

Features

**LETTERS TO THE EDITOR**

2296 words

10 May 2008

[The Australian](#)

1 - All-round Country

16

English

Copyright 2008 News Ltd. All Rights Reserved

Where is the evidence?

IT seems now to be accepted (at least in the pages of The Australian) that every debate about a legal issue should include a swipe at "unelected judges". The article by James Allan ("When it comes to picking High Court justices, give the little guys a go", Legal Affairs, 9/5) is the latest example. Bob Carr ("Lawyers are already drunk with power", Opinion, 24/4) went further when he portrayed judges as some sort of collective Emmanuel Goldstein in his scare piece about a charter of rights.

What have judges done to deserve this? Where is the evidence in the modern Australian judiciary of some great (or even creeping) movement to ignore judicial oaths and usurp the legislature?

Allan argues that we should choose a provincial plodder for the High Court. He says we should do that because such a person is less likely to be an activist, more likely simply to apply the law. The implication is that the High Court is doing something different at the moment. What is the evidence of that? If he means that the members of the High Court think more deeply than the average lawyer, isn't that what we want of the people ultimately responsible for the rule of law? If he means that they test their reasoning to make sure that they go for the legally correct answer, rather than the obvious or intuitive answer, isn't that what we want?

Allan argues that the Sydney-centric composition of the High Court is the reason that it has made decisions which tend to expand the role of central government. His thesis seems to be that because they live in the biggest state, they are more comfortable with central government. That link is, at best, tenuous but it also ignores the legal reality.

The case credited with the biggest expansion of central power is, of course, the Work Choices case. Notwithstanding the elegant arguments raised in the High Court against that legislation, was there ever very much doubt that the power in the Constitution to make laws for trading and financial corporations included the power to regulate the contracts made by those corporations? Work Choices could hardly be regarded as some high-water mark for judicial activism.

Nick Ferrett

(Barrister)

Brisbane, Qld