
Re-Examining the Bricks and Mortar: Case Law, the Doctrine of Precedent and Contemporary Legal Education

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1. Introduction

In examining the future of *stare decisis*,¹ its history should not be ignored. It is a principle of fundamental importance to the common law system; its application is not static but ever-changing. It is a doctrine which reflected the middle and latter part of the 19th century when English society was stable and business and industrial development were seen to be the basis of a society that called for the application of such a principle. Whether it will continue to be of such importance in a world of rapid technological change, of social and economic ferment, political volatility and legislative outpourings, is open to question.²

The comments of Lockhart J, made in 1987, could be regarded as an 11th-hour warning to the legal profession of the approaching debate on the contemporary roles of judges and the doctrine of precedent. Despite such warnings a largely unprepared legal profession has been dragged reluctantly into the melee. The debate is now well under way, but little has been achieved by way of resolution. It has centred upon concepts such as “judicial activism” and “policy intervention” and has become increasingly heated and public. It has drawn virtually unprecedented extrajudicial comment from a number of senior judges, and provoked detailed analysis by both academic and practising lawyers.

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1 “The ‘sacred principle’ of English law by which precedents are authoritative and binding, and must be followed” — R Bird *Osborn’s Concise Law Dictionary* 7th edn Sweet & Maxwell London 1983 at 310.

2 Lockhart J ‘The Doctrine of Precedent — Today and Tomorrow’ (1987) 3(1) *Australian Bar Review* 1 at 26.

From the increasingly complex arguments have come various calls for lawyers to equip themselves for the challenges of the new (or at least newly understood) judicial practices.³ This aspect of the debate necessarily concerns the processes of legal education. While the need to encourage in students a critical understanding of trends in (and influences upon) judicial reasoning is now generally recognised, the abstract and often very practical nature of relevant developments makes basic explanation difficult. However it is possible to ground the developments in fundamental principle and such an approach may assist with both academic analysis and educational interpretation. The trends and influences manifest themselves at a basic and accessible level — in the operation of the doctrine of precedent.

The purpose of this article is to identify important modern influences upon the operation of the doctrine of precedent in Australia, to interpret those influences in the context of legal practice and education, and to suggest some practical solutions for legal professionals faced with the “drifting goal-posts” of contemporary judicial reasoning.

The development of “Law in Context” — type courses over recent years has significantly broadened introductory teaching to law, and reference will be made to relevant teaching examples from such courses later in this paper. However the purpose of this paper is not to address the whole range of issues relevant to these courses, but rather to focus on precedent-specific issues.

The teaching of case-analysis and *stare decisis* must encourage in law students an understanding of the changing position of case law in the contemporary Australian legal system. The traditional introduction of students to precedent — tracing the early evolution of a simple legal principle such as the Postal Rule, can now be only one part of a broader explanation of the doctrine. The more complex and dynamic aspects of the doctrine should not be left to emerge obliquely in a jurisprudence subject, or in an ad hoc manner in relation to specific principles. Furthermore, analysis of particular significant cases can not be conducted within the narrow context of legal history and formalistic reasoning.

There are a number of clearly identifiable statistical and theoretical trends that affect the creation and/or interpretation of case law. In addition to the much publicised debate over judicial objectivity, relevant considerations include:

1. the interaction between case law and the growing body of legislation;
2. the growing number of negotiated settlements in litigation; and
3. the proliferation of quasi-judicial determinative tribunals (often not bound by “legal technicalities” or “the rules of evidence”).

The importance of such developments to the doctrine of precedent and judicial

3 See for example, Thomas J ‘A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy’ (1993) 23 (1) *Victoria University of Wellington Law Review* 1 at 14; B Horrigan ‘Australian Legal Principles in Practice — Taking Reasoning and Research Seriously’ (1993) 9 *Queensland University of Technology Law Journal* 159 at 163.

reasoning, and hence to legal education, is the subject of this article.

Undergraduate students cannot be expected to immediately understand the complexities of current High Court reasoning (certainly not while the public debate demonstrates confusion at much higher levels), but the “call to arms” by observers of the developments must be answered by law schools. The theoretical justification for recent changes in common law process remains uncertain, but the external realities of those changes are settled and law graduates must enter the workplace equipped to deal with the evolution of legal practice.

2. Precedent — “The Old Rules are being Reconsidered”

(a) Modern Influences on the Doctrine

For much of Australia’s legal history, close analysis of the operation of the doctrine of precedent has been the task of jurisprudential academics. However, the technicalities of the doctrine, and its importance to the development of the common law, have been drawn into mainstream legal thought as explanations are sought, and justifications offered, for the changing approaches of the Australian judiciary. Justice Lockhart commented in 1987 that “an analysis of *stare decisis* is timely in an era where there are clear indications that old rules are being reconsidered”.⁴ Other commentators have focused upon the more general shift in judicial attitudes which is, as noted by Horrigan, apparent from a comparison of views on the benefits of strict legalism: Dixon CJ saw “no safer guide to judicial decisions in great conflicts”, whereas McHugh J has suggested that “the judiciary should not be composed exclusively of those who are masters only of a strict and complete legalism”.⁵

Justice Lockhart’s 1987 analysis of the doctrine of precedent touched upon a number of factors influencing the operation and usefulness of the doctrine in modern times. A number of these warrant close consideration in the context of Australian law in the 1990s :

1. changing economic and social conditions;⁶
2. the increasing volume of legislation covering a broader range of subjects;⁷

4 Lockhart *supra* n. 2 at 1.

5 Horrigan *supra* n. 3 at 162; quoting from Sir Owen Dixon ‘Address Upon Taking the Oath of Office as Chief Justice’ (1965) *Jesting Pilate* 247 and M McHugh ‘The Law-Making Function of the Judicial Process — Part II’ (1988) 62 *ALJ* 116 at 124.

6 Also significant is the emergence of new perspectives — see for example the analysis in MJ Mossman ‘Feminism and Legal Method: The Difference It Makes’ (1986) 3 *Australian Journal of Law and Society* 30.

7 The consequences of this trend include: a general decline in the importance of case law; a changing role for case law (ie a new focus upon administrative monitoring of the executive and statutory interpretation); the need for a re-thinking of the traditional intellectual commitment to the common law; and the “covering of the field” by legislation — leaving less room for both law-making and reference to pre-legislation authorities by judges; see Lockhart *supra* n. 2 at 20-24; FP Grad ‘The Ascendancy of Legislation: Legal Problem Solving in our Time’ (1985) 9(2) *Dalhousie Law Journal* 228.

3. limitations on appeal rights;
4. the increase in the number of reported cases;
5. the growing willingness of judges to look to overseas jurisdictions for legal solutions;
6. more frequent reference to unreported cases by advocates;
7. the increasing reliance upon judges to make decisions and exercise discretions in areas of public law;
8. Australia's diminishing links with the United Kingdom legal system, and its increasing commercial and legal links with the United States and Asia.⁸

A number of the factors identified are of relevance to all common law jurisdictions. Indeed re-examination of the operation of the doctrine of precedent is taking place in a number of countries.⁹ The last factor is specifically relevant to Australia, however the effects of internationalisation upon Australian common law might be reasonably regarded as representative of its effects upon the legal systems of other common law countries.

Two other factors can be added to those listed above. First, reference should be made to the proliferation of quasi-judicial determinative tribunals. What is the role of precedent in the decision-making processes of such tribunals? A detailed response to this question is beyond the scope of this article. However, on the basis of relevant enabling legislation, and general principles of administrative law, two observations can immediately be made about this relatively new and potentially expansive limb of *stare decisis*:

1. Pursuant to enabling legislation, tribunals are often directed to proceed "informally", "without technicality" and/or "expeditiously". They are frequently "not bound by the rules of evidence".¹⁰ Further, there may often be no automatic right to legal representation, and hence limited reference by parties to factual or legal precedents. Although a number of tribunals in practice often do maintain the "trappings" of judicial process, these procedural directions dictate against the development of strict lines of precedent. Tribunal processes relating to fact-finding, advocacy, and analysis of facts and similar cases may be different in kind to processes of courts, and may vary significantly from tribunal to tribunal and from case to case.¹¹
2. Two rules of administrative law potentially conflict with the development of

8 Lockhart *supra* n.2 at 1,18-23.

9 See G Bale 'Casting Off The Mooring Ropes Of Binding Precedent' (1980) 58(2) *Canadian Bar Review* 255, for an analysis of cases illustrating freedom from binding precedent in Australia, Canada and England.

10 See for example *Administrative Appeals Tribunal Act* 1975 (Cth), s. 33; *Native Title Act* 1993 (Cth), s. 109. Increasingly, courts themselves are subject to such directions: see *Native Title Act* s. 82.

11 Refer, for example to the discussion of procedures in G Neate 'Determining Native Title Claims — Learning from Experience in Queensland and the Northern Territory' (1995) 69 *ALJ* 510.

“administrative precedent”. First, an administrative tribunal cannot act under the dictation of another body. Secondly, its discretion cannot be fettered by self-created policy.¹² While it is exhibited in practice that a tribunal can follow its own previous decisions in like cases, it must not “pursue consistency at the expense of the merits”.¹³

Private sector and government lawyers are now more frequently required to practise in areas of public law, and to appear before administrative tribunals. They are therefore dealing with noticeably different systems of precedent and reasoning. This is a compelling argument for the expansion of introductory teaching of *stare decisis* to cover administrative equivalents and variations. This may entail closer reference to first instance decisions in administrative hierarchies where appellate decisions revert to more formal judicial reasoning.

Secondly, any discussion of modern influences on the doctrine of precedent should include reference to the increasing frequency of pre-trial settlement. It was noted in 1993 that even in traditional trial-orientated courts, settlement rates were approximately 75-90%. In some courts, the rates approximated 95%.¹⁴ In a single “Spring Offensive” mediation program in Victoria in 1992, over 50% of Supreme Court civil matters awaiting trial were settled.¹⁵ The logical consequence of this trend is that often only “test cases” and “worst cases” are left to form “precedent”. Whilst in a variety of respects such cases are worthy of close analysis in undergraduate law courses, the “common” dispute with which the law is primarily concerned is increasingly beyond the reach of the law reports — having been confidentially settled on the first morning of trial. In practical terms, while development of modern legal principle largely floats upon the machinations of corporate, government (and perhaps vexatious) litigants, the most common use of binding precedent is as a crucial bargaining chip. Many would suggest at this juncture that it is better to bargain than to gamble on current judicial reasoning.

Two consequences for law schools emerge from these trends of settlement. The best-equipped graduates will be those who understand that precedent research must be directed not only to preparation for trial, but also to establishing a strong bargaining position for the client. That may in particular instances involve emphasis on particular aspects of the client’s case, a “broad brush approach” focusing on principle rather than precedent, or in fact in certain cases a degree of thoroughness unnecessary for court preparation. An understanding of such variations in case

12 Refer to GA Flick ‘Administrative Adjudications and the duty to give Reasons — a Search for Criteria’ (1978) *Public Law* 16 at 38.

13 Flick *supra* n.12 at 40. The future development of “administrative precedent” in Australia has been assisted by the introduction of various legislative requirements for reasons to be given, both by original decision makers and merits review tribunals; see for example the *Administrative Decisions (Judicial Review Act)* 1977 (Cth).

14 C Boyle ‘The Myths of Case Management’ (1993) 20(6) *Brief* 33.

15 Refer to C Bartlett ‘Mediation in the Spring Offensive 1992’ (1993) 67(4) *Law Institute Journal* 232.

preparation could be encouraged through the increased use of context-specific research exercises, or mock mediations.

Furthermore, law schools can seek to adapt to the increasing elusiveness of “common disputes”. The “extraordinary preoccupation with the exceptional cases that go to trial”¹⁶ has been criticised in a number of contexts. The system of reporting has traditionally forced upon law schools a similar “preoccupation” with those cases. The solution may lie in teaching innovations such as placement of students for work experience in community legal services, mediation programs or private firms with established mediation expertise. Further, students may obtain useful practical insights from reported “exceptional cases” if they are encouraged to identify, in the course of analysis, the “real” points of contention between the parties, and examine the respective interests and motivations of the participants.

One practical influence upon the operation of the doctrine of precedent identified by Lockhart J can be dealt with in this introductory context. Justice Lockhart noted:

The deluge of case law reported today and the widening scope of authorities to which reference is being made may call for intervention by the courts or legislatures. The judge is torn by two competing claims. On the one hand he is assisted by citation of relevant authorities. On the other hand the volume of reported cases is reaching such proportions that it is of concern.¹⁷

A number of other commentators have recognised the significance of this problem. In the English context, “the inconvenience and possible injustice of excessive quantities of caselaw” has been blamed for an increase in the cost of legal advice, and the slowing of litigation.¹⁸ Further, Thomas J has commented that “every indication suggests that the number of reported decisions may render *stare decisis* logistically unworkable... the real risk, however, is that with the vast number of cases available to counsel and the courts, principle will be obscured and lost”.¹⁹

Lord Diplock has reportedly described over-zealous citation as “an ineradicable practice”,²⁰ however he was himself prepared to attempt its correction. In *Roberts Petroleum v. Bernard Kenny*²¹ he issued a practice direction prohibiting the citation before the House of Lords of unreported decisions of the Court of Appeal unless they contained some “novel and binding” principle of law.²²

16 Boyle *supra* n.14 at 38. Boyle’s criticism arose from an analysis of procedural rules.

17 Lockhart *supra* n.2 at 19.

18 NH Andrews ‘Reporting case law: unreported cases, the definition of a *ratio* and the criteria for reporting decisions’ (1985) 5(2) *Legal Studies* 205. Andrews proffers a list of criteria against which cases could be assessed when deciding whether they should be reported — at 225-226. His list may be of value to legal educators in that it provides an objective measure by which to gauge the legal significance of cases.

19 Thomas *supra* n.3 at 30.

20 Lockhart *supra* n.2 at 19.

21 [1983] 1 All ER 564.

22 For a general discussion, refer to Andrews *supra* n.18 at 205-206.

The significance for legal education of the proliferation of potential authorities is perhaps well demonstrated by judges' criticisms of the techniques of some advocates. These complaints are not new. In 1981, Lord Roskill strongly criticised the practice of citing masses of cases in support an uncontroversial principle.²³ More recently in Australia, Kirby J included in a list of "seven deadly sins" the failure to state basic legal propositions at the outset of an argument, the reading of large passages from cases, and the failure to adequately plan the structure of arguments.²⁴ To avoid such criticisms, law graduates must understand the effect of practical influences (eg the sheer quantity of authorities) on the realities of legal practice. Some of the difficulties of the present trend of "litigation by attrition" would be alleviated by a more reasoned approach to precedent by practitioners.

Combinations of the myriad of influences discussed above can be identified in the reasoning of most contemporary High Court judgements. At a fundamental level, the High Court's present approach to the doctrine of precedent is illustrated by the decision in *Northern Territory v. Mengel*.²⁵ In that case, the High Court expressly overruled a principle enunciated in a prior decision,²⁶ and in doing so, focused directly on the basis of the departure. It was considered that the circumstances satisfied the criteria laid down in *Johns v. FCT*²⁷ which "determine whether the court should review or depart from" an earlier decision:

1. The earlier decision does not rest upon a principle carefully worked out in a significant succession of cases.
2. There is a difference between the reasons of the majority judges in the earlier decision.
3. The earlier decision has achieved no useful result, but rather has led to considerable inconvenience.
4. The earlier decision has not been acted on in a manner militating against its reconsideration.²⁸

In *Mengel*, the majority considered that departure was justified due to factors including the lack of authoritative support for the existing principle and the difficulty of reconciling liability under that principle with the general trend of legal development confining liability to intentional or negligent infliction of harm.²⁹

This example of the High Court's approach to precedent squarely raises a number of issues central to the judicial activism debate. The criteria enunciated in *Johns* for

23 *Pioneer Shipping v. BTP Tioxide* [1981] 2 All ER 1030 at 1046; refer generally to Andrews *supra* n.18 at 206.

24 Kirby J 'Judge Lashes Lawyers — Seven Deadly Sins' (1985) 3(5) *Lawyer (Victorian Young Lawyers)* 4.

25 (1995) 129 ALR 1.

26 The Principle overruled was that formulated in *Beaudesert Shire Council v. Smith* (1966) 120 CLR 145.

27 (1989) 166 CLR 417.

28 *Northern Territory v. Mengel* (1995) 129 ALR 1 at 12. In *Johns* itself, the first two criteria were seen to be met, the third was considered irrelevant, and although the fourth was not met, other factors existed warranting departure from the authority under consideration — (1989) 166 CLR 417 at 438-9.

29 (1995) 129 ALR 1 at 16.

overruling prior decisions include two factors which may, in particular circumstances, open the door to broad non-legal considerations. For example, to what extent may identifying “considerable inconvenience” or detrimental reliance entail reference to policy and community issues? The significance of such reasoning is referred to in part 3 of this article. Furthermore, some commentators argue that the court’s explanation of its practice bears no resemblance to its practice in fact.³⁰ The court’s stated reasons in *Mengel* indicate that the overruling of *Beaudesert* rested primarily upon inconsistent developments in analogous areas of law — a factor having little connection to any of the *Johns* criteria.

Whether one focuses on the *Johns* enunciation, the *Mengel* illustration, or the commentators’ explanation, there is found here further support for the proposition that legal education must adapt to ensure that graduate lawyers have an appreciation of this expansive judicial reasoning.³¹

(b) The Utility of the Doctrine

Discussions of modern influences upon *stare decisis* invariably touch upon traditional arguments as to the usefulness of adherence to the doctrine.³² It is unnecessary to revisit these arguments in detail, however in the context of this paper, the following are of particular relevance:

1. It has been argued by some that overruling precedent amounts to usurping the role of the legislature. This proposition is of central importance to the role of the judiciary and has been debated for decades.³³
2. It has been argued that old precedents may be inappropriate to modern times because of change, with the result that courts must carry out the “charade” of artificially distinguishing prior decisions. Some commentators have seen this “charade” as a strength of common law — “in the hands of good judges, it is capable of flexible adjustments by the wider or narrower restatement of [a] rule, and the clever manipulation of what is found to have been holding, and what dictum, in earlier cases”.³⁴

30 Refer for example to Horrigan *supra* n.3 at 163; compare the references by New Zealand lawyers to “judicial sophistry” in lieu of “frank acknowledgment” — D Mathias ‘Mens rea: Stare decisis v statutory interpretation’ (April 1987) *New Zealand Law Journal* 112 at 113, and to “preserving the fiction” — Thomas *supra* n.3 at 22. This issue is analysed further in part 3 of this paper.

31 Reasoning by reference to developments in analogous areas of law and by reference to non-legal considerations is discussed in part 3 of this article.

32 Refer generally to Lockhart *supra* n.2 at 4-7.

33 As early as 1913, Isaacs J referred to the High Court’s duty to overrule prior decisions which were “manifestly wrong” — *Australian Agricultural Co v. Federated Engine-Drivers and Firemen’s Association of Australasia* (1913) 17 CLR 261 at 274-8. A detailed analysis of the High Court’s approach to overruling is contained in BT Horrigan ‘Towards a Jurisprudence of High Court Overruling’ (1992) 66(4) *ALJ* 199.

34 Grad *supra* n.7 at 231.

3. It has also been argued that strict application of the doctrine destroys or delays the “development and application of necessary fundamental principles”.³⁵

Of the myriad of arguments that have emerged in common law countries about the usefulness of the doctrine of precedent, the three listed above are perhaps the most relevant to the current trend of judicial activism in Australian law, and the consequent call for lawyers to “re-equip” themselves. These issues are considered in part 3 of this article.

Before parting from this analysis, it is worth noting Lockhart J’s somewhat surprising conclusions on the nature and usefulness of the doctrine:

The doctrine of *stare decisis* is not some fixed and immutable path which binds each judge who travels along it dressed in a strait-jacket. I prefer to regard the doctrine essentially as the product of human experience whereby it is helpful to know how a similar case was dealt with in an earlier case.³⁶

These comments, in 1987, were a bold admission of growing judicial “creativity”.

(c) Ratio and Obiter

The traditional distinction between the *ratio* and *obiter* of a judgment has always been of fundamental importance to introductory legal education. The purpose of this section is not to return to fundamental principles, but rather to raise some issues of relevance to legal education that arise at the peripheries of the primary debate over present High Court reasoning.

In his paper advocating the codification of commercial law,³⁷ Goode quoted from Professor Aubrey Diamond on the issue of identifying *ratio*:

The technique to be used for abstracting the *ratio decidendi* involves not only professional expertise but also an inspired appreciation of the trends in judicial attitudes. Small wonder that over the centuries voices have been raised in protest against the tons of verbal pulp that must be squeezed to produce an ounce of pure judicial law.

Goode also referred to the more extreme view of the American jurisprudential and commercial lawyer Llewellyn, who considered that the factors motivating a decision were rarely to be found in the actual language of the judgment.

While these views were quoted in the context of a call for codification of commercial law, they assist with two notions in the context of this article. First, they are a pointed reminder that the extraction of ratio is not something akin to a mathematical exercise. While it may be difficult to teach an “inspired appreciation” of

35 Lockhart *supra* n.2 at 5.

36 *Ibid* at 6.

37 R Goode ‘The Codification of Commercial Law’ (1988) 14 *Monash University Law Review* 136.

judicial attitudes, the complex ways in which *ratio* and *obiter* are interpreted and delimited by the court, and the realities of judicial reasoning can not be ignored. As mentioned above, the distinction between *obiter* and *ratio* has often been seen as a tool by which the doctrine of precedent is manipulated. Approaches to the distinction vary with the changing attitudes to “strict legalism” and changing perceptions of the roles of judges. Even in times of more formalistic judicial reasoning the identification of *ratio* and *obiter* arguably depended largely upon legal instinct — an instinct developed through full and close reading of significant decisions by law students. Trends of subjective and more complex reasoning increase the importance of this practice.

Secondly, particularly Llewellyn’s attitude is thought provoking in view of one criticism of the Australian High Court that has emerged from the debate on judicial activism with considerable support. It has been argued that the High Court has failed to identify and explain its approach to law-making.³⁸

Traditional approaches to *ratio* were the subject of recent analysis by Lucke.³⁹ Briefly, Lucke analyses three approaches to *ratio* — the “classical theory” whereby the *ratio* is the principle seen by the judge as the basis of his or her decision, the “illusionist view” which discounts altogether the operation of the doctrine of precedent, and the “material facts” theory expounded by Goodhart. Lucke expresses a preference for Goodhart’s view after discussing some definitional difficulties with the words “material” and “facts”. Importantly for our purposes, in the context of his detailed analysis of the extraction of *ratio*, Lucke acknowledges that “a purely adjudicative model of the judicial function has fallen out of favour in more recent times, as more and more judges have openly asserted, in their extra-judicial writings, a judicial law-making role”.⁴⁰

It is also relevant in the context of this discussion to identify some problems faced by lawyers attempting to extract *ratio* from decisions of courts operating in a broad and complex hierarchy. These problems have obvious consequences for the operation of the doctrine of precedent. Two examples of the difficulties have been raised in the context of case reporting.⁴¹ First, the reasons of a prior case may be such that the subsequent court itself attempts to explain the possible basis of the decision. Such an activity is different in kind to a mere exercise in delimiting “material” facts for the purposes of identifying *ratio*, and raises significant questions about the role of precedent where the ingredients for the doctrine’s operation are not all present. Secondly, it is noted that there may be inconsistent, or even conflicting, statements of principle by appellate judges jointly hearing a matter. This second issue has been referred to on a number of occasions:

38 See for example Horrigan *supra* n.3 at 163; B Virtue ‘The coming debate on Judicial law-making’ (1995) 30(9) *Australian Lawyer* 20.

39 HK Lucke ‘Ratio Decidendi: Adjudicative Rationale and Source of Law’ (1989) 1(1) *Bond University Law Review* 36.

40 *Ibid* at 50.

41 Andrews *supra* n.18 at 227.

... a disquieting feature of the recent pronouncements has been a distinct lack of unanimity... it is becoming impossible to extract the ratio decidendi to be applied in subsequent cases. It would not be going too far to say that there is a danger that in the long run the good work will be undone in lower courts which find it impossible to apply the High Court's decisions.⁴²

Finally, in this short discussion on *ratio* and *obiter*, reference should be made to the importance of obiter to legal education. In support of calls for a "return to principle" in legal process, it has been argued that:

The statement of a rule in a decision is the manifestation of all the factors which contribute to that decision, and it is shallow to depict that manifestation as the binding element comprising the law when all the factors which led to the final formulation of the rule contributed directly to its binding quality... the rule is but the manifestation, and not the substance, of the law.⁴³

The importance of considering the entirety of factors behind a decision is not solely jurisprudential. There are sound substantive reasons for the reporting and analysis of complete decisions. Full reports (including dissents) enable subsequent reference to the full complexity of arguments articulated in the earlier decision and enhance the "richness of material guiding lawyers".⁴⁴ Dissenting judgments are in a variety of respects invaluable, and dicta may be of considerable weight in subsequent cases.⁴⁵

Perhaps the most persuasive expression of the importance of reference to dicta by practitioners, academics and students, particularly in the context of contemporary judicial reasoning, is found in the comments of Lord Devlin: "A judge-made change in the law rarely comes out of a blue sky. Rumbblings from Olympus in the form of obiter dicta will give warning of unsettled weather."⁴⁶

42 JW Carter 'Liquidated Damages and Penalties: The Saga Continues' (1989) 1(1) *Bond University Law Review* 78. Compare however the most recent trend in the High Court decisions — an apparent shift back towards consensus judgments.

43 Thomas *supra* n.3 at 33-34.

44 Andrews *supra* n.18 at 205.

45 See for example Lockhart *supra* n.2 at 11,25. Compare however the comments of Thomas J concerning the need to separate the "accidental and the non-essential" from the "essential and the inherent" -Thomas *supra* n.3 at 27.

46 Lord Devlin 'Judges and Lawmakers' (1976) *MLR* 1 at 10. It has been pointed out that in New Zealand, at least, the "extension of the applicability of contributory negligence has been the subject of numerous judicial observations which legal advisers would be foolish to ignore" — GN Gunasekara 'Judicial Reasoning by Analogy with Statutes: The Case of Contributory Negligence and the Law of Contract in New Zealand' (1993) 14 (2) *Statute Law Review* 84 at 92-93.

3. Judicial Activism and the Intervention of Policy

Of the various contemporary trends identified in this article as being of relevance to student approaches to case law, perhaps the one of most practical and immediate importance is the emergence of a new “judicial activism” in higher Australian courts. Detailed analysis of the development of that trend and its implications is beyond the scope of this article. The purpose here is to trace the course of the debate in order to illustrate the pressing implications for modern legal education.

Reference to policy considerations by the judiciary is not entirely unsanctioned by the legislature. Indeed some suggest that the trend of “judicial law making” is as much a result of parliamentary attitudes as judicial ones. Mason CJ commented in the *Australian Lawyer* in July 1993: “I think that in some circumstances governments and legislatures prefer to leave the determination of a controversial question to the courts rather than leave the question to be decided by the political process.”⁴⁷

More specifically, in a variety of federal and State Acts, there can be found statutory prescription for consideration by the courts of “policy”. Of equal significance for the purposes of this paper is the fact that there is an increasing trend for judges to be called upon to make decisions and exercise discretions in areas of public law. Accordingly, the controversy surrounding judicial reasoning in common law fields largely ignores the fact that the judiciary are asked with increasing frequency to engage in various kinds of “law-making” by parliament. Even if the High Court were to cease referring to “policy” and “community values” in deciding common law disputes, lawyers will still be practising in a legal climate where policy arguments will frequently be relevant to the protection of their clients’ interests.

Before proceeding further, it is useful to briefly consider one definitional problem inherent in the debate on “policy” intervention. The term “policy” has a potentially broad meaning — a few of the concepts arising in the debate are: implied rights, fundamental freedoms, community values and expectations, the intent of analogous legislation, and personal preference or opinion. Some writers have called upon jurisprudence for definitional guidance, for example, the Dworkin definition of policy — “that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community”.⁴⁸ Horrigan has referred to a number of possible interpretations of the term, and argues that references to “policy” in Australian judicial reasoning must be understood in two senses — a pejorative sense and a non-pejorative sense. Decisions based on community interests without regard to the law are argued to be “policy” decisions in the pejorative sense. Decisions made after reference to community

47 Interview with Mason CJ ‘Putting *Mabo* in Perspective’ (1993) 28(6) *Australian Lawyer* 23. When this comment was repeated by Mason CJ in the context of the *Mabo* debate to an overseas audience, there was a sharp response from the federal opposition spokesman on *Mabo* — see P Reith Keynote speech ‘Native Title and the *Mabo* Decision: A South Australian Perspective’, Adelaide, 23 October 1993, 2.

48 Thomas *supra* n.3 at 37 — quoting R Dworkin ‘Is Law a System of Rules?’ in Summers (ed) *Essays in Legal Philosophy* Blackwell Oxford 1968 at 34.

interests or values to rank alternative solutions left open by the positive law are seen as “policy” decisions in the non-pejorative sense.⁴⁹ This useful distinction helps to explain some of the differences in the views analysed in the following discussion.

(a) Policy by Legislative Prescription

As early as 1982, members of the judiciary were commenting that legislatures were moving towards value — based expression and purposive interpretation. Parliament was increasingly passing to courts the responsibility and authority to determine how best to work out and apply the broad purpose of the legislation.⁵⁰ Street CJ pointed to a number of examples of this trend in New South Wales statutes. New South Wales courts are in various circumstances required to have regard to the “circumstances of the case and the public interest”, validate provisions to the extent that they are “not against public policy”, and excuse non-compliance of a person who has “acted honestly and ought fairly to be excused”.⁵¹ It is unnecessary to catalogue the frequency of such prescriptions, or the use of phrases such as “reasonableness” and “just and equitable” in Australian legislation. Consider also prescriptions for purposive interpretation of legislation in the Acts Interpretation Acts.⁵² In the public law context, judges find themselves making or reviewing decisions based on notions such as “hardship”⁵³ or “public interest”.⁵⁴

Street CJ concludes that “in these fields public policy, or public interest... that unruly horse upon which judges had for so long looked askance... is firmly ensconced in the judicial stable”.⁵⁵

A related phenomenon can be found in the gradual acceptance in common law countries of the use of legislative as opposed to judicial precedent in developing the law.⁵⁶ Evidence of this trend is found in decisions in the United Kingdom, the United States, and New Zealand. In the New South Wales Court of Appeal, Kirby P, in identifying a common law rule requiring reasons in support of administrative decisions, relied in part upon the enactment in other jurisdictions of provisions to that

49 Horrigan *supra* n.3 at 168.

50 See for example, Street CJ ‘Judicial Law-Making — Some Reflections’ (1982) 9(3) *Sydney Law Review* 535 at 536.

51 *Ibid* at 536-537. Refer to the *Land and Environment Court Act 1979* (NSW), the *Restraints of Trade Act 1976* (NSW), and 1961 amendments to the *Money Lenders and Infants Loans Act* (NSW).

52 For example, *Acts Interpretation Act 1901* (Cth), s. 15AA.

53 See for example ministerial determinations under the *Health Insurance Act 1973* (Cth), s. 23DNC.

54 See for example *Freedom of Information Act 1982* (Cth), s. 33A.

55 Street *supra* n.49 at 536.

56 See Gunasekara *supra* n.45 at 84 and the reference to comments made by Cooke P in *Day v. Mead* [1987] 2 NZLR 443 at 555. In the context of the possible extension of principles of contributory negligence to the law of contract, Cooke P stated that “the evolution of Judge-made law may be influenced by the ideas of the legislature as reflected in contemporary statutes and by other current trends...”

effect.⁵⁷ Consider also the High Court's reference to developments in analogous areas of law in *Northern Territory v. Mengel*⁵⁸ — it might be predicted that reasoning by reference to legislation in analogous fields will soon be a readily accepted part of High Court process. Critics of the High Court's present processes may find a certain democratic legitimacy in such reasoning. The obvious consequence for legal education is that where particular significant cases warrant teaching by contextual as well as legal analysis, the appropriate "context" may soon necessarily include legislation in different, but analogous, areas of law.

Also relevant to this discussion from a Queensland perspective is the recent enactment of the *Legislative Standards Act 1992* (Qld). The enunciation by that Act of "Fundamental Legislative Principles" (FLPs) may represent a subtle but significant progression in the pattern of change to the role of the judiciary.

The Office of the Parliamentary Counsel is directed by the Act to have regard to FLPs in drafting legislation. FLPs are defined as the "principles relating to legislation that underlie a parliamentary democracy based on the rule of law".⁵⁹ Specifically, legislation is required to have sufficient regard to the "rights and liberties of individuals" and the "institution of Parliament".⁶⁰ The Act lists specific examples of what may amount to "sufficient regard" in relation to each. The "rights and liberties" examples cover such matters as: the proper definition of administrative powers affecting rights and liberties; the principles of natural justice; the delegation of administrative power only in appropriate circumstances; protection of the onus of proof in criminal cases and the privilege against self-incrimination; fair compensation for compulsory acquisition of property; and the need to have regard to Aboriginal tradition and Island custom.⁶¹ It has been noted that the list "shows some potential to go beyond the rights and liberties granted or assumed at common law".⁶²

A number of these considerations resemble either constitutional prescriptions or notions raised in the "bill of rights" debates, and therefore are not entirely new or surprising. However, as Sampford notes, the principles may be seen by some as an indication that "the philosophers have really run amok".⁶³ He himself prefers to view the principles as "core legal and political ideals", and the Act not as a "back-door way of introducing a Human Rights Bill" but as a "way of ensuring their consideration".⁶⁴

57 *Public Service Board of New South Wales v. Osmond* [1984] 3 NSWLR 447; overturned by the High Court — (1986) 159 CLR 656. See also the reasoning of the New South Wales Court of Appeal in *Daniels v. Anderson* (1995) 37 NSWLR 438 at 492-493.

58 (1995) 129 ALR 1.

59 *Legislative Standards Act 1992* (Qld), s. 4(1).

60 *Legislative Standards Act 1992* (Qld), s. 4(2).

61 *Legislative Standards Act 1992* (Qld), s. 4(3).

62 C Parker 'Legislation of the Highest Standard? Fundamental Legislative Principles in the Queensland *Legislative Standards Act 1992*' (1993) 2(2) *Griffith Law Review* 123 at 131.

63 C Sampford 'Fundamental Legislative Principles: Their Meaning and Rationale' (1994) 24(6) *QLSJ* 531 at 532.

64 Sampford *supra* n.62 at 532-533.

The Act does not provide for the enforcement of the principles — either through sanctions for errant drafters or nullification of non-complying legislation. Furthermore, it has been noted that the practice formalised in the Act of scrutinising bills has been broadly followed by Senate Standing Committees for some ten years.⁶⁵ What then is the significance of the Act for judicial process, and hence for modern legal education? The Act may be seen to provide further legislative authority for judicial consideration of policy issues. As mentioned above, the principles potentially extend recognition of rights and liberties beyond established common law categories.⁶⁶ The principle regarding indigenous custom, for example, arguably recognises group rights.⁶⁷ Additionally it should be noted that the listed considerations are merely “examples” of those to which legislation should have “sufficient regard” — the list may therefore expand through judicial interpretation and community pressure. Accordingly, while the wording of the Act would seem to preclude nullification by the court of non-complying legislation, two potential effects of the Act upon judicial reasoning can be identified:

1. FLPs may be indirectly enforced by the courts through purposive interpretation. FLPs could be regarded as a common component of the underlying objects of new legislation, on the assumption that the legislation was intended to embody due regard for those principles.⁶⁸ It has been said that this expected influence on statutory interpretation is based on a precarious argument as the Act’s policy is only general and capable of being overridden by a more specific purpose in a particular case.⁶⁹ However, it might be predicted that once the attention of litigants and their advisers focuses upon the stipulated FLPs, the courts will increasingly be presented with arguments of purpose and called upon to give effect to the principles. Those principles potentially provide convenient justification for the decisions of courts already inclined towards policy-based reasoning. It would seem inevitable that this new influence upon statutory interpretation will gradually emerge as an important factor.
2. FLPs may affect the important distinction between relevant and irrelevant considerations in public law decision making. Administrative decision makers are faced with a set of “seminal” principles underlying new enabling legislation, and the concurrence of their reasoning processes with those principles is likely to be tested upon judicial review. Once again courts are called upon to interpret and weigh a range of policy factors.

What are the implications for legal education of the incorporation of policy

65 Sampford *supra* n.62 at 533.

66 Refer to the discussion of internationally legitimate rights that have not been included in the list, and the courts’ increasing willingness to look to international law considerations and implied rights: Parker *supra* n.61 at 133.

67 Parker *supra* n.61 at 132.

68 See *Acts Interpretation Act* 1954 (Qld), s. 14A, and the discussion at Parker *supra* n.61 at 141-142.

69 Parker *supra* n.61 at 142.

considerations in the wording (and hence in the administration) of statutes? The changing relationship between the legislature and the courts is manifested in legislation which increasingly calls upon the judiciary to abandon traditional legal reasoning and make decisions by reference to emerging rights and community values. Law graduates are now immediately and frequently confronted with situations wherein their client's interests depend upon arguments as to "public interest", "public policy" or "fairness". Legal education must adapt to this re-shaping of the professional playing field, through emphasis upon contextual, critical and practical analysis of precedent and principle.

(b) Judicial Activism — Policy by the Court's Own Volition

In 1993, a thought-provoking analysis of the transcript of the *Communist Party Case*⁷⁰ was published in the *Sydney Law Review*. The article was titled in part: "Reading the Judicial Mind".⁷¹ In addition to being of historical interest in a variety of respects, the paper illustrates that important insights can be gained from analysis extending beyond reported judgments. Students would benefit greatly from carrying out such an analysis at least once in their undergraduate study. The exercise would enhance their understanding of both judicial reasoning and advocacy processes. Additionally, although junior practitioners regularly assigned the task might disagree, the exercise is a very interesting one.

The author, Williams, conducts a thorough analysis, examining the histories of the judges and leading counsel, the respective relationships between them, points of intervention by the judges, turning points in the course of arguments, reasons for the success of particular arguments, and political developments of the time. The writer's conclusions reveal the value of the exercise:

1. The arguments of counsel and the judges' reactions underline the case's strong links with the preservation of civil liberties and the constitutional position of the High Court.⁷²
2. The summary of argument extracted in the *Commonwealth Law Reports* does not convey the Bench's interventionist approach, nor the depth and range of submissions presented by counsel.⁷³
3. Barwick (as an advocate in this case) was not one to rely solely upon the strength of his law but followed the maxim "the important thing in life is to know the judge".⁷⁴
4. The judges' interventions during submissions illuminate their stated reasons

⁷⁰ *Australian Communist Party v. The Commonwealth* (1951) 83 CLR 1.

⁷¹ G Williams 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case' (1993) 15(1) *Sydney Law Review* 3.

⁷² *Ibid* at 4.

⁷³ *Ibid*.

⁷⁴ *Ibid* at 7, quoting from the biography of Barwick by D Marr (1980).

for decision which “though clothed in the guise of legalism, reflect clear dislike towards the interference with civil liberties and the role of the High Court achieved by the Dissolution Act”.⁷⁵

5. Latham CJ’s interjections were “heart-felt” and revealed his own political opinions.⁷⁶ His Honour had his “own poetically founded assumptions” as to the role of the Communist Party in Australia.⁷⁷
6. While the reported decision appears divorced from wider political issues, the transcript reveals that this was far from the case.⁷⁸
7. The victory of Evatt (as an advocate) over Barwick was characterised by his reliance upon the principle that accorded with the position most acceptable to the majority of the Court.⁷⁹

Williams’ paper demonstrates the importance of close analysis to a deep understanding of significant cases. His examination is timely in an era when it is unnecessary to look to decisions of such political importance to find unambiguous resort to principle and policy in judicial reasoning. Practitioners seeking to argue, interpret or predict the law must understand the role of relevant political and social trends, and acknowledge that the law is not applied (or made) in isolation from non-legal factors and personal opinion. Faced with the interpretation of the Constitutional defence power, counsel formulated arguments in the *Communist Party* case that provide a striking illustration of the “multi-skilling” demanded of lawyers in advocacy: the factors argued by Barwick to be worthy of “judicial notice” included China’s turning to communism, Soviet influence in Eastern Europe, Commonwealth munition expansion, the increased significance of espionage and sabotage to national security, and the sympathy necessarily held by communists with the aims and ambitions of the Soviet Union.⁸⁰

Williams’ analysis might be regarded as a useful case-specific contribution to the broader debate concerning judicial activism. Of the numerous opinions expressed on this trend, none can be more convincing than those of the judges themselves, who have with increasing regularity stepped out from behind the well-written legal judgement to join the debate.

The goal of the following discussion is to demonstrate, by reference to the progress of debate and recently expressed opinions of key judges, that the external realities (if not the theoretical justification) of the trend towards judicial activism are sufficiently settled for law schools to address the implications for legal education. The historical progress and obvious component of “question and response” in the debate are best understood in chronological context. The following selection of

75 *Ibid* at 24.

76 *Ibid*.

77 *Ibid* at 25.

78 *Ibid*.

79 *Ibid*.

80 *Ibid* at 11.

contributions to the arguments were chosen by reason of their authoritativeness and relevance to legal education. The key opinions are summarised and unresolved issues are identified and discussed.

1987 — *McHugh J*

In 1987, McHugh J expressed the view that for a “generation”, most lawyers (practising and academic) have accepted that judges make law and have the right to do so. His Honour was referring to the “small but still significant number of cases where the courts must ‘make’ law because the rules or principles arguably applicable are unclear or out of touch with the needs of contemporary society or have not been applied to similar facts”.⁸¹ Critics of judicial law-making, he said, cannot “realistically expect the legislature to use valuable parliamentary time in the continuing supervision and amendment of all private law doctrine. The void has to be filled by the courts of New South Wales...”⁸²

1987 — *Lockhart J*

At the time of McHugh J’s exposition of judicial law-making, Lockhart J was expressing what would by many be regarded as an inappropriate complimentary proposition: “no one could doubt that judicial decisions are affected by conscious, unconscious and semi-conscious attitudes of judges”.⁸³ In the context of the “intrusion” of legislation, His Honour quoted from Brennan J :

It is difficult to see how one might settle administrative disputes by adjudication if the judge were precluded from deciding any case in which there was some policy elements. The technique of searching for an applicable policy would be different from the technique of ascertaining a rule of law. The policy may not be found in the books, but in material of a more diffuse kind.⁸⁴

Justice Lockhart phrased an important question in the judicial activism debate thus: “How do judges learn about social and economic implications of the law?”⁸⁵

81 McHugh J ‘Law Making in an Intermediate Appellate Court: The New South Wales Court of Appeal’ (1987) 11(2) *Sydney Law Review* 183. Compare His Honour’s later comment that “the common law is the product of eight hundred years of judicial law-making”, McHugh J ‘The Law-making Function of the Judicial Process — Part 1’ (1988) 62 *ALJ* 15.

82 McHugh *supra* n.81 at 188.

83 Lockhart *supra* n.2 at 6, referring to the views of R Blackburn ‘Plain Words on the Judicial Process’ (1974) 48 *ALJ* 229.

84 Lockhart *supra* n.2 at 20, quoting from G Brennan ‘New Growth in the Law — The Judicial Contribution’ (1979) 6 *Monash University Law Review* 1 at 18.

85 Lockhart *supra* n.2 at 22. Compare an alternative phrasing of the question: “If outcomes are to displace processes, from what authentic source is a judge to derive his criteria?” — A Fogg ‘Two Views of Law and Social Process’ (1992) 17(1) *University of Queensland Law Journal* 1 at 6.

1990 — *Brennan J*

Justice Brennan asserted in *O'Toole v. Charles David Pty Ltd* that “judges seek to make the law an effective instrument of doing justice according to contemporary standards in contemporary conditions”.⁸⁶

1993 — *Thomas J*

In his call for a “return to principle in judicial reasoning”, Thomas J dealt with a number of matters arising in the debate surrounding judicial activism and the intervention of policy. He stated that the declaratory theory of law had been thoroughly discredited, and that no serious observer would deny that judges make law.⁸⁷ A consequence of a return to principle, he argued, would be that judges would need to express their actual reasons for decision. Value judgments of judges would thereby become explicit. His Honour referred with approval to the notion of “judicial autonomy” — “the process by which a judge translates the standards, needs and expectations of the community into legal principles, or the basis for legal principles”.⁸⁸

In the course of his arguments, Thomas J identified various sources of “principles”. These included: past cases;⁸⁹ other disciplines such as economics, psychology, political science, sociology, anthropology, and the behavioural sciences in general;⁹⁰ foreign law and international treaty and human rights covenants;⁹¹ social, ethical and philosophical considerations;⁹² and legislation.⁹³ Ultimately, he said, “the source of all principle must be the standards, needs and expectations of the community which the law serves”.⁹⁴ His Honour created, in contra-distinction to Dworkin’s “Hercules J”, a “Solomon J” — imbued with the thinking of his theories. Solomon J, had he decided *Trigwell*,⁹⁵ would have readily considered the changing circumstances of society, developments in analogous areas of law, the social and economic impacts upon stock owners and the farming community of various alternative results, and questions of cost allocation and insurance.⁹⁶

From Thomas J’s analysis, once again the question arises, how would a judge

86 (1990) 171 CLR 232 at 267. Horrigan considers that such an assertion accords with “increasing judicial reference to ‘substance’ rather than ‘form’, purposive statutory interpretation rather than literal statutory interpretation, consensus community values, ‘policy’ considerations, abstract notions of fairness and justice, and other High Court innovations...” — Horrigan *supra* n.3 at 161.

87 Thomas *supra* n.3 at 2. Compare the comments in Kirby J ‘Courts and Policy: The Exiting Australian Scene’ (1993) 19(4) *Commonwealth Law Bulletin* 1794 at 1808.

88 Thomas *supra* n.3 at 2.

89 *Ibid* at 6.

90 *Ibid* at 7.

91 *Ibid*.

92 *Ibid*.

93 *Ibid* at 67.

94 *Ibid* at 7.

95 *SGIC v. Trigwell* (1979) 142 CLR 617.

96 Thomas *supra* n.3 at 47-48.

inform him or herself of such issues? His Honour's approach has been compared to a politician saying "I have no manifesto, but trust me".⁹⁷

1993 — *Mason CJ*

In an interview published in the *Australian Lawyer*, Mason CJ argued:

The fact that in *Mabo* and in the *Political Advertising* and *Nationwide News* cases the Court had regard to policy considerations does not indicate that the Court is trespassing beyond its judicial function or going beyond what courts have traditionally done in the past.⁹⁸

On another occasion, Mason CJ referred to a number of developments underpinning the High Court's modern approach — these included: the elimination of Privy Council appeals (leaving the High Court with sole responsibility for developing the Australian common law); the discarding of the declaratory theory; the fact that legislatures are increasingly leaving the elucidation and development of principles to judges; the accession of Australia to international conventions; the importance of international law to the development of the common law; and the elimination of appeal by right.⁹⁹

1993 — *Kirby J*

Justice Kirby has attributed the following comment to Lord Justice Hoffman:

You sit there, and your first thought always is 'Is this chap being treated fairly?' And if not, your next thought is, 'Am I in a position to do anything to put this right?' The new judges are more ready to give themselves the benefit of the doubt.¹⁰⁰

His Honour stated that common law judges had always been "creative". He stressed that where modern judges have fallen down is in failing to explain and support the "essential and legitimate function of the judiciary in continuously creating new law at the margins".¹⁰¹ His Honour proceeded to make some significant

97 DF Dugdale 'A Polite Response to Mr Justice Thomas' (1993) 23(3) *VUWLR* 125.

98 'Putting *Mabo* in Perspective' (1993) 28(6) *Australian Lawyer* 23. Contrast another interpretation placed upon the judgment of Gaudron and Deane JJ in *Mabo* — "a useful summary of the guilt-speak which has been so politically effective for over two decades" — H Morgan 'Australia After *Mabo*' (1993) 13(10) *Australian Business Monthly* 46.

99 Mason CJ 'The High Court in Sir Samuel Griffith's Time: Contemporary Parallels and Contrasts' (1993) NILEPA Samuel Griffith Centenary Conference, Brisbane, 25-26.

100 Kirby *supra* n.86.

101 Kirby *supra* n.86 at 1808. Earlier, Mathias took up the point that stated reasons for a decision often do not truly reflect the basis of that decision. He explained one instance of "judicial sophistry" as the result of a "miscalculated desire to adhere to stare decisis, when a frank acknowledgment that the courts are legislating in accordance with perceived policy requirements might have

comments upon the performance of the legal profession in general:

All too often, the judges of today have disdained candour in their legal reasoning. They have grasped at the straws of false distinctions and dubious logic pretending mere 'development' of the law, denying creation of new law. The legal profession has aided and abetted these techniques. We have failed to reform our procedures in court to permit the better identification of legal principle and the more analytical presentation of relevant legal policy. Instead, all too frequently, our courts continue to focus exclusively on legal authority, ignoring the two other props of our mature common law system — principle and policy.¹⁰²

Justice Kirby acknowledges that no definite formula has been provided which explains the final boundary of judicial "creativity" or the reference which may be made in discovering that boundary to "perceived issues of policy". He does however list a number of examples of "judicial law-making" in a variety of areas of Australian law.¹⁰³ It is interesting to note that in a number of the examples given, Kirby J sets the judicial change in the law against a backdrop of law reform commission reports, critical obiter, academic writing, and remedial legislation in other jurisdictions. His process of analysis supports the proposition that cases should be analysed contextually by both students and practitioners. The sources of policy identified in the examples are relatively concrete and reference to them by judges may meet with the approval of those who criticise "judicial activism" on the grounds that lawyers are ill-equipped to divine community values. On this issue of the capability of judges to engage in "policy reasoning", it is interesting to point out that Kirby J notes that new judicial processes may "eventually require new procedures for the appointment and confirmation of judges".¹⁰⁴

1995 — Doyle J

At *The Mason Court & Beyond* conference in Melbourne, Doyle J expressed concern about the exact nature and source of the "relatively permanent values of the

saved the error". He noted examples of where the opportunity for a discussion of relevant policy matters was lost. He said that "precedent and policy must be considered together" — Mathias *supra* n.30.

102 Kirby *supra* n.86 at 1808. Compare the comment that the court "cannot be activist and leave public education about this activism to somebody else" — Horrigan *supra* n.3 at 163.

103 Kirby *supra* n.86 at 1799-1800. The fields in which examples are given include: privity of contract; police verbals; rape in marriage; rights to free speech; mistake of law; rights to legal representation; and native title. This list is obviously not exhaustive — recent issues of law journals are full of articles carrying out policy analysis of decisions in areas of law such as planning and building; the delimiting of federal jurisdiction; corroboration of evidence; exclusion of liability for negligence; damages for defective works; and builders' liability for economic loss.

104 Kirby *supra* n.86 at 1809. Compare comments upon the United States and New Zealand system of appointments, summarised in Kirby J 'Conference on Courts and Policy' (February 1994) *New Zealand Law Journal* 51. The issue of judicial appointment in Australia has re-emerged in the context of the native title debate.

Australian community”, which he saw as the High Court’s current touchstone, and referred to the need for lawyers to explain and justify the present court processes. He noted that there had, to date, been no attempt to develop clear rules or guidelines on the presentation of “policy” arguments to the court, nor any thorough preparation of such arguments by advocates. He queried whether as a consequence, the court was inadequately equipped to carry out the law-making function it had claimed for itself.¹⁰⁵

It can be seen that two significant difficulties have emerged from the debate:

1. How is the “policy-oriented” judge to ascertain relevant “policy”? This issue seems to have been inadequately dealt with in the various contributions. For example, Thomas J in “A Return To Principle” refers to the problem at various points, but provides no satisfactory solution. He in fact acknowledges at one point that the process may be seen as “infuriatingly indefinite”.¹⁰⁶ The magnitude of the problem depends upon the source of the particular “policy”. For example, law reform commission reports, academic writings, obiter, analogous legislation, and the particular grievances of individual litigants are easily examinable by lawyers for policy direction, particularly as they present policy in a legal formulation. However, more nebulous sources of policy such as “daily contact” between judges and the community,¹⁰⁷ “general trends”, personal opinion and “deep” judicial perceptions seem to be inherently unreliable.¹⁰⁸
2. What is the legitimate boundary of judicial law-making? Again it is recognised that this problem has gone largely unaddressed. Much of the difficulty here would seem to turn upon the definitional problems discussed previously.

While the future permutations of “judicial activism” and “policy intervention” can not be precisely predicted, it is clear that these much-debated trends are a reality for Australian law, and hence for Australian legal education. Horrigan argues that as the High Court moves towards policy-oriented reasoning, “all Australian lawyers must review their skills for finding, interpreting, and applying Australian law”.¹⁰⁹ He rightly suggests that “the horse has bolted” and that “everybody should stop agonising over whether the High Court’s activism is right or wrong... rather, everybody should better inform themselves about today’s legal, political, and social questions which the Court is addressing.”¹¹⁰

105 Refer to the summary of Doyle J’s comments in *Virtue supra* n.37 at 20-21.

106 Thomas *supra* n.3 at 57.

107 A problem inherent in this source of “policy” is the fact that, in the general courts at least, most of the civil actions commenced, or at least tried, are between companies, governments and insurers.

108 Refer generally to Thomas *supra* n.3 at 18, 52-55, 57 and 75; Horrigan *supra* n.3 at 162.

109 *Ibid* at 159.

110 *Ibid* at 163.

4. Conclusion

In this article, an analysis has been conducted of contemporary trends in, and influences upon, Australian legal reasoning, particularly in the application of the doctrine of precedent. The trends and influences are wide ranging, and many of those discussed are highly controversial. They are, however, substantially re-shaping legal process and practice, and hence have serious consequences for legal education. Practical factors identified in this article that are of particular importance to the education of lawyers include:

1. *the intrusion of legislation across a broad range of legal fields* — requiring from legal education an increasing focus upon the executive monitoring and statutory interpretation roles of case law, and a retreat from undue intellectual commitment to the common law;
2. *the increasing quantity of available precedent* — one of the myriad of factors which emphasises the need for a strong and responsive connection between legal education and legal practice — students must understand the manner in which practical realities temper the preparation of advice and advocacy;
3. *the “internationalisation” of Australian law* — this has not been considered in detail in this paper, however the trend is of potentially great significance for both curriculum development and teaching approaches to specific principles;
4. *the proliferation of quasi-judicial determinative tribunals* — a compelling argument for the expansion of introductory teaching of *stare decisis* to cover administrative equivalents and variations; and
5. *the frequency of pre-trial settlement* — which again emphasises the need for practical skills training — students can be encouraged to understand the changing goals of case preparation through flexible research curriculums and practical experience (which can be tailored to perform the additional function of allowing access to “common disputes” that no longer appear with any regularity in law reports).

One particular purpose of the article has been to identify both the boundaries of agreement, and the vast uncertainties, in the debate over the judiciary’s perceived annexation of social and political goals to judicial process. Whether in accordance with legislative prescription, or of their own volition, courts are increasingly reasoning by reference to such matters as “public policy”, “public interest” and “fairness”. A parallel trend is the increasing reference by the judiciary to a broad range of materials in deciding particular cases. Members of the judiciary have been at great pains to direct the attention of lawyers to the increasing importance of changing economic and social conditions, changes in analogous areas of law, relevant commentary, and obiter:

... the wise practitioner, in giving advice, will have regard to the standing or reputation of the precedent, the reception it has had at the hands of commentators, any observations

of judges which detract from its authority, developments in other branches of law, and any changed circumstances in the community which a responsive judiciary would be disposed to meet. Binding or not, therefore, a precedent provides the credible lawyer with only the beginning of his or her task.¹¹¹

It can be seen that there is an increasing need for law schools to encourage a contextual, critical, and practical analysis of precedent and principle. In addition to the factors referred to in the quoted passage, relevant considerations in the context of a particular precedent may include court structures and appeal rights of the time, the identity of the judges involved, major political and legal issues of the time, and concurrence or conflict in separate judgements.¹¹²

The analysis contained in this paper leads to two inevitable conclusions. The first is that modern influences upon judicial reasoning are a professional and commercial reality. The second is that legal practitioners, and hence legal educators, must act upon the first: "It would be a comfortable response to recent controversies in Australia to rush back into Alladin's cave, bar the door and resume the fairy tale. But it is not possible."¹¹³

111 Thomas *supra* n.3 at 14. Changes in community circumstances may be of central importance to the analysis of particular legal developments — consider for example the significance of social and political influences to the recognition of Indigenous native title at common law: refer to *Milirrpum v. Nabalco Pty Ltd* (1970) 17 FLR 141, *Mabo v. Queensland (No 2)* (1992) 174 CLR 1, and the myriad of intervening developments in Indigenous legal and social affairs.

112 Refer for example to the recording of a class presented by Professor David Gardiner in L Taylor (ed) *Variety in Teaching Law — Media Package* Queensland University of Technology Faculty of Law Brisbane 1996. The class concerned the decision in *SGIC v. Trigwell* (1979) 142 CLR 617. The decision has been widely criticised on the basis that the court made no attempt to analyse House of Lords precedent, nor to assess the quality of reasoning in it, and that the court failed to have regard to analogous legal principles and changing social conditions — Thomas *supra* n.3 at 44-45. See also Virtue *supra* n.37 at 21; McHugh *supra* n.80 at 23.

113 Kirby *supra* n.86 at 1809.