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The High Court and Judicial Activism

Introduction

Former Australian High Court judge Dyson Heydon, in a provocative paper postulating the death of the rule of law, was anxious to restrain the subjectivity of judges, which he equated with arbitrariness.[1] He reserved the strongest disapprobation for the 'activist judge' who invoked judicial power 'for a purpose other than that for which it was granted, namely, doing justice according to law'.[2] However, the assertion is weakened by the ambiguity besetting the terms he uses and the way they are shaped by the epistemological standpoint of the speaker. Heydon would certainly not go as far as Iain Stewart in describing law as a 'dark performative' that has no meaning of itself other than that which is constituted through the act of speech,[3] but he does concede that the rule of law possesses a 'range of meanings'.[4] Heydon does not qualify judicial activism in the same way, although it has been described as lacking defined content.[5] What these observations underscore is that the search for clear meanings is likely to be fruitless because the term is always politically contestable.[6]

1 Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110.

2 ibid., 113.

3 Iain Stewart, 'The Use of Law' in Michael Freeman (ed.), *Law and Sociology* (Current Legal Issues Vol. 8, Oxford University Press, 2006) 259.

4 Heydon (n. 1) 111.

5 Frank B. Cross & Stefanie A. Lindquist, 'The Scientific Study of Judicial Activism' (2007) 91(6) *Minnesota Law Review* 1752.

6 Tom Campbell, 'Judicial Activism: Justice or Treason?' (2003) 10(3) *Otago Law Review* 307.

Judicial activism is nevertheless a useful phrase, for it reminds us that judges are perennially engaged in what Robert Cover calls a 'jurisgenerative' process—that is, the creation of meaning;[7] activist judging is not an idiosyncratic act undertaken by a few radicals. Julius Stone draws attention to the fact that, within their hermeneutic universe, judges are compelled to exercise what he famously called the 'leeways of choice' at every step of the adjudicative process.[8] Furthermore, activism is central to the role of appellate courts:

> Courts of final appeal are properly activist. To suggest otherwise would require the suspension of reality in face of the facts—why else have a second layer of appeal if the role of such a court is not to make law?[9]

To deny the importance of the activist role comports with the well-known positivist myth that judges do not make law, although many judges adopt a more realistic stance.[10]

I do not propose to embark on a thoroughgoing critique of Heydon's position, which has been ably undertaken by others,[11] but to use it as a springboard for examining the Australian High Court's approach to disability discrimination legislation. Thus, rather than focus on either constitutional or common law adjudication—the more conventional sites of the critique of judicial activism—I turn the spotlight on statutory interpretation. I argue that an ostensibly formalistic approach, far from revealing deference to the rule of law, may actually frustrate legislative intent—although ascertaining the meaning of intent is always contestable.[12] Indeed, I turn Heydon's notion of activism on its head and suggest that the judges of the High Court post *Mabo*[13] and *Wik*,[14]—particularly

7 Robert Cover, '*Nomos* and Narrative' (1983) 97(4) *Harvard Law Review* 4, 11.

8 Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1968) 325–30, *et passim.*

9 Fiona Wheeler & John Williams, '"Restrained Activism" in the High Court of Australia' in Brice Dickson (ed.), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007) 65, doi.org/10.1093/acprof:oso/9780199213290.003.0002. Cf. Michael Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576.

10 For example, Anthony Mason, 'Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?' in Geoffrey Lindell (ed.), *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason AC, KBE* (The Federation Press, 2007).

11 Allan C. Hutchinson, 'Heydon Seek: Looking for Law in All the Wrong Places' (2003) 29 *Monash University Law Review* 85; John Gava, 'Unconvincing and Perplexing: Hutchinson and Stapleton on Judging' (2007) 26 *University of Queensland Law Journal* 67.

12 Natalie Stoljar, 'Postulated Authors and Hypothetical Intentions' in Ngaire Naffine, Rosemary Owens & John Williams, *Intention in Law and Philosophy* (Ashgate/Dartmouth, 2001) 271.

13 *Mabo v Queensland* (1992) 175 CLR 1 (*Mabo*).

14 *Wik Peoples and Thayorre People v Queensland* (1996) 141 ALR 129 (*Wik*).

the 'rampant conservatives'[15] of the Gleeson court (1998–2008)—were insidious activists in contrast to the moderate social liberals of the Mason court (1987–95),[16] who acknowledged their activism. Leslie Zines notes the more democratic approach of the High Court that emerged, at least as far as constitutional adjudication was concerned, following passage of the *Australia Act 1986* (Cth).[17]

Antidiscrimination law could be described as a paradigm of social liberalism because the legislation that first emerged in the 1970s and 1980s is designed to promote equality between all citizens regardless of sex, race, sexuality, disability, age or other characteristic of identity.[18] While the legislation is not entrenched and is riddled with exceptions, it is the nearest instrument to a bill of rights in most Australian jurisdictions, which heightens its sensitivity to changes in the political climate. The neoliberal turn that began in the 1980s became pronounced in the 1990s. The key characteristic of neoliberalism is the adulation of the free market, although it is accompanied by a constellation of politically and morally conservative values that are supportive of the market, including the privileging of employer prerogative over employee rights, administrative convenience, efficiency, the maximisation of profits and promotion of the self. Correspondingly, we see a resiling from broad human rights principles. These changes are reflected in the values of the court, although they are subtle and evocative, rather than overt, as the adjudicative process is cloaked in a carapace of technocratic rules.

The activism of interpretation

Kent Roach argues that activist judging is a 'loaded and slippery term'[19] that has emerged from a two-century debate about the role of the US Supreme Court and the US Constitution.[20] The debate focuses on whether judges should be free to interpret the constitution as they think fit or whether

15 Brice Dickson, 'Comparing Supreme Courts' in Brice Dickson (ed.), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007), doi.org/10.1093/acprof:oso/9780199213290.003.0001.

16 Wheeler & Williams (n. 9) 65.

17 Leslie Zines, 'Judicial Activism and the Rule of Law in Australia' in Tom Campbell & Jeffrey Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (Ashgate/Dartmouth, 2000) 397.

18 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).

19 Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, 2001).

20 Cross & Lindquist (n. 5).

they should exercise restraint and be more deferential to the legislature.[21] It is this American-centric critique, Roach argues, that has spread like an epidemic around the globe and extended from constitutionalism to statutory and common law adjudication.[22]

It would seem the neoliberal turn induced Australian conservatives to adopt the populist North American understanding of judicial activism, which avers that if judges are not elected, any 'lawmaking' in which they engage must necessarily be undemocratic.[23] This very point was made by conservative newspaper columnist Janet Albrechtsen shortly before the 2007 Australian federal election.[24] Fearing the prospect of a Rudd Labor government, she denigrated Rudd's team for what she claimed would be its likelihood of favouring the appointment of judges with little time for 'democratic traditions'.[25] That is, Labor-appointed judges would want to make law themselves rather than defer to the legislature.

When we turn to discrimination legislation, we see that the aims are clearly articulated in terms of effecting equality between all persons and eliminating discrimination. Of course, these aims are expressed at a high level of abstraction and require creativity on the part of judges to interpret them meaningfully considering the facts of the instant case, but the positive injunction is undeniable. When conservative judges focus on statutory construction and disregard the objects of the legislation, they are committing the very sins that critics such as Heydon and Albrechtsen deplore. The aims of antidiscrimination legislation are grounded in a democratic political system and, as Tom Campbell points out, if the objects are reasonably clear, citizens have a right to expect statutes to mean what they say.[26]

The attacks on so-called activist judges are most vociferous when there is a victory by litigants from outside the ranks of the socially powerful, as in the case of Indigenous communities (for example, *Mabo* and *Wik*). In other words, when the political pendulum swings away from formal justice, which favours the hegemony of the powerful, and moves towards substantive equality, in an endeavour to redress the inequitable position

21 Ronald Dworkin, *Law's Empire* (Belknap/Harvard University Press, 1986) 369 ff.
22 Roach (n. 19) 98.
23 ibid., 99.
24 Janet Albrechtsen, 'Activist Judiciary a Looming Menace', *The Australian*, 31 October 2007, 16.
25 ibid.
26 Tom Campbell, 'Legislative Intent and Democratic Decision Making' in Ngaire Naffine, Rosemary Owens & John Williams (eds), *Intention in Law and Philosophy* (Ashgate/Dartmouth, 2001) 291.

of the less powerful, the backlash is sharp and furious. As Wheeler and Williams show in their considered analysis of the attack by conservatives on the Mason court for its 'judicial activism', the attacks were motivated by the substantive outcomes in landmark cases rather than by the court's adjudicative style.[27]

Conservatives reserve a particular animus for the progressive judge who is concerned with substantive equality, as can be seen in the disparagement by Heydon of the judgements of the late Justice Lionel Murphy as a 'series of dogmatic, dirigiste and emotional slogans',[28] which lends support to the view that criticisms of judicial activism are ideologically based and analytically unhelpful.[29] The epistemology of standpoint is crucial here. While conservative commentators suggest that judicial activism is the improper usurpation of the role of the legislature by progressive judges, the conservative judges who subvert legislative intent are depicted as exercising restraint.[30] A value-free neutrality simply cannot be supported in adjudication.[31] It is a fiction designed to mask the political, which is yet another 'category of illusory reference'.[32] While 'the political' may broadly encompass all aspects of citizen–state relations, on the one hand, or be restricted to the party–political, on the other, I am more interested in the political philosophies that underpin adjudication.

I am not sure I would go as far as Hutchinson and assert that law *is* politics,[33] as there are always powerful steadying factors at work in appellate courts that arise from acculturation in law.[34] Nevertheless, the competing views of judicial activism are undoubtedly shaped by the prevailing political philosophy of the court, despite the rhetoric averring judicial autonomy. Wendy Brown, drawing on Nietzsche, suggests that a concept of *ressentiment*[35] inheres within liberalism—the dominant political philosophy of the Western world—because of the way liberalism simultaneously promises both freedom and equality:

27 Wheeler & Williams (n. 9) 29.
28 Heydon (n. 1) 122.
29 Michael Coper, 'Concern about Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 562, 573; Cross & Lindquist (n. 5).
30 Herman Schwartz, *The Rehnquist Court: Judicial Activism on the Right* (Hill & Wang, 2002).
31 Anthony Mason, 'Rights, Values and Legal Institutions: Reshaping Australian Institutions' in Geoffrey Lindell (ed.), *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason AC, KBE* (The Federation Press, 2007).
32 Stone (n. 8).
33 Hutchinson (n. 11).
34 Stone (n. 8) 322.
35 Friedrich Nietzsche, *On the Genealogy of Morals*, translated by Walter Kaufman & R.J. Hollingdale (Vintage Books, 1969) 127.

> A strong commitment to freedom vitiates the fulfilment of the equality promise and breeds *ressentiment* as welfare state liberalism—attenuations of the unmitigated license of the rich and powerful on behalf of the 'disadvantaged'. Conversely, a strong commitment to equality, requiring heavy state interventionism and economic redistribution, attenuates the commitment to freedom and breeds *ressentiment* expressed as neo-conservative anti-statism, racism, charges of reverse racism, and so forth.[36]

I suggest these pendulum swings in the contemporary political realm are obliquely reflected within the process of adjudication, despite the formalistic facade and the myths of objectivity. The fluctuations on the political continuum and the subjectivity of the judge are further disguised by the powerful discourse of merit that surrounds judicial appointments, which avers that the best person for the job is appointed, as discussed in Chapter 11.

Swings and roundabouts

When decisions that upheld the human rights of Indigenous people[37] and women[38] began to be handed down for the first time, the *ressentiment* of the Right began to manifest itself through agitation against progressive decisions—most notably, those of *Mabo* and *Wik*. The court's upholding of native title against the property interests of powerful landholders was viewed by detractors as an arrant manifestation of judicial lawmaking.[39] The attack on the court in the wake of *Wik* paralleled the trenchant attack by conservatives on the US Supreme Court under Chief Justice Warren following *Brown v Board of Education*[40]—one of that court's most famous decisions.[41]

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36 Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995) 67.

37 For example, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

38 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237.

39 Garfield Barwick, 'Chief Justice Comments on Fundamental Issues Facing the Judiciary' in Geoffrey Lindell (ed.), *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason AC, KBE* (The Federation Press, 2007) 398; Zines (n. 17) 406–8; David Marr, 'No More Than They Deserve' in David Marr, *The High Price of Heaven* (Allen & Unwin, 1999).

40 *Brown v Board of Education of Topeka* 347 US 483 (1954).

41 John D. Carter, *The Warren Court and the Constitution: A Critical View of Judicial Activism* (Pelican Publishing, 1973).

Wik coincided with the election of Prime Minister John Howard in 1996, signalling a sharp swing to the right and the embrace of a neoliberal political agenda. A dramatic manifestation of the Howard government's intention following *Wik* was the announcement by then acting prime minister Tim Fischer that the government would appoint 'Capital C Conservatives' to the High Court to replace retiring judges.[42] The six new appointments to the court (of seven), including Murray Gleeson as chief justice in 1998, were intended to reflect the neoconservative turn and, as in the United States, a major transformation was initiated through a 'right-wing phalanx'.[43] While not all the judges may have identified themselves as capital-C Conservatives, the High Court's style of adjudication changed markedly. Wheeler and Williams describe the return to legalism as 'a recalibration of doctrine in key areas suggestive of a desire to check the perceived activism of the Mason era'.[44] Most significantly, I suggest, it retreated from an inchoate rights-based jurisprudence that recognised the changing position of women and disfavoured Others, including people with disabilities.

In all the discrimination appeals decided by the High Court during the decade of Howard's tenure as Australian prime minister (1996–2007), the complainants lost, in sharp contrast with comparable cases in the preceding decade. It is noteworthy that, considering the conservative outcry against *Mabo* and *Wik*, none of these decisions dealt with race; instead, one dealt with sex (*Amery*),[45] one with age (*Christie*)[46] and three with disability (*IW v City of Perth*,[47] *X v Commonwealth*[48] and *Purvis*).[49] In each instance, the majority judges interpreted the legislative texts in ways that undermined the proscriptions against discrimination. Justice Kirby, consistently in dissent, reminds us that antidiscrimination legislation is beneficial legislation that requires regard for its aims that can only be frustrated by narrow technical readings.[50] I suggest, however, that far from being the rogue activist out on a limb, Justice Kirby was the only

42 Nikki Savva, 'Fischer Seeks a More Conservative Court', *The Age*, [Melbourne], 5 March 1997, 1–2.
43 Ronald Dworkin, 'The Supreme Court Phalanx' 54(14) *New York Review of Books*, 27 September 2007, 92.
44 Wheeler & Williams (n. 9) 58.
45 *New South Wales v Amery* (2006) 226 ALR 196, discussed in Chapter 9, this volume.
46 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280.
47 *IW v City of Perth* (1997) 191 CLR 1.
48 *X v Commonwealth* (1999) 200 CLR 177.
49 *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.
50 For example, *Amery*, 213.

judge, except for Justice McHugh, who exercised restraint in the Howard years by deferring to legislative intent in the terms ostensibly favoured by Heydon.

Heydon is dismissive of 'talk of policy and interests and values'.[51] However, antidiscrimination law does not lend itself easily to a technocratic approach without distorting legislative intent, for it is an area of law necessarily shaped by 'policy and interests and values'. It is not enough simply to enjoin judges to 'apply the law', as recommended by conservative commentators.[52] Historically, the common law did not recognise the non-discrimination principle at all, and law itself was engaged in reifying the inequitable status of women and disfavoured Others vis-a-vis benchmark men who represented the white, Anglo-Celtic, heterosexual, able-bodied, middle-class, male standard that underpins discrimination complaints. An injunction in favour of 'strict and complete legalism'[53] makes little sense in novel areas of law where there may be no precedent or other signposts. In such cases, judges must draw on their own subjective values and those of the normative universe they inhabit.[54] Beneath the seemingly neutral guise of technocratic 'black letter' law, conservative judges may be engaged in a hermeneutic process that is deeply political. Hence, I suggest they may be the rogues, not those denigrated as activist or 'hero judges'.[55]

Litigation may arise from a failure to conciliate a complaint of discrimination, whereupon one of the parties initiates a formal hearing within a tribunal or court. The greater the degree of formalism, the more favourable is the process to the respondent. Formalism exercises an ideological role in three ways: first, by favouring points of procedure and sloughing off the merits; second, by deterring appeals by other complainants because of the prospect of paying a respondent's costs as well as their own; and third, by formally orienting the jurisprudence towards a respondent perspective. The result can be a somewhat skewed notion of justice.

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51 Heydon (n. 1) 119.

52 For example, Gava (n. 11) 81.

53 Owen Dixon, 'Swearing In of Sir Owen Dixon as Chief Justice' (1952) 85 *Commonwealth Law Reports* xi, xiv; Owen Dixon, 'Concerning Judicial Method' in Owen Dixon, *Jesting Pilate and Other Papers and Addresses, Collected by Judge Woinarski* (Law Book, 1965).

54 Cover (n. 7). Cf. Regina Graycar, 'The Gender of Judgments: An Introduction' in Margaret Thornton (ed.), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 262.

55 John Gava, 'The Rise of the Hero Judge' (2001) 24 *University of New South Wales Law Journal* 747.

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

The discrimination jurisdiction is a paradigm of Marc Galanter's analysis in his iconic 1970s essay, 'Why the "Haves" Come Out Ahead'.[56] Applying his typology, the complainant is the one-shotter who may be interacting with the legal system for the first time and is baffled by its disregard for justice—that is, justice in a substantive sense. In contrast, the repeat player is typically a corporate respondent whose knowledge, homologous relationship with lawyers and virtually unlimited resources enable it to wear down the complainant by focusing on procedural justice. A snapshot of recent age and disability discrimination jurisprudence in the High Court shows how an ostensibly formalistic adjudicative style invariably favours the repeat player, who is exonerated when the court finds that no discrimination has occurred or, if it did, it was justifiable.

The litmus test of discrimination

I consider the discourse of judicial activism by first comparing a pair of disability discrimination cases. I take the first from the period when social liberalism was in the ascendancy and the second from the period following

56 Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974–75) 9 *Law & Society Review* 95, doi.org/10.2307/3053023.

the neoliberal turn post *Wik* to reveal contrasting views of activism considering the human rights aims of the legislation. I then consider another pair of cases from the latter period, arising from age and disability relating to the inherent requirements of a job, in which the High Court privileged employer prerogative over human rights. A final case dealing with HIV underscores the idea that a neoconservative morality invariably accompanies the neoliberal turn.

Two facets of activism: For and against disability

Waters v Public Transport Corporation (1991) 173 CLR 349

Waters represents the high point of social liberalism and may be contrasted with the harsher direction in disability discrimination cases evinced at the turn of the millennium. The case was brought under the former *Equal Opportunity Act 1984* (Vic.) (*EOA*) by and on behalf of people with various physical and intellectual disabilities who alleged that the removal of conductors from trams and the introduction of scratch tickets constituted indirect discrimination against them. While there were differences of opinion between the judges regarding the elements of indirect discrimination that included the imposition of a requirement or condition with which a disproportionate percentage of the complainant class was unable to comply, and the vexed standard of reasonableness, the seven judges—Mason CJ and Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ—were, in a rare feat, unanimous in finding for the complainants.[57]

Of course, the judges of the High Court were making law because they were confronting and having to determine the ambit of the legislative proscription against disability discrimination in the provision of services for the first time, but they deferred to the intention of the legislature, not corporate power or bureaucratic convenience. The inference is that the court regards legislation proscribing discrimination on the ground of disability as a positive initiative: 'A measure of the civilisation of a society is the extent to which it provides for the needs of the disabled.'[58] A narrow technocratic view of the rule of law may have paid more attention to the

57 For analysis, see Glenn Patmore, 'Moving Towards a Substantive Conception of the Anti-Discrimination Principle: *Waters v Public Transport Corporation of Victoria* Reconsidered' (1999) 23 *Melbourne University Law Review* 121.

58 *Waters*, 372 (Brennan J).

exception under *EOA* s. 39(e)(ii) regarding compliance with another Act. In this case, the respondent had endeavoured to argue that it was not bound by the *EOA* because it was acting under the *Transport Act 1983* (Vic.) s. 31(1). However, the court read down the provision and held that the respondent could not rely on it if there were no specific duty to remove conductors from trams or do away with scratch tickets.[59]

The familiar legal standard of 'reasonableness', as discussed in Chapter 9, may also prove to be a sticking point,[60] as its open-endedness provides a fertile field for jurists. Julius Stone describes reasonableness as a concept that is 'slippery and even treacherous',[61] but the reasonableness criterion was not interpreted in a way that favoured the corporate respondent. Brennan, Deane, Dawson and Toohey, together with McHugh JJ, construed the term to encompass all the circumstances of the case, including the financial situation of the respondent,[62] whereas a more restrictive view was articulated by Mason CJ and Gaudron J, who determined that it be ascertained by reference to 'the scope and purpose of the Act'.[63] In other words, legislative intent was privileged over financial exigencies. As the issue of reasonableness is treated as a matter of fact, it was remitted to the Victorian Equal Opportunity Board for determination.

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

> [T]he principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects

59 *Waters*, 370 (Mason CJ & Gaudron J).

60 For example, *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 263 (Bowen CJ & Gummow J).

61 Julius Stone, *Human Law and Human Justice* (Maitland Publications, 1965) 328. See also Chapter 9, this volume.

62 *Waters*, 379 (Brennan J), 383 (Deane J), 395–96 (Dawson & Toohey JJ), 410 (McHugh J).

63 *Waters*, 362 (Mason CJ & Gaudron J).

> or enforces human rights. In construing such legislation the courts have a special responsibility to take account of and give effect to the statutory purpose.[64]

This is a powerful sentiment, but it was soon nipped in the bud by the neoliberal turn. In subsequent cases, the court discarded the purposive approach in its interpretation of the legislation in favour of a narrow view that conformed with the orthodox and positivistic approach that had prevailed in the interpretation of antidiscrimination statutes in Australia.[65] The interpretative role seems to be directed towards contracting the human rights perspective in the name of efficiency or administrative convenience, the effect of which inevitably favours corporate respondents and frustrates legislative intent. The activism emerges not from a progressive approach to human rights legislation, as the detractors claim, but from a regressive approach, which relegates the broad aims of the legislation to the periphery or casts them off altogether. By way of illustration, I contrast *Waters* with *Purvis*, a disability case heard by the court 12 years later, which has been widely criticised.[66]

Purvis v New South Wales (Department of Education and Training) (2003) 217 CLR 92

Purvis involved a boy with intellectual disabilities who had been accepted into a mainstream high school. His violent behaviour led to several suspensions before he was excluded, whereupon his foster father lodged a complaint under the *Disability Discrimination Act 1992* (Cth) (*DDA*). At the initial hearing, the HREOC held that the behaviour of the boy, Daniel, arose from his disability.[67] This decision was overturned on appeal by a single judge of the Federal Court, who held that Daniel was excluded

64 *Waters*, 359.

65 Beth Gaze, 'Context and Interpretation in Anti-Discrimination law' (2002) 26 *Melbourne University Law Review* 325, 332.

66 Belinda Smith, 'From *Wardley to Purvis*: How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3, doi.org/10.2139/ssrn.1005528; Colin D. Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator under the *Disability Discrimination Act 1992* (Cth)' (2007) 35(1) *Federal Law Review* 111, available from: journals.sagepub.com/doi/10.22145/flr.35.1.4; Jacob Campbell, 'Using Anti-Discrimination Law as a Tool of Exclusion: A Critical Analysis of the *Disability Discrimination Act 1992* and *Purvis v NSW*' (2005) 5 *Macquarie Law Journal* 201; Kate Rattigan, '*Purvis v New South Wales (Department of Education and Training)*: A Case for Amending the *Disability Discrimination Act 1992* (Cth)' (2004) 28 *Melbourne University Law Review* 532; Samantha Edwards, '*Purvis* in the High Court: Behaviour, Disability and the Meaning of Direct Discrimination' (2004) 26(4) *Sydney Law Review* 639.

67 *Purvis on behalf of Hoggan v New South Wales (Department of Education)* (2001) EOC ¶93–117 (HREOC).

because of his behaviour, not because of his disability.[68] Emmett J adopted a literal approach to the phrase 'in circumstances that are the same or not materially different' (*DDA* s. 5[1]), without regard to 'the scope and purpose of the Act' that had carried such weight in *Waters*. The narrow conceptualisation of disability, which severed the linkage between the disability and the behaviour, was upheld by the Full Court of the Federal Court[69] and then by a majority of the High Court.[70] McHugh and Kirby JJ (dissenting) held that Daniel's behaviour was a manifestation of his disability and formed part of his disability for the purposes of the *DDA*.

The severance of the linkage between the disability and the behaviour paved the way for the majority to conceptualise the appropriate comparator in direct discrimination complaints as a person without a disability who engages in the same conduct as a complainant with the disability.[71] They concluded that any other student who had behaved like Daniel would have been suspended and discrimination could be found only if the hypothetical student were not suspended. This narrow conceptualisation of equal treatment not only allowed the school to suspend Daniel to protect staff and other students, but also sloughed off the allegation that it had acted in a discriminatory manner by expelling him. In other words, the rationalisation of the action by the school relating to safety erased altogether the issue at the nub of the case—that is, the disability and the less favourable treatment that flowed from it. The approach pulled the rug from beneath the feet of complainants alleging direct discrimination (the basis of the preponderance of complaints), not only on the ground of disability,[72] but also potentially on other grounds,[73] including pregnancy[74] and age.[75] Sections 5(2) and 6(2) of the *DDA* have since been amended to enable the definition of discrimination to include a failure to make reasonable adjustments for a person with a disability.

McHugh and Kirby JJ (dissenting) held, following Commissioner Innes in the original HREOC decision, that Daniel's treatment by the school had to be compared with that of a student without a disability and

68 *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69.
69 *Purvis v New South Wales (Department of Education and Training)* (2002) 117 FCR 237.
70 *Purvis* (Gleeson CJ, Gummow, Hayne, Heydon & Callinan JJ).
71 *Purvis*, 160 [220] (Gleeson CJ, Gummow, Hayne & Heydon JJ).
72 For example, *Zhang v University of Tasmania* (2009) FCAFC 35; *Collier v Austin Health* (2009) VCAT 565.
73 Smith (n. 66).
74 For example, *Dare v Hurley* (2005) EOC ¶93–405 (FMCA).
75 For example, *Virgin Blue Airlines P/L v Stewart* (2007) EOC ¶93–457 (SCQ).

without his disturbed behaviour.[76] This view is based firmly on established jurisprudence—Sir Ronald Wilson having made the same point some 15 years earlier:

> It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment … could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act.[77]

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

> The international developments reflected in the Act have the high object of correcting centuries of neglect of, and discrimination and prejudice against, the disabled. It would be wrong and contrary to the purpose of the Act to construe its ameliorative provisions narrowly.[78]

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

76 *Purvis*, 112 [48].
77 *Sullivan v Department of Defence* (1992) EOC ¶92–421 (HREOC), cited in *Purvis* [119] (McHugh & Kirby JJ).
78 *Purvis*, 103 [18].

Where is the deference to the legislature in *Purvis* that Justice Heydon and the critics of judicial activism extol? Indeed, the narrow approach to comparability endangers the viability of the legislation.[79] If corporate convenience and cost had been invoked in *Waters* as the primary considerations, the inability to catch a tram without a conductor or scratch a ticket could have been held to be irrelevant and people with disabilities told to take taxis. The bad behaviour of the complainant in *Purvis*—kicking schoolbags, as well as a teacher's aide—was not only regarded as serious conduct, but also discussed by Chief Justice Gleeson in the context of criminality,[80] rather than as conduct explicable in terms of intellectual disability. Importing notions of potential criminality and health and safety into the definition of direct disability discrimination has no firm basis in law; the legislation includes no test of reasonableness or justifiability.[81]

To devise a new test involving the reading down of the comparator to mean a person without a disability but who evinced the same conduct, as opposed to a person without a disability *simpliciter*, entailed an overt act of judicial activism, which effectively vitiated the value of the *DDA*. As Jacob Campbell concludes, *Purvis*, in sharp contrast to *Waters*, gave little encouragement to people with disabilities: 'It carries a message of exclusion rather than inclusion, which undermines the usefulness of the Act as a mechanism for social change.'[82]

A common standard for statutory judicial activism in the US literature is the striking down of a statute but, as Cross and Lindquist suggest, interpreting a statute in a manner that is contrary to legislative intent may be an even more egregious form of activism: 'Instead of leaving a blank legislative slate (as in the case of invalidating a law), such a misinterpretation leaves in place a statute that means what the judges wish, not what the legislature wishes. This truly is judicial legislation.'[83]

An interpretation that has the effect of negating virtually any possibility of a complainant pursuing a remedy successfully under antidiscrimination legislation, as occurred with Daniel Hoggan, instantiated a new meaning. As mentioned, very few discrimination cases reach the High Court, but

79 C. Campbell (n. 66) 128.
80 *Purvis*, 98 [5].
81 Smith (n. 66).
82 J. Campbell (n. 66) 220.
83 Cross & Lindquist (n. 5).

those that are heard become important precedents not just for courts and tribunals below, but also for the conciliation arena, as the effect of decisions from the most authoritative level percolates down to the informal base of the dispute-resolution hierarchy, beyond which few complaints proceed.

Of course, the court can change the meaning it has accorded the comparator in the future, but few complainants have either the tenacity or the financial resources to persevere against powerful corporate respondents. Hence, what Cross and Lindquist refer to as 'judicial legislation'[84] may stand for some time. Indeed, the very idea that it exists is likely to have a chilling effect on prospective litigants not only because of the risk of having the ruling confirmed, but also because of the possibility of having to pay the respondent's costs as well as their own.

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

The inherent requirements of the job: Judges know best

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

Qantas Airways Ltd v Christie (1998) 193 CLR 280

The *Christie* litigation was initiated by a pilot who was dismissed on his sixtieth birthday but who wished to keep flying international aircraft. The relevant legislation was the *Industrial Relations Act 1988* (Cth) (s. 170DF), which rendered it unlawful to terminate employment because of age. (The action preceded passage of the *Age Discrimination Act 2004* [Cth].) The case did not turn on the actuarially greater likelihood of heart attack,

84 ibid.

stroke or other factor associated with age, as might be expected, although 'potential disability' lies at the heart of the case. Some countries to which Qantas flew precluded the flying of international passenger aircraft by pilots aged over 60, which meant the only overseas routes available were short-haul flights to Indonesia, New Zealand and Fiji. Because short flights were in limited supply, pilots had to bid for them to make up their rosters. Qantas claimed it could not accommodate all pilots who wished to continue to fly after reaching the age of 60; it argued that for a pilot to be under the age of 60 was an inherent requirement of the job.

The physical and mental skills and aptitudes necessary to perform a particular job are normally regarded as its inherent requirements, but the standing of operational requirements is uncertain.[85] A majority of the High Court (Brennan CJ, Gaudron, McHugh and Gummow JJ) was of the opinion that administrative convenience was an inherent requirement of the job of an airline pilot in that a pilot needed to be able to fly to a reasonable number of destinations.[86] Justice Gummow conceptualised the inherent requirement as the complainant being available for duty as required by Qantas in any part of the world[87]—a requirement that seems to possess only a tenuous connection with age, albeit arising from the contract of employment. Indeed, if the complainant were able to fly jumbo jets internationally to Denpasar, Fiji and New Zealand, it could not be said that age (as a proxy for the rostering system) was an inherent requirement of the job of being an international pilot, as the majority judges, Gray and Marshall JJ, had argued in the Industrial Relations Court.[88] Construing administrative convenience as an inherent requirement of a job is another example of activist judging, as it clearly transcends the core elements associated with the ability and aptitude to pilot jumbo jets internationally.

Kirby J, in dissent, would undoubtedly agree with this criticism, for he stressed the importance of a purposive approach when interpreting discrimination legislation to which various international conventions on discrimination were appended.[89] These instruments, he argued,

85 Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, 2009) 560–64.
86 For a detailed analysis of the case and the various judgements, see Anna Chapman, 'Qantas Airways Ltd v Christie' (1998) 22 *Melbourne University Law Review* 743.
87 *Christie*, 319 [117].
88 *Christie v Qantas Airlines* (1995) 60 IR 17.
89 *Christie*, 332 [152].

must be given the same meaning as dedicated instruments proscribing discrimination.[90] Elevating 'operational issues' and administrative convenience to the status of the inherent requirement of a job, as he points out, means that such an exception could be perennially relied on in respect of sex, family responsibilities and pregnancy.[91] Elaborating on the point, Marshall J in the Full Bench decision hypothesised that Qantas could dismiss a female or gay pilot if one or more foreign countries refused the airline permission to fly into their airports.[92]

An inherent requirement of a job is a matter of fact to be determined by the relevant tribunal. However, as Ronald McCallum points out, the concept does not work well as the sole determinant of employability.[93] While the absence of legislative guidelines provides space for activism, the intention of the *DDA* is to prohibit discriminatory terminations unless continuation would require accommodation that was clearly unreasonable.[94] Extending the concept beyond the ability of a person to perform the job so as to include administrative convenience is always going to skew the outcome in the interests of the respondent employer. In *Christie*, therefore, we once again see a clear instance of the court making law by deferring to corporate convenience rather than to the relevant legislative and international instruments.

By elevating administrative convenience to the status of an inherent requirement, no space is left in which to manoeuvre; it operates as a form of rational discrimination that trumps the proscription of age discrimination. The activist approach to determining the inherent requirements of a job leaves the way open for ever more expansive interpretations in accordance with the revived notion of employer prerogative that prevailed because of radical reforms effected during the Howard years.[95] After *Wik*, the influence of neoliberalism could be clearly discerned within the court, although there is no bright line of demarcation, as several of the same judges sat on both *Waters* and *Christie*. Justice McHugh, in *Christie*, for example, acknowledged the importance of the prohibition against

90 ibid., 333 [152].
91 ibid., 343 [164].
92 *Christie v Qantas Airlines* (1996) 138 ALR 19, 39.
93 Ronald McCallum, 'Labour Law and the Inherent Requirement of the Job: *Qantas Airlines Ltd v Christie*—Destination the High Court of Australia—Boarding at Gate Seven' (1997) 19 *Sydney Law Review* 211, 217.
94 ibid.
95 Anthony Forsyth & Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (The Federation Press, 2009).

discrimination in the legislation, but was nevertheless prepared to cast aside its precepts in the context of 'a free enterprise system of industrial relations where employers and employees have considerable scope for defining their contractual rights and duties'.[96] This sentiment would seem to echo a rhetoric averring equality of bargaining power between management and individual workers that typified the nineteenth-century law of contract, where employer prerogative was all-important. In *Christie*, the definition of contractual rights by the employer authorised rational discrimination based on business convenience. After *Waters*, the values of neoliberalism had insidiously seeped into the court's adjudicative style to trump consistently the non-discrimination principle.

X v Commonwealth (1999) 200 CLR 177

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

In the first instance, the complainant was found by the HREOC to be in excellent health, to be symptom-free and to be able to carry out the soldiering role for which he had been prepared.[97] An order of review was conducted before a single judge of the Federal Court and dismissed.[98] Relying on Mason CJ and Gaudron J in *Waters*, Cooper J stressed that *DDA* s. 15(4) was to be construed in light of the objectives of the Act. He acknowledged that the inherent requirements meant the ability or capacity consistent with the common law duty of care to avoid risk of loss or harm

96 *Christie*, 307 [79]–[80].
97 *X v Department of Defence* (1995) EOC ¶92–715 (HREOC).
98 *Commonwealth v Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76.

to others. Nevertheless, it was not a finding of fact that 'bleeding safely' was an inherent requirement of the job of soldiering. This interpretation was rejected by the Full Bench of the Federal Court,[99] which held that an inherent requirement of employment as a soldier included the ability to 'bleed freely'. The court considered the view of the HREOC and the lower court to be too narrow: 'The inherent requirements of a particular employment are not to be limited to a mechanical performance of its tasks or skills.'[100] The issue of safety then became central, but from whose perspective is it to be assessed—that of the soldier, fellow employees or others? This was the question Mansfield J of the Full Bench of the Federal Court had percipiently posed, which underscores the leeways of choice confronting judges. The High Court granted special leave to the complainant to appeal and upheld the Federal Court decision.

In *X v Commonwealth*, Gummow and Hayne JJ, with whom Gleeson CJ and Callinan J agreed, accepted the expansive construction of the inherent requirement articulated by the Federal Court. McHugh J also accepted the broad interpretation but expressed scepticism regarding the Commonwealth's insistence that the ability to bleed safely was the relevant inherent requirement.[101] He would have allowed the appeal and remitted the matter to the HREOC for a clear finding of fact regarding the precise nature of a soldier's employment. Curiously enough, the majority appears to have made their decision in the absence of sound evidence as to just what were the essential skills and aptitudes of soldiering. There seemed to be more concern with the prognosis for HIV. Gummow and Hayne JJ (Gleeson CJ and Callinan J agreeing) found that it leads to AIDS, which is fatal,[102] whereas McHugh J found that it *usually* leads to AIDS. While McHugh J was of the view that it was legitimate to have regard to the health and safety of others, he noted that the Commonwealth had not availed itself of *DDA* s. 48—an express exception pertaining to infectious diseases.[103]

In *X v Commonwealth*, we see stereotypical assumptions about health and safety in relation to someone who is HIV-positive being actively read into the interpretation of the inherent requirement of soldiering, just as

99 *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 76 FCR 513.
100 ibid., 519 (Burchett J).
101 *X v Commonwealth* 220 [72].
102 ibid., 206 [96].
103 ibid., 194 [52].

administrative convenience had been read into the inherent requirement of piloting international planes in *Christie*. As Cooper J pointed out, injury resulting in bleeding is by no means peculiar to soldiering.[104]

Kirby J (dissenting) believed there was no error of law on the part of the HREOC and the appeal should be allowed. He sought to restrict the inherent requirements of the job to those factors that are 'essential, permanent and intrinsic' to its performance.[105] He was the only judge to advert to the broader social role of the legislation and to the fact that, as remedial legislation, it should be construed beneficially. He specifically adverted to the way the typical discrimination complainant succeeds in the first instance, only to have victory subsequently snatched away as an error of law.[106] Yet again, we see how rational discrimination can be invoked to relegate the merits of a case and legislative intent to the periphery in the interests of a powerful respondent. In this case, it was the state itself that had embarked on a course that undermined its own legislation. This is a familiar scenario within the discrimination jurisdiction, as seen also in *Purvis*, *Amery* and *Schou*.[107]

Once the High Court has determined that the inherent requirement of a job is not limited to the skills and capacity associated with its performance, as occurred in *Christie*, it is difficult to contain, as Kirby J observed.[108] Carter C, in the initial HREOC hearing,[109] had drawn a useful distinction between the inherent requirements and the incidents of employment, but this did not win favour with the High Court, although the ability to bleed freely may have been characterised in that way.

It would be interesting to have Heydon's view on how this decision satisfied 'principles which are known or readily discoverable' and how the decision was 'drawn from existing and discoverable legal sources independently of the personal beliefs of the judge'.[110] While one can rarely uncover the judicial subjectivity at the heart of decision-making, since it is encased within the formal language of adjudication, there is a sense that homophobia and stereotypical assumptions about those who

104 *Commonwealth v HREOC* (n. 98) 91.
105 *X v Commonwealth*, 85.
106 ibid., 211 [114].
107 *Victoria v Schou* (2004) 8 VR 120 (VCA), discussed in Chapter 9, this volume.
108 *X v The Commonwealth*, 343.
109 *X v Department of Defence* (n. 97) 78377–78.
110 Heydon (n. 1) 108.

are HIV-positive could have played a role in the decision. Determining that the ability to bleed freely was an inherent requirement of the job of modern soldiering in the absence of sound evidence stands out as a dramatic manifestation of activist judging.

Homophobia or rules rationality?

IW v City of Perth (1997) 191 CLR 1 was another case involving HIV post *Wik*, albeit not in employment but in the provision of services, which I mention briefly for the sake of completion. The complainants, an incorporated association, People Living with AIDS (PLWA), applied unsuccessfully to a local council for permission to establish a daytime drop-in centre in a business district for people who were HIV-positive. There were objections from businesses, occupiers and residents to the City Town Planning Committee, which recommended to the council that the proposal be rejected. Five members of the council voted against the proposal because of what the Equal Opportunity Tribunal of Western Australia (EOTWA) found to be their ignorant and biased attitudes.[111] In other words, homophobia was found to be a causative factor that engendered discrimination on the ground of impairment. Although the minister for local government approved the application on appeal, PLWA proceeded with the discrimination complaint under the *Equal Opportunity Act 1984* (WA) (*WA EOA*). The complainants succeeded at the tribunal level[112] and in an appeal before a single judge of the WA Supreme Court,[113] but failed on technical grounds before both the Full Bench of the Supreme Court[114] and the High Court, which caused the question of homophobia to recede into the background.

In *IW*, Brennan CJ, with McHugh, Dawson and Gaudron JJ, held that the word 'service' was not wide enough to capture a statutory discretion, while Dawson and Gaudron JJ held that the appellant, although a member of the PLWA, was not an 'aggrieved person' for the purpose of the *WA EOA*. Brennan CJ and McHugh J, with the support of the *Interpretation Act 1984* (WA), reiterated the now familiar mantra that stressed the importance of a liberal construction of legislation intended

111 *DL (representing the Members of People Living with AIDS (WA) Inc.) v City of Perth* (1993) EOC ¶92–510 (WA EOT).
112 ibid., ¶92–422 (WA EOT).
113 *Perth City v DL* (1994) 88 LGREA 45; *City of Perth v DL, acting as representative of All Members of People Living with AIDS (WA)* (1992) EOC ¶92–466 (WASC).
114 *Perth v DL* (1996) 90 LGERA 178.

to be beneficial and remedial,[115] but accepted a rules rationality approach by way of justification—that is, a council may be acting as an arm of government rather than a provider of services for the purposes of the discrimination legislation.

Toohey and Kirby JJ, in separate dissenting judgements, took a broader view of the meaning of 'services'. The EOTWA had said that the granting of planning approval itself was a service, whereas Toohey J was of the view that it was too narrow an interpretation to find that the giving of the planning approval, not the consideration of the application, was the service.[116] Kirby J, again focusing on first principles, adverted to the aim of the *WA EOA*, which requires the elimination, as far as is possible, of discrimination on the ground of impairment; a narrow approach can only frustrate the purpose of the Act.[117] The ambiguity at the heart of the rule of law can accommodate both the narrow technical and the broad purposive interpretations so that the subjectivity of the judge is immunised from scrutiny. A reliance on rules rationality was able to occlude consideration of the discomfiting issue of homophobia at the High Court level, despite the clear finding of fact before the tribunal.

As Kirby J pointed out, the proceedings illustrate the difficulty of a complainant obtaining a successful outcome in a discrimination case even when there are relatively simple facts—that is, a finding by the tribunal of homophobia at the council meeting is transmuted into a rationalisation of discrimination by focusing on a restricted meaning of the word 'services', which is incompatible with the aims of the legislation.[118] What we see in *IW* is an example of excessive formalism at the expense of human rights, which enables a more subtle form of activist judging than seen in *X v Commonwealth*, although the effect is similar. Rather than an expansive interpretation of 'service' or 'aggrieved person', as we saw with the 'inherent requirement of the job', a narrow reading enables the judges to avoid confronting the issues of either homophobia or disability at the heart of the case.

115 *IW*, 12.
116 ibid., 28.
117 ibid., 58.
118 ibid., 73 (Kirby J).

An American example

The seeming attempts to eviscerate the *DDA* following the neoliberal turn resonate uncannily with the experience of the *Americans with Disabilities Act 1990* (US) (*ADA*) during Chief Justice William Rehnquist's leadership of the US Supreme Court. *Sutton v United Air Lines* is exemplary.[119] In this case, the court determined that severely myopic twin sisters who wished to become airline pilots were not substantially limited in one or more of life's activities in accordance with the terms of the statute because their vision could be corrected with glasses or other aids. Nevertheless, the sisters were denied employment as airline pilots *because* their uncorrected visual acuity was less than 20/100. The court's reasoning left the complainants bereft of a remedy. Justice Stevens, with whom Justice Breyer agreed, was scathing of the majority stance:

> Although vision is of critical importance for airline pilots, in most segments of the economy whether an employee wears glasses—or uses any of several other mitigating measures—it is a matter of complete indifference to employers. It is difficult to envision many situations in which a qualified employee who needs glasses to perform her job might be fired … because … she cannot see well without them. Such a proposition would be ridiculous in the garden-variety case.[120]

Like a majority of the Australian High Court in the latter constellation of discrimination cases discussed, a majority of the US Supreme Court was '[a]pparently unconcerned that the ADA (US) [was] a remedial statute that should be "construed broadly to effectuate its purposes"'.[121] The majority 'decided to ignore Congress's express instruction that the "purpose of [the *ADA* (US) is] to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"'.[122] Justice Stevens, like Justice Kirby, exhorted a generous rather than a 'miserly' interpretation of the legislation in view of 'the remedial purposes of the Act'.[123]

119 *Sutton v United Air Lines* 527 US 471 (1999).
120 ibid., Stevens J at 510.
121 Andrew J. Imparato, 'The "Miserly" Approach to Disability Rights' in Herman Schwartz (ed.), *The Rehnquist Court: Judicial Activism on the Right* (Hill & Wang, 2002) 204.
122 ibid.
123 *Sutton* (n. 119) 495.

The effect of thwarting the aim of the *ADA* (US) for people with disabilities has been deplored by commentators. Imparato, for example, observes that the tendency of conservative courts to uphold the status quo by 'overblown deference to bureaucratic prerogatives means that disabled people will continue to experience unnecessary segregation and institutionalisation for many years to come'.[124] A commitment to formal equality treats everyone the same even if they are unequally situated, which only serves to exacerbate their inequality.

Conclusion

In the cases of *Purvis*, *Christie*, *X v Commonwealth* and *IW*, it is notable that there was no public outcry comparable to that which followed *Mabo* and *Wik*. The complainants had lost but were deemed undeserving—disfavoured Others who were aged, disabled, disadvantaged and, if HIV-positive, possibly also figures of abjection.[125] Women, too, could be added to this list (*Amery*). Had the complainants succeeded, there could have been cries of improper judicial activism, as occurred with *Mabo* and *Wik*, but, because they lost, the rule of law was deemed to have been upheld. In these cases, we see the way judicial activism can occur by stealth under the seemingly neutral cloak of the depersonalised techniques of legal formalism.

According to Heydon, the duty of the court is not to make law but to do justice according to law. While we would all like to believe that justice was the telos of lawmaking, I have suggested that there is little evidence of it, other than in a limited procedural sense, in the disability discrimination cases in the neoliberal climate post *Wik*. A majority of the High Court judges played an active role in subverting the intention of legislation that proscribes discrimination on grounds of disability to effect equality between all citizens. I have sought to demonstrate the proposition regarding the disability discrimination cases heard over a decade, all of which accord greater weight to employer prerogative and administrative convenience.

124 Imparato (n. 121) 211.

125 Julia Kristeva, *Powers of Horror: An Essay on Abjection*, translated by Leon S. Rondiez (Columbia University Press, 1982).

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

Dismantling the non-discrimination principle by stealth in deference to bureaucratic and corporate power destabilises the rule of law, for it sets dangerous precedents and encourages lower courts and tribunals to emulate the approach. The social liberal moment may have been fleeting, as a narrow approach is generally favoured by Australian courts in the adjudication of discrimination law.[126] It is therefore not the activist judges with a social conscience and a modest commitment to distributive justice who are corroding the rule of law, but those who, under a cloak of rationality, are construing antidiscrimination legislation in ways that accord with what has become neoliberal orthodoxy. These judges are fighting a rearguard action to sustain a version of the rule of law that constrains egalitarian human rights, while reviving the dominant values of a past age—a version that accords with benchmark masculinity, which it is well and truly past its use-by date.[127] Trammelling the interests of disfavoured Others, particularly people with disabilities, to achieve these ends constitutes an improper form of judicial activism.

126 Gaze (n. 65) 332; Glenn Patmore, 'The *Disability Discrimination Act* (Australia): Time for Change' (2003) 24 *Comparative Labor Law & Policy Journal* 62.
127 Hutchinson (n. 11).

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