at 343) observed. Carter C, in the initial HREOC hearing of *X v Department of Defence* (1995 at 78,377–78), had drawn a useful distinction between the inherent requirements and the incidents of employment, but this did not win favour with the High Court, although the ability to bleed freely may well have been characterised in that way.

It would be interesting to have Justice Heydon’s view as to how this decision satisfied ‘principles which are known or readily discoverable’ and how the decision was ‘drawn from existing and discoverable legal sources independently of the personal beliefs of the judge’ (2003, 112). While one can rarely uncover the judicial subjectivity at the heart of decision making, since it is encased within the formal language of adjudication, there is a sense that homophobia and stereotypical assumptions about those who are HIV-positive may have played a role in the decision. Determining that the ability to bleed freely was an inherent requirement of the job of modern soldiering in the absence of sound evidence stands out as a dramatic manifestation of activist judging.

### Personal values or rules rationality?

#### *IW v City of Perth*

*IW* was another case involving HIV post-*Wik*, albeit not in employment but in the provision of services, which I mention briefly for the sake of completion. The complainants, an incorporated association, People Living with AIDS (PLWA), applied

unsuccessfully to a local council for permission to establish a daytime drop-in centre in a business district for people who were HIV-positive. There were objections from businesses, occupiers and residents of the City Town Planning Committee, which recommended to the council that the proposal be rejected. Five members of the council voted against the proposal because of what the Western Australian Equal Opportunity Tribunal (WA EOT) found to be their ignorant and biased attitudes (*DL (representing the Members of People Living with AIDS (WA Inc) v Perth City Council*, 1993 at 79,610–12). In other words, homophobia was found to be a causative factor that engendered discrimination on the ground of impairment. Although the Minister for Local Government approved the application on appeal, PLWA proceeded with the discrimination complaint under the *Equal Opportunity Act 1984* (WA EOA).<sup>1</sup>

The complainants succeeded at the tribunal level and in an appeal before a single judge of the WA Supreme Court (*Perth City v DL*, 1994), but failed on technical grounds before both the Full Bench of the Supreme Court (*Perth v DL*, 1996) and the High Court, which caused the question of homophobia to recede into the background. Brennan CJ and McHugh, Dawson and Gaudron JJ held that the word ‘service’ was not wide enough to capture a statutory discretion, while Dawson and Gaudron JJ held that the appellant, although a member of the PLWA, was not an ‘aggrieved person’ for the purpose of the WA EOA. Brennan CJ and McHugh J, with the support of the *Interpretation Act 1984* (WA), reiterated the now familiar mantra, which stressed the importance of a liberal construction of legislation tended to be beneficial and remedial (at 12), but accepted a rules rationality approach by way of justification — that is, a council may be acting as an arm of government rather than a provider of services for the purposes of the discrimination legislation.

Toohy and Kirby JJ, in separate dissenting judgments, took a broader view of the meaning of ‘services’. The WA EOT had said that the granting of planning approval itself was a service, whereas Toohy J (at 28) was of the view that it was too narrow an interpretation to find that the giving of the planning approval, not the consideration of the application, was the service. Kirby J (at 58), beginning with first principles again, adverted to the aim of the WA EOA, which requires the elimination, so far as possible, of discrimination on the ground of impairment; a narrow approach can only frustrate the purpose of the Act. The ambiguity at the heart of the rule of law is able to accommodate both the narrow technical and the broad purposive interpretations

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1 The respondent had earlier sought, without success, a ruling from the WA EOT that there was no case to answer; see *DL (representing the Members of People Living with AIDS (WA Inc) v Perth City Council*, 1992. The respondent’s appeal to the Supreme Court of Western Australia was also unsuccessful; see *City of Perth v DL, acting as representative of All Members of People Living with AIDS (WA)*, 1992.

so that the subjectivity of the judge is immunised from scrutiny. A reliance on rules rationality was able to occlude consideration of the discomfiting issue of homophobia at the High Court level, despite the clear finding of fact before the tribunal.

As Kirby J pointed out (at 52), the proceedings illustrate the difficulty of a complainant obtaining a successful outcome in a discrimination case even when there are relatively simple facts — that is, a finding by the tribunal of homophobia at the council meeting is transmuted into a rationalisation of discrimination by focusing on a restricted meaning of the word ‘services’, which is incompatible with the aims of the legislation (Kirby J at 73). What we see in *IW* is an example of excessive formalism at the expense of human rights, which enables a more subtle form of activist judging than seen in *X v Commonwealth*, although the effect is similar. Rather than an expansive interpretation of ‘service’ or ‘aggrieved person’, as we saw with the ‘inherent requirement of the job’, a narrow reading enables the judges to avoid confronting the issues of either homophobia or disability at the heart of the case. The fact that the decision in *IW* was handed down in the same year as *Green v R*, 1997, a ‘homosexual advance defence’ (HAD) case that has been strongly criticised,<sup>2</sup> may lend some credence to this view.

### *The American experience*

The seeming attempts to eviscerate the DDA following the neoliberal turn resonate uncannily with the experience of the *Americans with Disabilities Act 1990* (ADA (US)) during Chief Justice Rehnquist’s leadership of the American Supreme Court. *Sutton v United Air Lines*, 1999, is exemplary. In this case, the court determined that severely myopic twin sisters who wished to become airline pilots were not substantially limited in one or more of life’s activities in accordance with the terms of the statute because their vision could be corrected with glasses or other aids. Nevertheless, the sisters were denied employment as airline pilots *because* their uncorrected visual acuity was less than 20/100. The logical fallacy in the court’s reasoning left the complainants bereft of a remedy. Justice Stevens, with whom Justice Breyer agreed, was scathing of the majority stance:

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2 If successful, HAD reduces murder to manslaughter. David Marr (1999, especially 62, 70–71) is highly critical of what he believes to be the way the personal values of the majority judges of the High Court influenced their stance in allowing the partial defence, which he attributes to their Catholic upbringing. He is particularly scathing of what he sees as the ‘bigotry’ of Brennan CJ. It is notable that Brennan CJ, McHugh and Toohey JJ also sat on *IW*, but Brennan and Toohey had retired by the time of *X v Commonwealth*.

Although vision is of critical importance for airline pilots, in most segments of the economy whether an employee wears glasses — or uses any of several other mitigating measures — it is a matter of complete indifference to employers. It is difficult to envision many situations in which a qualified employee who needs glasses to perform her job might be fired ... because ... she cannot see well without them. Such a proposition would be ridiculous in the garden-variety case. [Stevens J at 510.]

Like a majority of the Australian High Court in the most recent constellation of discrimination cases, a majority of the American Supreme Court was '[a]pparently unconcerned that the ADA (US) [was] a remedial statute that should be "construed broadly to effectuate its purposes"' (Imparato 2002, 204). The majority 'decided to ignore Congress's express instruction that the "purpose of [the ADA (US) is] to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"' (Imparato 2002, 204). Justice Stevens, like Justice Kirby, exhorted a generous rather than a 'miserly' interpretation of the legislation in view of 'the remedial purposes of the Act' (*Sutton* at 495).

The effect of thwarting the aim of the ADA (US) for people with disabilities has been deplored by commentators. Imparato, for example, observes that the tendency of conservative courts to uphold the status quo by 'overblown deference to bureaucratic prerogatives means that disabled people will continue to experience unnecessary segregation and institutionalisation for many years to come' (2002, 211). A commitment to formal equality treats everyone the same even if they are unequally situated, which only serves to exacerbate their inequality.

## Conclusion

In the cases of *Purois*, *Qantas Airways Ltd v Christie*, *X v Commonwealth* and *IW*, it is notable that there was no public outcry comparable to that which followed *Mabo* and *Wik*. The complainants had lost, but were deemed undeserving — disfavoured Others, who were aged, disabled, disadvantaged and, if HIV-positive, possibly figures of abjection also (Kristeva 1982). Women, too, could be added to this list (*Amery*). Had the complainants succeeded, there may well have been cries of improper judicial activism, as occurred with *Mabo* and *Wik*, but, because they lost, the rule of law was deemed to have been upheld. In these cases, we see the way judicial activism may occur by stealth under the seemingly neutral cloak of the depersonalised techniques of legal formalism.

According to Justice Heydon, the duty of the court is not to make law but to do justice according to law (2003, 122). While we would all like to believe that justice was the telos of law-making, I have suggested that there is little evidence of it, other than in

a limited procedural sense, in the outcome of disability discrimination cases in the neoliberal climate post-*Wik*. A majority of the High Court judges have played an active role in subverting the intention of legislation that proscribes discrimination on grounds of disability in order to effect equality between all citizens. I have sought to demonstrate the proposition with particular regard to the disability discrimination cases heard over a decade, all of which accord greater weight to employer prerogative and administrative convenience.

The favoured method of adjudication is narrow and formalistic. Despite the wealth of research and commentary that has emerged in respect of discrimination against older people and people with disabilities, including those who are HIV-positive, none of this literature is acknowledged by the majority judges of the High Court post-*Wik*. 'Strict legalism' seems to mean self-referentialism, which enables the judges to slough off not only all knowledge of discrimination as a social phenomenon, but interdisciplinary perspectives and the non-discrimination aims of the legislation as well. Erasure of the problem means that they then have no obligation to devise a remedy.

Dismantling the non-discrimination principle by stealth in deference to bureaucratic and corporate power destabilises the rule of law, for it sets dangerous precedents and encourages lower courts and tribunals to emulate the approach. The social liberal moment may have been fleeting, as a narrow approach is generally favoured by Australian courts in the adjudication of discrimination law (for example, Gaze 2002, 332; Patmore 2003). It is not the 'activist' judges with a social conscience and a modest commitment to distributive justice who are corroding the rule of law, but those who, under a cloak of rationality, are construing anti-discrimination legislation in ways that accord with the neoliberal turn. These judges are fighting a rearguard action to sustain a version of the rule of law that constrains egalitarian human rights, while reviving the dominant values of a past age — one that accords with benchmark masculinity, albeit that it is well and truly past its use-by date (see Hutchinson 2003). Trammelling the interests of disfavoured Others, particularly people with disabilities, to achieve these ends constitutes an improper form of judicial activism. ●

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