

Judicial Activism: A Question of Power and Politics, Not Law

Janet Albrechtsen

Constitutional Law Conference

Friday February 8 2008, NSW Art Gallery

Introduction

I would perhaps be guilty of hubris, the sin of which I am about to accuse some judges, if I called this an Emile Zola moment. But what the heck.

J'accuse. I accuse some judges of naked, unvarnished judicial activism. I accuse them of distorting and destroying the democratic foundations of our political system in Australia. I accuse them of being, as Thomas Jefferson once remarked, being a "subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric."¹

We are indeed indebted to Jason Pierce for exposing to us for the first time the reality of this process in Australia. If you doubted that some judges regarded Parliament as a bunch of generally slow, incompetent populists whose legislation (or lack of it) needs to be corrected by a more intelligent class of being, look no further than Jason's book, *Inside the Mason Court Revolution*.² Let me give you a small selection from the smorgasbord on offer:

¹ Thomas Jefferson in a letter to Thomas Ritchie, 25 December 1820.

² Jason L Pierce, *Inside the Mason Court Revolution - The High Court of Australia Transformed*, Carolina Academic Press 2006.

“Mabo ... broke a tension (that) the politicians were quite unable to break,” one judge said. “If the High Court had not ruled against the idea of terra nullius, that would have been a political problem that we would not have been able to resolve through the ordinary democratic process.”³

Another judicial superhero- sorry, I mean - another Federal Court judge said: “With the two houses of parliament and the difficulty of the government actually commanding a majority ... it really does give courts the power to move where the legislature can't.”⁴

Yet another Federal Court judge said the courts needed to step in when parliament “wimped out ... the whole issue is too divisive so it falls to the court to fill in”.⁵

A Victorian appellate judge gave wholehearted support for the High Court as quasi-legislator representing the people: “I think that there is room for the court to be more adventurous ... I don't think the country can move forward ... unless the High Court is prepared to take risks ... It takes parliaments a hell of a long time to make laws reflecting community feelings.”⁶

Another judge suggested it was the duty of the judiciary to get out in front and educate the masses about the new activist role. He derided critics of Mabo as “vociferous red-neck people” with “no sympathy for liberalism”.

³ Supra, note 2 at 126.

⁴ Ibid.

⁵ Ibid.

⁶ Supra, note 2 at 127.

These are not isolated. They are not accidental. They are deliberate. And dangerous. And there are more where this came from, as I will mention later.

We have not yet reached crisis point - as they have in the United States - where the very legitimacy of the courts, and thus community acceptance of their rulings, is threatened. But we will move closer to such a crisis if views such as the ones I mentioned prevail.

Now, I know that the polite thing to do is to play to one's audience - splash around a few comments about how brilliant lawyers are, etc. Instead, I will be frank. And if, by the end of this discussion, some of you are offended, I'm afraid I won't be apologising for that.

Which brings me to my second accusation. This time not aimed at judges, but at the legal profession as a whole. For what is the legal profession doing to fix the problem? Nothing.

Quite the opposite. The profession is trying to maintain the ability for judges to remain activist by pretending this is a purely legal issue, a purely technical issue of interest only to lawyers, and thus to be left to lawyers to solve. This device of treating the issue purely as a technical issue enables the profession to play its favourite delaying games of obfuscation and complication. Death by definition, I call it. Judicial activism cannot be defined, ergo, judicial activism does not exist. It is simply some kind of fiction concocted by wicked conservatives who disagree with the substance of particular decisions.

I will return to that charge later to prove that is simply nonsense. It is just another attempt by some in the legal profession to disregard judicial activism as an issue.

If the lawyers in this room come together simply to pontificate about judicial activism as a legal issue, then I submit you have got it wrong. This issue is more about power

and politics than it is about the law. It is about who makes decisions on key issues, about who wields power and to what extent. It is about the legitimacy and community acceptance of our institutions.

If the legal community will not accept the challenge to properly address the issue, but instead continues to dance on the heads of pins, to engage in hairsplitting and denial in the face of clear evidence, we will end with a politicised judiciary.

Let me remind you - and I am sure Jason can speak to this more than I can - that the appointment of US judges has been so politicised that it has become the subject of election promises and Senate filibusters. Many will recall the kerfuffle when Democrats challenged George W Bush's federal court appointments in 2005. Those with an eye to history recognised this was not, as many claimed, unprecedented.

Certainly, between 1897 and 1968 the US Senate rejected only one candidate for the Supreme Court. However, by 1968 there was, as one writer has called it, an "ongoing donnybrook" where 6 candidates were rejected or withdrawn and four others confronted serious opposition. David Greenberg, from Rutgers University has tracked how the "contentious era began in June 1968, when Supreme Court Chief Justice Earl Warren decided to retire, and President Lyndon B Johnson tapped Associate Justice Abe Fortas, his old friend and adviser to replace him..."⁷

With Johnson a lame duck president, Richard Nixon the likely Republican nominee turned the Warren Court's jurisprudence into an election issue, promising to appoint judges who would 'interpret the Constitution' and not 'legislate from the bench.' The core reason for opposition to Fortas was ideology. And as Greenberg notes, it was not just Republicans who challenged the Fortas appointment. "Conservative Southern Democrats (otherwise known as the Dixiecrats) had long abhorred the

⁷"Filibustering Judicial Appointments is Unprecedented?", David Greenberg, George Mason University's History News Network at <http://hnn.us/articles/11754.html>

Warren Court's rulings on racial equality, sexual freedom, and the rights of the accused."

The defeat of the nomination of Fortas was the first in 38 years, but it would not be the last. In 1987, a new verb - to be "borked" - was born when the Senate rejected the confirmation of Robert Bork after an intensely political campaign by civil and women's rights groups. Their aim: to derail his appointment for his alleged desire to roll back civil rights decisions of the Warren and Burger Courts.

And let's not forget that judicial decisions necessarily influence the political landscape. Decisions such as *Roe v Wade*⁷ galvanised the religious Right, which never accepted these matters should be decided by the courts, not Parliaments. It is by no means far fetched to say that *Roe v Wade* gave America George W Bush. Without such decisions, would the US landscape look as it does today?

Of course, in the United States their Bill of Rights gives the US Supreme Court the right to decide social and political issues. But that has patently not saved the Court from criticism or from the underlying fear that their decisions lack public acceptance.

In Australia, there is much less legitimacy in the view that courts can engage in activism. If you doubt that this is an issue in Australia, then let me suggest you need to get out more. You should see my email inbox every time I write a column about judicial activism. Whilst not at US levels, there is a lot of concern - and yes, much anger - out there. Many ordinary Australians are losing respect for courts who believe they may usurp the role of politicians.

⁷ 410 US 113 (1973)

No doubt much can be explained by the values gap between many judges and the bloke in the street. Doubt that? Well, once again let's defer to what the judges say. One judge told Jason that "the composition of the judiciary has changed quite a bit. I suspect the social values of the judiciary have become more radical. I don't mean we are all raving comrades. But...judges are..to use the Americanism..more liberal as a class."⁸ When asked to give examples of this more liberal judiciary, he replied: "Almost the entire membership of the Federal Court."

So let me suggest that this audience and the wider legal profession needs to take this issue on in good faith. It needs to stop fobbing off the concerns with paternalistic nodding and a quiet admonition of "there, there, you just leave this to us."

What I therefore want to do in the time remaining is, first, remind you of the evils of judicial activism. That is the easy part, though.

The final, and much harder task, is to stimulate a different kind of discussion than the one I suspect lawyers (including those in this room) are used to - by suggesting that any definition of judicial activism must recognise the political context, not just the legal angle. A definition that gives the average Australian a say in determining the legitimate role of the courts. I realise that by offering such a definition up to an audience of lawyers is a bit like offering up a Christian to the lions. It will be savaged by experts and its inevitable flaws mercilessly exposed - thus allowing lawyers to continue doing what they want to do. But here is the challenge.

The onus is on the lawyers - the real lawyers I mean, not former lawyers-cum-journalists like me, to come up with an appropriate definition. I will offer a definition as a trial balloon - a ritual sacrifice if you like. But do not expect me to set down in stone "Judicial Activism According to Janet." Ultimately it is the lawyers who must do better than they have to date. If I have been able to move the debate outside this room, then I will have succeeded. But if lawyers refuse to recognise the political

implications of judicial activism, and find a way to control it, the profession will have failed.

PART 1: THE EVILS OF JUDICIAL ACTIVISM

I'd like to call this section the Seven Deadly Sins of Judicial Activism. But alas, only a few are sins. The other problems are the unfortunate and unacceptable consequences of judicial activism. As I said this is the easy - or at least the easier - part of my address.

1. Hubris

Hubris is the most egregious sin of judicial activists. That judges suppose they can mould a better world by making law from the bench rather than leaving it up to boring old democratic processes is the height of arrogance. Doubt that arrogance exists?

Recall those comments I read out earlier made by judges to Jason. Those interviews reveal that, far from being apologetic for past activism, many of our most senior judges believe that the High Court should solve a problem if parliament cannot or will not fix it.

In other words, at least some senior and influential judges believe that judicial lawmaking is justified if, in the personal opinion of the judge or judges, Parliament has failed to do its duty. That Parliament's inaction may be deliberate or may reflect the will of the people is, to these judges, irrelevant.

Recall the series of cases that began in the early 1990s with the Nationwide News and Australian Capital Television cases and, later the Theophanous case. The Mason court embarked on a boisterous implied rights jurisprudence where the court discovered in the Constitution a hitherto undiscovered implied right to freedom of political speech.

Once again, with a healthy dose of arrogance, judges supposed that their role was to fill in the gaps. It was, said one judge, a necessary ``void-filling exercise ... In the absence of a bill of rights, there is a void there that from time to time has to be filled.”⁹ Another agreed: “ In the absence of a bill of rights, I don’t see any problem with the High Court reading by implication some implied rights into the Constitution.”¹⁰ And another: “With two houses of Parliament and the difficulties of Governments securing majorities in both, it’s a very clever system because it really does give courts the ability to move where the legislature can’t.”¹¹ Another described it as a ``legitimate development in jurisprudential analysis. It puts flesh on the bones of the Constitution.”¹² One High Court judge, with refreshing honesty, said:``perhaps it's illegitimate to pull the rabbit out of the hat, but it's nice to see the rabbit emerging.”¹³

Whilst as a journalist I rather like the notion of an implied right to free political speech, that is not the point. The end does not justify the means. So do not imagine that claims of judicial activism are made when one does not agree with the merits of a decision.

Call me old fashioned but I tend to side with the traditionalists who scoff at the notion that the court's power can be dialled up in order to fill perceived gaps. I tend to agree with the High Court judge who remarked to Jason that : ``That's not an appropriate function of the judiciary. The judiciary may not know why parliament is not moving on a particular subject or they think they know and they might be wrong."

2. Wrath

⁹ Supra note 1 at 169.

¹⁰ Ibid.

¹¹ Supra note 1 at 169.

¹² Supra note 1 at 168.

¹³ Supra note 1 at 169.

Far from settling a contentious issue, when courts make law in circumstances when they should not, they tend to inflame passions and cause greater divisions over a particular issue. Activists naturally like to do an end run around democracy. But as Adelaide University's John Gava has argued, "the easy option [is] not necessarily the best one in the long run"¹⁴.

Thirty years after the US Supreme Court decided *Roe v Wade*, abortion remains highly controversial. Opinion polls in the US suggest a high level of support for abortion yet, as *The Economist* has noted,¹⁵ there remains a feeling that the Court in that case usurped the power of the people. And so the decision is forever tinged with a lack of legitimacy. It taints the court and the issue.

As I alluded to earlier, my view is that *Roe v Wade* gave the United States George W Bush. The controversial, highly political, decision helped galvanise an incredibly strong religious Right constituency which put George W Bush in the White House. It horrifies liberals when I say that, but it's a case of the best of intentions having unintended consequences.

¹⁴ John Gava, "The Rise of the Hero Judge" (2001) 24 UNSW Law Journal 747 at 755.

¹⁵ "The war that never ends" *The Economist* January 2003. See also "Why we'd be better off without Roe", Jeffrey Rosen, *The New Republic*, 24 February 2003.

After the Supreme Court struck down laws prohibiting sodomy in June 2003¹⁶, polling revealed that Americans became less tolerant towards homosexuality.¹⁷

¹⁶ *Lawrence v Texas* 539 US 558 (2003).

¹⁷ When asked whether same-sex relations between consenting adults should be legal, 48% said yes; 46% said no. *USA Today* reported that support had not been that low since 1996. Two months earlier - that is prior to the Court's decision - support stood at 60% in favour, 35% against. A Gallop poll in May revealed a 49-49 split on whether gays should have the right to civil unions which attract the same legal rights as married couples. After the *Lawrence* decision, 57% opposed it and 40% supported it. See "Are Gays Facing a Backlash" Howard Kurtz, *Washington Post* 30 July 2003.

The same backlash was evident over native title in Australia. I agree with academics such as John Gava who believe that a legislative solution to native title had a better chance of securing much greater acceptance than a court-imposed solution such as *Mabo* ever will.¹⁸

3. Sloth

When judges enter politics they let politicians off the hook on the difficult issues like *Mabo*. When things get too hot politically, politicians may decide to leave the hard ones for law-making judges. But judges should not be doing the work of politicians.

4. Democratic deficit

Having dealt with well-known sins, the real problem with judicial activism is that when judges think its up to them to craft a better world, that they know better, it gives rise to a fundamental democratic deficit. Judges are not representative, even if they think they have a finger on the nation's pulse.

When a British High Court was called on to interpret lyrics in a rap song, one judge remarked on the "faintly surreal experience of three gentlemen in horsehair wigs examining the meaning of such phrases as 'mish mish man.'"¹⁹

More seriously, as one High Court judge told Jason: "The difficulty is to know what contemporary values are. *Mabo* is a good example of that because the community is deeply divided over native title. If one gives effect to so-called contemporary values, that really means that one gives effect to the values of the

¹⁸ John Gava, "The Rise of the Hero Judge" (2001) 24 UNSW Law Journal 747.

¹⁹"Rap is a foreign language, rules rueful judge" *The Times* June 6 2003.

justices. We live in a democracy and ... the judges' values are not necessarily the values of the majority."²⁰

One judge said in response: ``It was common in the 1990s among intermediate court judges to speak of the High Court judges as politicians ... `those politicians in Canberra'.'

Unelected politicians, of course. As Professor Greg Craven has asked rhetorically, "Who did you vote for in the last High Court election?"²¹

That democratic deficiency is made worse when judges make laws with a nod to foreign fads. Why should American judges, for example, try to emulate the chic Europeans? When the US Supreme Court struck down that Texas law which prohibited sodomy, the Court said the law was inconsistent with "values we share with a wider civilisation."²² And in working out who or what is "wider civilisation", the Court took as its lead the views of the European Court of Human Rights. Why is the European Court of Human Rights more representative of values Americans share than a Texas law enacted by the duly elected representatives of the people?²³

Now the people in this room would no doubt agree with the Supreme Court. And, of course, it must be repeated that the US Supreme Court does have that judicial super-charger - a Bill of Rights - which essentially gives the court a licence to draft

²¹ Professor Gregory Craven, "The High Court of Australia: A Study in the Abuse of Power" The Thirty-First Alfred Deakin Lecture, 9 October 1997.

²² *Lawrence v Texas* 539 US 558 (2003).

²³ Eric D Hargan, "The Sovereignty Implications of Two Recent Supreme Court Decisions" published by *The Federalist Society for Law and Public Policy Studies*.

up social policy. However, I would submit that keeping up with the Joneses in wider civilisation is patently not the role of the Australian judiciary. And it produces the worst kind of vague legal reasoning.

It must surely embolden the lobby groups and political activists when courts use the opinion of something called “wider civilisation” and various international instruments to pole-vault over domestic laws. Spurred on activists produce even more fine-sounding international instruments which judges can draw upon to make more laws.

To see this process at work, take the case of *Mabo*, where some members of the High Court relied on the “expectations of the international community”. If judges are going to make law in line with changing social and economic circumstances, why is the measure the “expectations of the international community”? What about the expectations of the domestic Australian community?

Which brings me back to where I started: do judges really suppose they are equipped to work out what community standards are, especially on contentious issues?

5. Incompetence

The next problem is one of incompetence. Courts are inferior vehicles for making law. As Sir Harry Gibbs said at this conference a few years ago: “the court is not able to conduct inquiries and undertake research into the consequences of its reforming decisions in the way that governments may do before enacting legislation.”²⁴ Judges are, he said quoting Ninian Stephens “a primitive and handicapped legislature.”

²⁴ Judicial Activism and Judicial Restraint: Where Does the Balance Lie?” Constitutional Law Conference 20 February 2004 at 4. See also “Courts and Social Change”, Justice Ronald Sackville (2005) 33 Fed L Rev 371 at 378; “Judicial Activism: The Beginning of the End of the Beginning”, Professor Greg Craven, Volume 16, Samuel Griffith Society, Chapter 16.

6. Accountability

The reason judges should not usurp the role of the legislature is obvious. They lack accountability. At least in the US, judges are accountable. Given that they openly legislate, using the Bill of Rights as their mandate to do so, they are forced to confront a political process before they make political decisions.

In Australia, there is no such accountability. Even when judges are held accountable by the media, in the form of public criticism, they invariably cry foul, referring to critics as “bully boys”.

7. Uncertainty

Whether it is driven by empire-building or a disdain for representative government, or both as is so often the case, judges tend to justify their creative law making efforts on the basis that they are necessary to make the world in which we live a better place. And if you see your role as protecting and improving civilisation, then small matters of jurisprudence and the rule of law tend to look secondary in nature.²³

One of the central tenets of the law is certainty. It exists so people can organise their affairs, knowing what the law is. If judges start making law in circumstances when they should not, certainty is lost. That’s why mediation is a booming industry as Jason discusses in his book.²⁴

8. Illegitimacy

²³ Robert H Bork, “The Supreme Court 2000 - A Symposium,” *First Things*, October 2000.

²⁴ *Supra*, note 1 at 84.

When courts rearrange the legal landscape and social policy - in other words usurp Parliament - they inevitably lose respect. I am ending with this consequence of judicial activism because it leads me to the second part of my address - why defining judicial activism is about power and politics, and why lawyers must recognise the political implications of the issue instead of treating the matter as a purely technical, legal one.

PART 2 - WHAT IS JUDICIAL ACTIVISM?

So now we get to the harder questions. What is judicial activism? Who gets to decide?

Nothing but fluff?

Is it the case that the endless debate over judicial activism suggests there are no right answers? The usual starting point for many is to say that the term judicial activism means nothing. The phrase, judicial activism, is “nothing but fluff” said US Supreme Court Justice Antonin Scalia.²⁵ A curious position from a judge who is usually more than ready to lay a few punches on his fellow judges whenever they step outside what he sees as the proper role of the judge.

Others say it's a pejorative term, a phrase that means, according to Frank Easterbrook, “judges behaving badly”.²⁶ I agree. I certainly do not use the phrase as a compliment. But when I use the term, it is not because I disagree with a decision.

²⁵ See What Exactly Is Judicial Activism? The Charges Made Against the President's Judicial Nominees” John W Dean at <http://writ.news.findlaw.com/dean/20050617.html>

²⁶ “Do Liberals and Conservatives Differ in Judicial Activism” The Hon Frank H Easterbrook, (2002) 73 U Colo L Rev 1403.

The term “judicial activism” is only meaningful if it is limited to the proper role of judges. The question is when, precisely, are judges behaving badly so as to constitute “judicial activism”?

Death by definition

Lawyers love to claim this issue as their own. They play a game called death by definition, trying to kill off the issue by suggesting we can't really define judicial activism in any meaningful way. It's a ruse to dismiss the issue. I'm not going to play that game.

When lawyers do bother to come up with a definition, they perform legal calisthenics to get to their own preferred position: In late 2006 the *New York Times*²⁷ became rather excited by a new study that came out of the University of Kentucky law school. Professor Lori Ringhand²⁸ had apparently discovered the essential truth on judicial activism. She uncovered what she called an “objective” definition of judicial activism - the Holy Grail that we had all been chasing was found by the clever professor. Ringhand drew up a “judicial activism” scorecard for each US Supreme Court justice according to how often they (1) invalidated a federal law, (2) invalidated a state law and (3) overturned one of the Supreme Court's own precedents. Finally, she said, we would be replacing the “normative” test of judicial activism, which elicits no agreement, with a “factual” test of judicial activism that we can all agree on.

²⁷ Editorial, “Activism is in the Eye of the Ideologist”, *New York Times*, September 11 2006.

²⁸ “Judicial Activism: An Empirical Examination of Voting Behaviour on the Renquist Natural Court” Lori Ringhand, published in *Constitutional Commentary*, Summer 2007.

It was a cute test with cute results that proved that conservatives on the US Supreme Court were just as judicially activist as their more liberal-minded brethren. No wonder the chaps at the *New York Times* were excited by this legal discovery.

The only problem is that the test is too cute. Testing judicial activism is not like undergoing a pregnancy test, where the emergence of a little pink line readily tells us provides a “yes” or “no” answer. If only it were that easy. Similarly, striking down a piece of federal or state legislation is not an objective test of judicial activism. There are of course grounds for judges to strike down legislation without it even skimming the surface of judicial activism.

I raise this example simply to show that lawyers think they have a monopoly over the definition of judicial activism. When they do come up with definitions, they can be self-serving and phony.

So let's not play those games.

Whilst it falls to lawyers to ultimately determine what is, or is not, permissible for judges to decide this does not mean that the legal profession can dream up a definition of judicial activism that suits them, repulsing and ignoring the rest of the community.

When one profession - even the wonderfully intellectual guys and gals on the bench - determine what is and what is not its proper role, it has an exceptionally heavy onus to ensure it does so in full recognition of, and in full conformity with, the political context in which it operates. If it does not do so, then it risks losing its legitimacy.

When judges tell us they are acting within their bounds by making law, they should not assume that the wider community agrees. Most people recognise when judges are making political decisions, moving beyond the bounds of the proper role of

judges. And when that happens, watch out. Political judges will start to be treated as politicians.

A Question of Legitimacy

Some do not think there is a legitimacy problem. A few years ago, for example, Justice Sackville wrote that “the apparent willingness of the Australian community to accept the legitimacy and binding force of even controversial judicial decisions tends to reinforce the view that the High Court has been well aware of the need to preserve ‘public confidence in the judiciary’. That awareness has doubtless contributed to a sense of caution in pushing the boundaries of judicial law-making too far.”²⁹

Let me suggest that not all judges are on the same page as Justice Sackville. Remember the explosive comments made by some judges who believe the people and their elected representatives are too slow, too stupid, too selfish and so lacking in compassion that judges must effectively legislate on their behalf?

If you do not think those views, if given effect to, will lead to the public losing confidence in the judiciary, then, as I said at the outset you need to get out more.

And that’s why what the wider community thinks about judicial activism matters.

The People’s Definition of Judicial Activism

So my challenge is to get you lawyers to think about a definition that takes account of that wider audience. I’ll have a go at drafting the “People’s Definition of Judicial Activism.

²⁹ “Courts and Social Change”, Justice Ronald Sackville, (2005) 33 Fed L Rev 371 at 382.

In starting that task, let me say that I recognise the apparent contradiction in devising a test that is determined by judges but must take account of what the man in the street would think is acceptable. But the contradiction is only apparent, not real.

Judges perform this task regularly. Take, for example, the comments of the High Court about the meaning of “industrial dispute”. In *R v Coldham; Ex Parte Australian Social Welfare Union*, the High Court said that “the words [industrial dispute] are not a technical or legal expression. They have to be given their popular meaning - what they convey to the man in the street. That is essentially a question of fact.”

Or look at when a court will imply a term into a contract to give business efficacy to that contract. In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, the Privy Council pointed out the term to be implied must be so obvious that it “goes without saying.”

These tests provide a start. By looking to the man in the street, I am not suggesting we engage in a popularity contests for courts and their decisions. It is not whether the man in the street likes or dislikes a decision. It is whether the man in the street thinks that a decision should have been made by the judiciary.

Now, before people start gesticulating, yes, judges do make law. They always have made law. They apply established rules to new situations. They alter the content of legal principles in accordance with changing economic and social circumstances. But as Sir Harry Gibbs has noted, “to say that because judges make law, they are therefore justified in becoming judicial activists has just as much sense as saying that because motorists drive, they are therefore entitled to drive at an excessive speed.”³⁰

³⁰ “Judicial Activism and Judicial Restraint: Where Does the Balance Lie,” H T Gibbs, Constitutional Law Conference UNSW 20 February 2004 at 1

Sir Harry was onto something. The reference to speed is useful. Consider the common law where we all agree that judges do make law. But the question is at what speed and when? When it comes to the common law, do judges move the common law in small incremental steps or great leaps?

What converts a judge into a common law judicial hoon, transforming acceptable judicial law-making into unacceptable judicial activism is the pace of change. Incremental change which goes no further than is absolutely necessary to decide a particular case, is acceptable. Change which a significant majority of Australians would regard as an accelerated leap in the law should be left to Parliament, not the courts, to decide.

If we are talking about judges interpreting statutes or the Constitution, the test may be whether a significant majority of Australians believe that it goes without saying that it falls to judges to decide a particular issue in the manner they did.

Now we get to the political point of the issue. It is important that the measure be a significant majority of Australians. A 50% plus one vote may be fine to get a political party over the line in an election and thereby confer on them legitimacy to govern. But that's because the other 49% know that in three years time, the decision will be thrown open with the government they did not vote for standing for re-election.

You cannot consistently have 49% of the people against you. Similarly, it is untenable that 49% of the people consistently believe that the judiciary is usurping its role without there being serious consequences for the legitimacy of the judiciary. That situation would lead to intense controversy and ultimately to the view that judges ought to have limited terms and be elected.

That's why, in defining judicial activism, judges need to take account of what a substantial majority thinks about its decision-making. To summarise, for judicial lawmaking to be acceptable I submit that (to borrow from cases on implying

contractual terms) it must be so obvious that a substantial majority of Australians regard the change as incremental or reasonable that it goes without saying.

Now, as I have admitted, this is just a tentative start towards finding a definition of judicial activism that recognises this is a question of power, not just law. We need different tests of the proper judicial role depending on whether we are talking about judges interpreting the common law, ordinary statutes or the Constitution. What is essential is that these tests include what the man in the street regards as the proper role of the judiciary in each instance.

Now it's over to you - the experts. This is your job. You need to find a test that will ensure that our courts continue to be regarded as impartial, dispassionate, apolitical implementers of the law, not legislators. If you want judges who actively make law, let's elect them. That, of course, goes without saying.