LEGAL RESEARCH FOUNDATION OF NEW ZEALAND

SEMINAR ON PUBLIC LAW

AUCKLAND, NEW ZEALAND, 6 AUGUST 1993

COURTS AND POLICY: THE EXCITING AUSTRALIAN SCENE

LEGAL RESEARCH FOUNDATION OF NEW ZEALAND

SEMINAR ON PUBLIC LAW

AUCKLAND, NEW ZEALAND, 6 AUGUST 1993

COURTS AND POLICY: THE EXCITING AUSTRALIAN SCENE

The Hon Justice Michael Kirby AC CMG*

Australia

A "SILENT REVOLUTION"?

The English *Observer* newspaper in May 1993 ran a major *Review* article by David Rose, titled "Silent Revolution".[1] Its thesis was that a new generation of judges in the United Kingdom was "quietly tearing up the old rules and shaping a fresh rôle for the Bench". It asserted that the judges had "revealed their radical views in exclusive interviews" with Mr Rose. His article appeared under a photograph of the House of Commons, above which was superimposed the massive image of the Statue of Justice above the Old Bailey and faceless portrayals of seven bewigged judges looking down upon the Commons from a great height. For good measure, the American Statute of Liberty was thrown in to lend weight to the scales of justice held by its goddess. In breathless prose, Mr Rose drew a contrast between the stable, cloistered life of the judges, in continuity with the centuries, and what he saw as the "visible signs of the new generation's readiness to challenge the government". He

ascribed to the Master of the Rolls, Sir Thomas Bingham, the assertion:

> *"Slowly the constitutional balance is tilting towards the judiciary. The courts have reacted to the increase in the powers claimed by Government by being more active themselves."*

Lord Woolf is quoted as explaining the "new judicial activism" as being a legacy of the expansion of the Executive Government under Mrs Thatcher:

> *"She was a confrontationist politician, and she was always pushing the limits of her authority."*

Part of this new creativity in the English judges is ascribed in the article to the impact upon English law of the *European Convention on Human Rights*. According to a leading English barrister, Mr Anthony Lester, the real explanation was that the judiciary had "recovered their self-confidence".[2] Lord Justice Hoffmann is quoted as saying:

> *"The line has moved in the past 10 years. The courts are less reluctant to interfere with what would once have been regarded as the Minister's prerogative. Partly it's a matter of confidence: as a judge, you do it once, and you don't get fired, so you do it again. You sit there, and your first thought always is, 'Is this chap being fairly treated?' And if not, your next thought is, 'Am I in a position to do anything to put it right?' The new judges are more ready to give themselves the benefit of the doubt."*

Lord Justice Farquharson reportedly said:

> *"A lot of us are pushing at the frontiers. We have to be very careful: the executive is elected. We have a role in the Constitution, but if we go too far, there will be a reaction. The Constitution only works if the different organs trust each other. If the judges start getting too frisky, there would be retaliation, renewed attempts to curb the judiciary."*[3]

One of the judges, in response to a letter from me about his comments, observed:

> *"Did you notice that within a week of publishing its scholarly article on judicial review the Observer very nearly folded? It is not likely to make that mistake again."*

The analysis of the limits of judicial review, in the wider context of reflection upon the nature and limits of the judicial function, continues to attract widespread professional and public attention in all of the countries of the common law. The purpose of this paper is to examine some of the recent consideration of these issues in Australia. Within the year past a series of remarkable, innovative and unquestionably important decisions of the High Court of Australia have seemed to push forward the metes and bounds of the judicial function. The decision which has attracted the greatest popular attention is that in *Mabo v Queensland*.[4] The Court there held that the Australian common law recognised a form of native title which, where it had not been lawfully extinguished, entitled the indigenous inhabitants of Australia, and their descendants, in accordance with their laws of customs, to title to their traditional lands. The decision appears to have exploded the long-held view that Australia had been, at the time of European settlement "*terra nullius*". The decision has attracted unprecedented media attention, popular debate, political criticism and judicial controversy. But *Mabo* is just one of a series of decisions of the recent past in Australia which have brought home to the politicians and to the public what lawyers always knew: the vitally important rôle of the courts in the Australian system of government, and the particularly crucial rôle of the High Court of Australia as the guardian of the Constitution and of the law.

Before approaching a consideration of the recent controversies

in Australia I must sketch the background. I will described, with necessary brevity, the doctrine of the separation of powers as it developed in Australia. I will then illustrate the classic expositions for judicial restraint which, with some notable exceptions, marked the approach of most Australian judges until recent times. Then I will collect a few of the most recent decisions of the Australian courts which appear to illustrate a new era of bold creativity. I will mention some of the controversy which these decisions have attracted. And I will finish with a few reflections of my own upon the lessons to be derived from the controversies and the likely way ahead.

THE SEPARATION OF POWERS IN AUSTRALIA

Systems of law (unless arbitrarily imposed) tend to be, or at least to become, reflections of the people and societies they serve. Thus the English looked comfortably upon their Parliament, especially the House of Commons, as the defender of liberties, at least after the time of the Stuarts. The American colonists, however, saw the same English Parliament as indifferent to their liberties and even as instruments of their oppression. It was therefore natural that the Americans should fall under the spell of the doctrine of the strict separation of powers and produce (from the analogies of the early supervision of colonial statutes by the Privy Council) the doctrine of judicial superintendence and constitutional lawfulness.[5]

James Madison in *The Federalist*[6] wrote:

> *"The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."*

It was this opinion which secured the strong doctrine reflected in, and derived from, the Constitution of the United States of

America, that its several branches of Government are fundamentally separate. The Supreme Court of the United States in *Springer v Government of the Philippine Island*[7] expressed the principle in that country thus:

> *"Unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either Executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power."*

When the Australian Constitution was being devised by our colonists a century ago, they were so fascinated by the United States model that their own originality became dampened. Thus, they followed with the adoption of a written Constitution after the Federal model with limited assigned powers for the Federal legislature, the residue remaining with the States. In particular provisions they even followed the precise language of the United States precedent. In the arrangement of the three institutions of government, dealing respectively with the Parliament, the Executive Government and the Judicature, the Australian Constitution resembles closely its American predecessor. Yet in important respects there were differences. There was no break in the chain of continuity of lawfulness. Although in substance the Australian Constitution was approved by referendum in the colonies, in form, (and in one important particular) it was an enactment of the Imperial Parliament at Westminster.[8] This was no revolutionary instrument. The Federal union remained one "under the Crown". No Bill of Rights was attached to the Constitution, such was the impenitent faith of the Founding Fathers in the collective wisdom of the Federal and State Parliaments. Above all, the Executive powers (although nominally vested in the Queen and exercisable by the Governor General) were to be administered by the Queen's Ministers of State who were required

to secure a seat in Parliament no later than three months after their appointment as such.[9]

This last provision meant that, from the start, the Australian Constitution rejected a strict separation of powers. On the other hand, a number of Australian decisions illustrate the limits upon the "invasion" by one branch of government of the proper province of the other. Some of these decisions concern the suggested usurpation of the legislative function by the Executive or the "abdication" by the Executive of its lawmaking responsibilities.[10] But from the point of view of the present topic it is more relevant to consider the resistance of the courts to successive attempts of the Federal Parliament to entrust the exercise of the judicial power to the other branches of government[11] or to confer upon courts powers not strictly judicial in character.[12]

The high watermark of this judicial attempt to hive off and preserve as uncontaminated from the other activities of government, the functions of the judicial branch was the *Boilermaker's Case* in 1956. It held that Federal legislation to confer upon a Federal court mixed functions, some judicial and some non-judicial, was inconsistent with the language of the provisions in Chapter III of the Australian Constitution and also with the very structure of the Constitution. Thus the Court of Conciliation and Arbitration could not validly exercise *both* judicial and non-judicial powers. The decision resulted in the division of these function and their assignment respectively to an Industrial Court (out of which has grown the Federal Court of Australia) and the Conciliation and Arbitration Commission (out of which has grown the Industrial Relations Commission of Australia).

Affirming the High Court's decision in the *Boilermaker's Case*, the Privy Council observed:

> *"... In a Federal system the absolute independence of the Judiciary is the bulwark of the Constitution against encroachment whether by the legislature or by the Executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard."*[12]

Their Lordships approved a passage in Harrison Moore's *The Constitution of the Commonwealth of Australia*:

> *[B]etween legislative and executive power on the one hand and judicial power on the other, there is a great cleavage."*[13]

This cleavage of the judicial power has caused a certain inconvenience and artificiality which has been questioned in more recent decisions of the High Court of Australia.[14] It has never been accepted as operating in relation to State courts and tribunals. Behind the Federal rule lie assumptions about the easy characterisation of governmental activities and their assignment to the respective branches of government. Above all, there is the assumption that the judicial branch is concerned only in the application of pre-existing norms to facts as ascertained in order to derive the judicial decision in the particular case.[15] It is important to observe that the *Boilermaker's* decision was handed down at a time of great assurance in Australia concerning the declaratory theory of the judicial function. The notion that judges invented law was strongly rejected. Chief Justice Dixon even asserted that the law would have no meaning as a discipline if there were not pre-existing norms which the judge merely had to find and to apply. The search might be difficult and, at times, taxing. But aided by "strict and complete legalism"[16] the application of logical rules and analogous reasoning, the relevant principle of law would always be found.

This view of the judicial function (which probably still reigns in the general community and amongst most Australian politicians) is now held by few Australian judges. It was difficult to take it seriously after Lord Reid in 1972 a denounced it as a "fairy tale" in which we did not believe "any more".[17] But to emphasise the change which has come about in both the creativity and candour of the Australian courts - and to illustrate the problems which this change presents - it is as well to remind ourselves of the discarded doctrines which held sway until so recently.

THE CLASSICAL DOCTRINE OF JUDICIAL RESTRAINT

Many are the statements - both judicial and extra-curial - which illustrate the approaches that Australian judges took until quite recently concerning their creative function. Sir Douglas Menzies, then a Justice of the High Court of Australia, expressed the conventional view well:

> *"It seems to me that the most general criticism of the Privy Council, stemming largely from scholars, is that their Lordships have been too ready to accept the methods of reasoning and the decisions of High Court judges, and like them, they have failed, so it is said, to give sufficient weight to changing economic, social and political ideas, and have in this way cramped the development of Australian constitutional law ... It is likely, however, that the decision of cases upon what may seem to have been narrow grounds has provided the stability which the bolder spirits of the Supreme Court of the United States have failed to achieve ... For my own part I do not believe that judges, in the exercise of their judicial power, have any need to play the part of legislators, and when they do, the result is often unfortunate."*[18]

To the same effect were the defensive remarks of Justice Crisp of the Supreme Court of Tasmania in 1965:

> *"Our American cousins call legalistic (and in America it is a term of reproach) ... our basic legal habit which sees the practice of law as a science developing and expanding by the application of recognised techniques to an existing corpus juris but ignoring as irrelevant*

economic, social and political factors unless specifically commended to the court's attention by the legislature."[19]

In court whilst sometimes embarking upon important leaps of policy-making (the *Boilermaker's Case* is itself an illustration) the judges of Australia, with a high degree of uniformity, at least until the 1970s, presented the conclusions which they reached as substantially (if not wholly) inevitable and derived strictly from legal sources and not from considerations of policy. Perhaps the last high-water mark of the recent assertions of restraint in Australia is to be found in *State Government Insurance Commission v Trigwell*.[20]

That was a case in which the question arose whether the rule of the English common law, limiting the liability of a property owner for sheep straying from adjoining land, was part of the law of Australia. The High Court (Chief Justice Barwick and Justices Gibbs, Mason and Aickin; Justice Murphy dissenting) held that it did. The Court had no authority to alter the common law because it thought that changes in society made, or tended to make, that law inappropriate to Australian conditions. Justice Mason explained his reasons for restraint[21]:

"I do not doubt that there are some cases in which an ultimate Court of Appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adopted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the Court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the Court should be reluctant to engage in such an exercise. The Court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The Court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The Court does

not, and cannot, carry out investigations or enquiries with a view to ascertaining whether the particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the Court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the Court cannot, and does not, engage in the wide-ranging enquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature."

It will be noted that in this passage are stated the two principal reasons for adhering to a restraint on creativity on the part of the courts. The first is that of legitimacy (the lack of democratic authority and accountability) and the second involves the restrictions of the facilities available to the courts (eg to secure policy data and popular opinion). These two considerations remain at the heart of the cautions which even the "bold spirits" amongst the judiciary[22] must keep in mind as they contemplate exhortation to legal creativity and policy innovation in a particular case.

On the other hand, Justice Murphy, whilst respectful of the legislature and the Executive Government (in both of which he had served) was much more flexible in the development of judge-made law. What earlier judges had made, later judges could unmake if changing conditions warranted that step.

Before the recent series of decisions in the High Court, my own Court in Australia had to consider the rôle of a court in applying a rule or principle of the common law said to be obsolete because the social conditions upon which it depended had changed so fundamentally that it no longer seemed apt to maintain it. The issue came up for decision in *Halabi v Westpac Banking Corporation*.[23] The question was whether the common law felony-tort rule (whereby a civil action based on a felony is automatically stayed until conviction, acquittal or the establishment of a reasonable excuse for not

instituting criminal proceedings) had been superseded in New South Wales by the development of the inherent jurisdiction enjoyed by the Supreme Court to stay all civil proceedings to prevent an abuse of process and to achieve justice between the parties. The Court divided in interesting ways. Justices Samuels and McHugh both held that the Court had no power to refuse to apply a rule or principle of the common law which was so settled in its formulation and application as to have the same quality of legislation simply because the judges considered the rule in question to be obsolete or the conditions which had given rise to it to have significantly changed.[24] Justice McHugh, however, considered that such rules might be further "developed" or incorporated into wider general principles:

> *"[C]are needs to be taken to ensure that the general proposition is really the result of the application of inductive logic to a number of particular rules or situations and not a device for abandoning a settled rule in favour of one which the judge finds more attractive."*

In my own view, there were a number of reasons why the earlier common law rule was based on premises which had disappeared. At least in the case of a rule of procedure (such as the felony-tort rule), being peculiarly the responsibility of the judges, the more honest approach was to drop the pretence of "developing" a higher principle or subsuming past authority in a wider rule:

> *"[T]he more candid course to take is to acknowledge that the rule is no longer part of the law. It has now been replaced by general judicial discretion which is more flexible and sensitive to the facts of the particular case. In this way the common law has frequently developed to a higher stage of more general principle. This is, in fact, the way of our system. When the higher principle is established, earlier historical efforts, pointing generally in the same direction, can be cut away by the judges just as surely as when they were first made. They can be removed unless, in the meantime, the rule in question has taken on such an authority that it is impervious to, or inappropriate for, later judicial*

clearances."[25]

The High Court of Australia refused special leave to appeal from this decision.

Especially against the backdrop of classical theory and constitutional authority, it might be expected that the courts in Australia would experience some difficulty in enlarging their creative rôle. To the extent that the courts are merely applying, mechanically, pre-existing and clear rules (whether made by or under statute or judicial decision) they are confining themselves to their own branch of government. To the extent that they are doing something creative and expressing or deriving a new rule to be applied in a particular case, the courts are performing a function more closely akin to that usually performed in the other branches of government, ie by the legislature or the Executive. They then face the dual problems of legitimacy and methodology referred to by Justice Mason in *Trigwell*.

LEGAL PRINCIPLE, AUTHORITY & POLICY

In Australia, no definite formula has yet been provided (assuming one is possible) which explains authoritatively the final boundary of judicial creativity or the use which may be made in discovering that boundary by reference to perceived issues of policy. Of course, various attempts have been ventured to offer helpful *formulae*. In *Caltex Oil (Australia) Pty Limited v The Dredge "Willemstad"*[26] Justice Stephen offered this attempt:

> *"Policy considerations must no doubt play a very significant part in any judicial definition of liability and entitlement in new areas of the law; the policy considerations to which their Lordships paid regard in Hedley Byrne are an instance of just such a process and to seek to conceal those considerations may be undesirable. That process should, however, result in some definition of rights and duties, which can then be applied in the case in hand, and subsequent cases, with*

relative certainty. To apply generalised policy considerations directly, in each case, instead of formulating principles from policy and applying those principles, derived from policy, in the case in hand, is, in my view, to invite uncertainty and judicial diversity."

Somewhat closer to the mark was the attempt of Justice Deane in the High Court of Australia, when he considered whether a rule, which had long been followed to determine the convenient forum for the hearing of an action, should be reformulated following an important decision of the House of Lords in *Spiliada Maritime Corporation v Cansulex Limited.*[27] By majority (Justices Wilson and Toohey dissenting) the High Court declined to follow their Lordships. But none of the Judges questioned for a moment the authority of the High Court, at least in such a matter of procedural law, to reformulate the rule that would thenceforth be authoritatively binding on all Australian courts. The question was thus not one of the power of the judiciary but whether that power should in the instant case be exercised.

Justice Deane expressed, for his part, what he took to be the proper approach when a judge is confronted by an invitation to change common law doctrine and to adopt a new principle different from that which had been applied in the past. In *Oceanic Sun Line Special Shipping Co Inc v Fay*, in the course of his reasons, he said[28]:

"There are three main reference points to which regard should be paid in deciding whether the United Kingdom doctrine should be accepted as the law of this country. They are legal principle, decided authority and policy."

Justice Deane examined each of these considerations in turn. He found none of them, in isolation, sufficient to answer the question which he had posed. He concluded in these terms[29]:

"The conclusion to which I have come in relation to the arguments based on policy is that they are persuasive but not compelling. In my view, they are not sufficiently strong to warrant a decision by this Court to depart from existing principle and authority at least at this stage of the development of the law. If the law of this country is to be changed in that regard, it seems to be to be preferable that it be done by legislation enacted after full inquiry and informed assessment of international as well as domestic considerations of a kind with which the Court is not equipped to make of its own initiative... Accordingly, I would not alter established principle in favour of a judicial adoption of the broader forum non conveniens doctrine."

Interestingly, and with portents of what was to follow, Justice Deane earlier in his reasons interred the mythology of the declaratory rôle of the judicial function. He posed the question whether the Court should, if it were to alter the doctrine, make only a prospective application of the new rule, that is, not retrospective based upon the fiction that all the court was doing was declaring what had always been the law.[30] Justice Deane leaves his reader in no doubt that, if only he had been of the view that the policy considerations advanced in favour of a broader formulation of the procedural rules outweighed pre-established authority and legal principle, he would have had no hesitation in adopting the new rule and thereby holding all Australian judges to it. A more clear-sighted recognition of the creative rôle of the Court could scarcely be offered. In this sense, the actual determination of the case is less important than the exploration of the principles to be applied in resolving the quandaries of judicial methodology presented by invitations to creativity.

INSTANCES OF JUDICIAL LAWMAKING

I now come to some recent instances of judicial law-making which will illustrate my theme from an Australian context.

Privity of contract: The same volume of the *Commonwealth Law Reports* which carried the decision of the High Court in

Oceanic Shipping also includes that Court's decision in *Trident General Insurance Co Limited v McNiece Bros Pty Limited*.[31] That was a case in which an appeal from the New South Wales Court of Appeal[32] was dismissed. It involved a claim on an insurance policy by which the insurer agreed to indemnify a company against all sums which it should become liable to pay in respect of an injury to persons on specified building sites. The "insured" within the policy was defined to include the company's contractors. A person injured as a result of the negligence of one of the contractors, which was not a contractor when the policy issued, recovered damages against the contractor. By majority[33] the Court held that the contractor was entitled to enforce the indemnity against its liability to pay damages. This was so although the contractor was not a party to the insurance contract and could not itself enforce it.

The decision was built upon widespread judicial criticism, both in Australia and other countries of the common law, of the contractual doctrine of privity. Lord Diplock once described it as "an anachronistic shortcoming that has for many years been regarded as a reproach to English private law".[34] Earlier judicial threats in Australia[35] and England[36] that the courts would cure legislative procrastination by reforming the law for themselves ultimately came to fruit in *Trident*. The decision is the more remarkable because of the long catalogue of minor legislative reforms noted and the numerous law reform reports cited in which the privity rule had been criticised and even modified but not wholly cured by amending legislation.

In rejecting the approach of judicial creativity Justices Brennan and Dawson both called in aid Chief Justice Dixon's injunctions in "Concerning Judicial Method"[37]:

"It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental or settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with the result held to flow from a long established legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience."

Police verbals: There is such a wealth of illustrative material since *McNiece* that demonstrates similar forces at work at the highest level of the Australian judiciary that it is difficult to know which ones to choose. Let me start with *McKinney v The Queen*.[38] The case concerned a so-called "verbal" confession of a prisoner in custody given to the police. Over more than a decade, the High Court, and other Australian courts, had been expressing grave concern about the dangers of wrongful conviction of accused persons upon the basis of uncorroborated, unrecorded confessional statements attributed to them by people in authority. Countless suggestions were made concerning the need for reform both in judicial decisions, law reform reports and academic writing. Legislatures, often under the spell of resistance within the police services, failed to act. In *McKinney*, the High Court majority found that the time had come for the judicial branch of government to act. Most notably, the majority laid down a "rule of practice for the future". The rule was that, wherever police evidence of a confessional statement allegedly made by an accused while in police custody was disputed at trial, and its making was not reliably corroborated, the judge should, as a rule of practice, warn the jury of the danger of convicting on the basis of the evidence alone. No such warning having been given in *McKinney*, the conviction was quashed.

I believe that this development of a judicial rule to assure the justice of the trial of persons before the courts on criminal charges was a wholly desirable and beneficial development. In earlier life as a law reformer, I had urged something similar with indifferent results. I also believe that it is fair to say that the strong leadership of the High Court of Australia in the assurance of fair trials for accused persons in Australia has spared the country of the unsettling instances of serious miscarriages of justice which have blighted the reputation of British justice in the United Kingdom in recent years.[39]

But the present point is not the justifiability of the result but the judicial method used to achieve it. Justice Brennan, also a signatory with me of the Law Reform Commission Report on *Criminal Investigation* recalled its recommendations and observed[40]:

> *"The development of electronic equipment since that time has enhanced the desirability of recording, by means of audio visual machines, police interviews of suspects. The intervening years have strengthened the view which I, as a party to that Report, then expressed."*

However, his Honour again joined Justice Dawson in questioning the wisdom of over-ruling authoritative and recent statements by the High Court of principles of law. Doing so would undermine the community's readiness to accept such decisions and the grounds assigned for the over-ruling. He stated his principle thus[41]:

> *"Courts of ultimate appeal necessarily possess a wider power to mould the law, conformably with constitutional and statutory law and accordance with judicial method, to serve the contemporary needs and aspirations of society and to reflect the society's contemporary values. The exercise of this power yields rule of law and practice the application of which ensures or enhances the administration of justice and, as those rules are followed by all courts in the hierarchy, they are enforced as the law of the land ... The majority hold the view ... that there should be a general rule of practice requiring the giving of a warning 'which will operate for the future'. With great respect, that phrase is more*

appropriate to the exercise of legislative power than it is to the exercise of judicial power."

Justice Dawson continued his lonely unwavering path as the strict adherent to Chief Justice Dixon's thesis about the judicial method. He simply conformed to the then current authority of the High Court concerning warnings. He noted that in some States, including his own (Victoria), legislation had been adopted, with carefully balanced provisions, designed to provide for the audio and video recording of confessions to police.

Prospective over-ruling: An acute problem was presented by the ruling in *McKinney* that the "rule of practice" would operate only for the future. Extraordinary arrangements were adopted by the High Court Registry to deliver copies of its judgment to courts throughout Australia to be opened simultaneously after delivery of the Court's opinion in Sydney. Rather like Budget Night in Federal Parliament, these arrangements were carried through presumably because of the prospective nature of the rule which the case laid down.

The prospective operation fell to be considered in the Court of Criminal Appeal of New South Wales in *R v George Savvas*.[42] The trial in that case was conducted before the decision in *McKinney* was handed down. The trial judge had, by coincidence, been asked to give a warning very similar to that which *McKinney* prospectively established. The judge, following the earlier decision of the High Court in *R v Carr*, declined to give the jury the warning asked for. The consequence was serious. There was a real dispute concerning the allegedly verbal confession and suspicious elements about its circumstances. If the trial had been conducted weeks later the *McKinney* warning would have been mandatory. The accused was convicted. He was undergoing a sentence of eighteen

years in prison when he appealed. In the Court of Criminal Appeal, the majority (Chief Justice Gleeson and Justice Loveday) held that the rule in *McKinney* operated, as stated, only for the future. Accordingly the judge's decision not to give the warning sought was no misdirection by the legal standards of the time. In my own opinion, *Savvas* highlighted the great difficulties presented by prospective over-ruling[44]:

> *"The issue is therefore this: can it be said that the subsequent clarification of authority in McKinney, although stated as a 'rule of practice for the future' cannot or should not be confined to 'the future'? The appellant so submitted. He suggested that it would be intolerable that an accused today, possibly on a lesser charge, would have the benefit of a new practice whereas he, the appellant, was deprived of it with serious consequences for the jury's approach to the disputed admissions to police in his case. The appellant argued that the new rule had been called one of 'practice' in a futile attempt to avoid the inconvenience of retrospective operation. He urged that, properly analysed, McKinney did no more than give the authority of the Full High Court to the opinion consistently held on this subject by Deane J and expressed as part of the holding in Carr. Above all, he pointed to the fact that the reasons advanced for the new 'Rule of Practice' applied as much in 1988 (when he was allegedly 'verballed') and in 1989 (when he was tried and convicted) as they did in 1991 (when the 'Rule of Practice was declared 'for the future')."*

With serious misgivings I held myself to be bound to comply with the clear indication of the High Court that the "rule" was to apply it for the future only. That made the trial judge's direction legally adequate. But it left the verdict unsafe or unsatisfactory and warranted a retrial. But the appeal was dismissed. Mr Savvas remains in prison.

During 1991 and 1992 scarcely a month passed without important new decisions of the High Court of Australia laying down novel legal principles.

Rape in marriage: Thus in December 1991, the High Court delivered its unanimous opinion in *The Queen v L.*[45]

Reversing two centuries of understanding of the common law, it decided that it should now refuse to accept the notion that, by reason of marriage, there was an irrevocable consent to sexual intercourse on the part of a spouse. That notion was held to be a mere legal fiction. Its well-known exposition in 1736 in Hale's *History of the Pleas of the Crown*[46] was disapproved. Socially, the decision was entirely explicable; indeed, the contrary would have seemed to many to be outrageous. But arriving at it was awkward. There were earlier decisions of high authority, including of the High Court of Australia itself[47] which seemed fully to accept Hale's proposition. Moreover, statutory codifications of the common law in Queensland, Western Australia and Tasmania clearly accepted Hale's principle by containing in the definition of rape the words "not his wife". But all of the Justices of the Australian court reached the same conclusion as the House of Lords had done a year earlier.[48] Justice Brennan declared that the common law fiction "has always been offensive to human dignity and incompatible with the legal status of a spouse". Even Justice Dawson, encouraged by the House of Lords, felt able to join the majority on this occasion[9]:

> *"... I think that it is appropriate to say that, whatever may have been the position in the past, the institution of marriage in its present form provides no foundation for a presumption which has the effect of denying that consent to intercourse in marriage can, expressly or impliedly, be withdrawn. There being no longer any foundation for the presumption, it becomes nothing more than a fiction which forms no part of the common law."*

Purists, whilst welcoming this result, might argue that it amounted to the retrospective application of the criminal law - also a serious offence against human rights. A husband might have been excused for believing prior to the decision in *The Queen v L* that he was protected from criminal liability by two centuries of common

law. Instead, he abruptly found himself criminally liable. An argument for legislative reform might be that the change would have been signalled, devised after public debate and input and almost certainly expressed to operate prospectively. But the High Court of Australia could wait no longer. The "fiction" was swept aside. Not here the restraint earlier expressed in *Trigwell* on a mere matter of civil liability for stray animals. Not here the suggested expansion of a principle to a wider *genus*. Merely its simple abolition.

Rights to free speech: In August 1992 came the two decisions which establish constitutional protections for free speech in Australia. In 1977, Justice Murphy had urged that the provisions of the Australian Constitution for the election of the Federal Parliament required freedom of movement, speech and other communication, not only between the States (as s 92 provides) but in and between every part of the Commonwealth. He asserted that the system of representative government itself required the same freedoms between elections. He described such freedoms as "not absolute, but nearly so".[50] At the time, his opinion was rejected by his colleagues and derided with merry laughter throughout the legal profession. Justice Mason in a later case[51] observed[52]:

> *"It is sufficient to say that I cannot find any basis for implying a new s 92A into the Constitution."*

Yet in *Australian Capital Television Pty Limited & Ors v The Commonwealth*,[53] with scarcely a nod of the earlier dissenting opinions of Justice Murphy and their rejection, the High Court struck down provisions of the *Political Broadcasts and Political Disclosures Act* 1991 (Cth) upon the ground that they involved a severe impairment of freedoms previously enjoyed by Australian citizens to discuss public and political affairs and to criticize

Federal institutions. Such freedoms were held to be embodied in the constitutional implication of an implied guarantee of freedom of communication as to public and political discussion necessary in a constitutional democracy such as Australia.

Justice Dawson,[54] in dissent, sought to call his colleagues back to the fundamental difference between the Australian and United States Constitutions:

> *"I have previously observed (Brown v The Queen (1986) 160 CLR 171 at 214) that the Australian Constitution, with few exceptions and in contrast with its American model, does not seek to establish personal liberty by constitutional restrictions upon the exercise of government or power. The choice was deliberate and based upon a faith in the democratic process to protect Australian citizens against unwarranted incursions upon the freedoms which they enjoy ..."*

Legislation of the kind struck down, restricting political advertising by radio or television, is found in many democracies, including the United Kingdom. Its suggested object has been to enhance real debate on the basis of news and facts rather than superficial jingles and slick images which debase the democratic system. At least that was the political justification of the law. The measure was only enacted after excruciating negotiations and compromise in the Australian Senate, where the Government did not enjoy a majority. In this sense, it represented the imputed political will of the Australian people. It was struck down by reference to implied rights nowhere expressed in the Constitution, never previously found by a Court and indeed previously rejected in explicit terms. The implied rights "found" by the judges were, in some ways, seemingly contrary to the Constitution's history and intention. At times, at least, that history and intention have proved significant in holding the High Court to the letter of the constitutional document. Thus, as recently as 1990 in *The State of*

New South Wales v The Commonwealth of Australia[55] the Court has held that s 51(xx) of the Constitution did not empower the Federal Parliament to legislate for the incorporation of trading and financial corporations. It has to be said that in Australia, as in the United States, the historical interpretation of the Constitution by the courts is selective.

On the same day as the *Australian Capital Television* case was decided, the High Court also delivered its decision in *Nationwide News Pty Limited v Wills*.[56] It struck down a statutory provision protecting the Industrial Relations Commission from forms of contempt. Some of the judges drew upon the inference as to fundamental freedom of expression in relation to public affairs and freedom to criticize public institutions which they found, upon examination, in the implied nature and terms of the Australian Constitution. These are not, I hasten to say, common law rights which run so deep that Parliament may not abolish them.[57] That doctrine, seemingly accepted in New Zealand, has not been adopted in Australia[58] although it too may now have been reserved for the future by the High Court.[59] Instead, these are principles of constitutional doctrine derived from the language of the Australian Constitution and the nature of the polity which it establishes. For present purposes, it is enough to point to the novelty of the new rights (not thought previously to exist) conferred on the people of Australia without the messy and uncertain procedure of a constitutional referendum.

The last attempt by referendum to add express rights to the Australian Constitution failed dismally in 1988 when the proposals gained only 31% of the national vote and carried not a single State.

Mistake of law: A few weeks after these heady constitutional decisions, the High Court of Australia delivered

David Securities Pty Limited v Commonwealth Bank of Australia.[60] The case was one concerning an attempt to recover money paid or expended as a result of a mistake of law. The majority[61] decided that the rule precluding the recovery of money paid under a mistake of law should be held not to form part of the law of Australia. It did so notwithstanding an elaborate, even compelling, exposition that such was certainly understood to be the law of Australia until the decision in question. It was a law with many critics. It had produced endless law reform reports, carefully collected in the majority opinion. The reports notwithstanding, Parliament had failed to enact adequate statutory reform. Parties had litigated their dispute, presumably upon an assumption that their rights were settled by a rule nearly 200 years old. That rule appeared to have been endorsed by earlier decisions of the High Court of Australia itself.[62] Yet the rule was declared no longer to be the law of Australia and that with retrospective operation.

Rights to legal representation: An even clearer rejection of even more recent authority of the High Court may be seen in *Dietrich v The Queen.*[63] The Court held that, in the absence of exceptional circumstances, a judge should, on application, adjourn, postpone or stay a criminal trial where an indigent accused person, charged with a serious offence is, through no fault of that person's own, unable to obtain legal representation. If such application were refused and, as a consequence, the resulting trial were not fair, a conviction might be quashed by an appellate court on the ground of miscarriage of justice. This decision is in marked contrast to the earlier holding of the Court in *McInnis v The Queen.*[64] Justice Murphy's dissent in that case was approved and followed.[65]

Resisting this change of the law, Justice Brennan again

returned to Sir Owen Dixon's essay "Concerning Judicial Method"[66]:

> *"That method guarantees the authority and acceptability of any change in the common law made by the courts ... The principle must be more precise than a value or concept, else its content is left for contention in later cases. Analogical reasoning is the handmaid of strict logic in developing the common law ... The provision of adequate legal representation for persons charged with the commission of serious offences is a function which only the Legislature and the Executive can perform. No doubt, demands on the public purse other than legal aid limit the funds available. If the limitation is severe, the administration of justice suffers. The courts can point out that the administration of justice is an inalienable function of the State and that the very security of the State depends on the fair and efficient administration of justice, but the courts cannot compel the legislature and the Executive Government to provide legal representation. Nor can this Court declare the existence of a common law entitlement to legal aid when the satisfaction of that entitlement depends on the actions of the political branches of government. In my opinion to declare such an entitlement without power to compel its satisfaction amounts to an unwarranted intrusion into legislative and executive functions. The common law is the creature of the courts alone and susceptible to enforcement by the courts: the common law is never dependent for its effect on action to be taken by the Legislature in exercise of a Legislative discretion or by the Executive in exercise of an Executive discretion. If the Constitution conferred an entitlement to legal aid, the courts would be empowered, if need be, to enforce the entitlement against the political branches of government. But we do not live under such a Constitution."*

Native title: It is against this background that the most controversial case in the series, *Mabo v Queensland*[67] must be considered. Here, the leading opinion was written by Justice Brennan whose fidelity to restraint, precedent and strict logic in the judicial method runs through most of the decisions which I have cited and many others. Yet here was a case clearly of the greatest importance in his Honour's perception. His opinion attracted the concurrence of Chief Justice Mason and Justice McHugh. In respect of the Murray Islands in Queensland, it reversed the assumption (held from the earliest days of the Australian colonies) that the continent

was *terra nullius* when settled and that its indigenous people had no title to land in Australia which Australian law would recognise. No positive action having been taken to extinguish the title of the indigenous people, it remained for the benefit of their descendants. On this occasion, Justice Dawson stood alone in dissent. Because of the peculiar acquisition and occupation of the particular islands, he agreed that they were not *terra nullius*. But he pointed to the fact that the acquisition of territory which was inhabited had nonetheless been treated as *terra nullius* by a long line of British and Australian cases, seemingly in conformity with international law at the time.

This is not the occasion to analyse this important decision of 100 pages. But it is important to observe the way in which a long-held opinion about legal entitlements affecting the most basic right of private property (ie to land) was demolished not by the legislature or even by the Executive branch. But by the least dangerous branch of government - the judiciary. The result is undoubtedly to confer substantive new rights to property upon thousands of Australian citizens and to affect what had been thought to be the right of property of many more. The economic consequences of the decision for governments and individuals will be large, to say the least. That was not felt by the High Court to be a reason for restraint in this case. The fallout and consequences in the multitudinous circumstances of native title beyond the Murray Islands is only now being dimly perceived. That was not considered sufficient (as it had been in *Trigwell*) to require the kind of inquiry and report thought necessary for a relatively minor reform of the law on liability for farm animals. Just as popular will could not be consulted in *Trigwell*, it was not available in *Mabo*. It seems safe to assume that there might have been louder and

stronger opinions concerning native title than liability for a few stray farm animals wandering onto highways. For the dissentients in *Dietrich*, the provisions of international human rights law guaranteeing the right to legal representation in a criminal trial were not thought sufficient to over-ride past court authority or the application of the pure judicial method.[68] But in *Mabo*, Australia's ratification of the *International Covenant on Civil and Political Rights* and of its *Optional Protocol* was considered a relevant factor in discerning what the modern common law of Australia required for the recognition of native title.[69]

I do not criticise these apparent inconsistencies of approach and methodology. I am duty-bound to obey the holdings that the Federal Supreme Court of my country establishes. Respectfully, I applaud the result achieved by the Court's orders in all of the foregoing cases. But I can understand the force of the dissenting opinions and of the external critics who say that this continuous flowering of legal creativity is more appropriate to the accountable branches of government, especially the legislature. Certainly the very number, variety and significance of the series and the effect on substantive law and economic rights challenges the popular notion of the judicial function, ie merely to apply settled law though the heavens may fall.

THE CRITICS HAVE THEIR SAY

Needless to say, the foregoing decisions have attracted a great deal of comment in Australia, both upon the holdings themselves and upon the High Court's methodology. Most of the attention has been paid to the particular decision in *Mabo*. Present a possible risk to people's property rights and they are bound to become very interested. But even before *Mabo* attracted a lot of attention, a paper which Justice John Toohey gave in Darwin[70] and a later

paper which Justice Brennan read to another conference, gathered in a huge amount of political and media attention.

The then Minister of Justice, Senator Michael Tate, attacked Justice Toohey's exposition of the High Court's rôle in defending individual rights. He said that Parliament would never allow the courts to "usurp" that function.[71] Other politicians criticized the notion of implied constitutional rights. Senator Chris Schacht, now a Minister, observed that "no unelected body has the right to frustrate the will of Parliament [by] making political decisions". He criticised the judges for "playing politics" contending:

> *"Six of the judges are WASP men (white, Anglo Saxon Protestant) and the other is a female WASP. The demand will come very quickly that we should appoint people to the High Court who do not represent the legal community alone."*[72]

This was a surprising remark given that only one member of the High Court, Justice Dawson, the consistent dissenter, is a Protestant. There is an irony here. The sole real WASP (if I may be so impertinent) conforms faithfully to the senator's apparent vision of the perfect judge.

Letter writers to the Australian newspapers suggested that it was inevitable, with the end of Privy Council supervision, that the "Justices of Australia's highest court should manifest their ambitions by creating laws rather than interpreting laws".[73] Journalists, whilst welcoming the implied constitutional right to free speech which might protect themselves, described the "flip-flop" from literal interpretation of legislation [to] "imposing weird and wonderful meanings on the provisions of the Constitution never dreamed of by the constitutional Founding Fathers..."[74] Others were defensive of the High Court's rôle. Thus the *Australian*

Financial Review observed[75]:

> *"Politicians today will have to learn to accept that they do not 'own' public life, have hegemony over the Constitution, or necessarily lead national debate. At present, it is Australia's judges who are showing the way towards a sound review of the Constitution while defending its verities."*

Other commentators called for frank and explicit recognition of basic rights in the Constitution, putting them "beyond the grasp of legislatures".[76] Soothing voices, both lay and legal, have sought to minimise the significance of the decisions frightening to some.[77] But leading industrial and mining figures attacked the *Mabo* decision especially. Mr Hugh Morgan, Managing Director of Western Mining Ltd, declared "The High Court has plunged property law into chaos and given substance to the ambition of Australian communists and the Bolshevik Left for a separate Aboriginal State ...".[78] This attack produced, in turn, an expression of concern by Chief Justice Mason, at a Judicial Conference at Cambridge, England, that a "concerted campaign" was being waged against the High Court by mining and pastoral interests and by some politicians. The Chief Justice stated:

> *"We live in an era in which what we are doing as Judges will be the subject of public attention and debate and that we must accustom ourselves to increasing and closer public scrutiny."*[79]

The evidence of attitudes and even of political retaliation can be seen in many big and little things. The effective dismissal of judicial officers by the reconstitution or abolition of their courts. The sometimes hysterical media campaign concerning allegedly "sexist" dispositions of judges. The establishment of a multitude of new complaint institutions and procedures. The growth of litigation attempting to make judges civilly liable for their actions as

such.[80] Attacks on judges in intemperate language[81] based on ignorance of their decisions. The failure of the Law Officers to come to the defence of the judges.[82]

One member of the Australian Federal Parliament described the decision of the High Court (on the disqualification of an independent member who had been an Australian Rules football coach) as the opinion of "a bunch of pissants".[83]

Even members, and past members, of the judiciary have added to the calumny. Justice R P Meagher of the New South Wales Court of Appeal, for example, criticised *Mabo* in these terms[84]:

> *"[Brennan J] said there were two ways of approaching the question of whether the natives in question owned the land in question. One way was to apply the existing legal authorities. One would be pardoned for thinking that a lawyer would find such course attractive, particularly if it was his duty to apply the law. But his Honour spurned such a course and thought it more palatable to invent a new law. Why? Because, he said, it was required by two imperatives: 'The expectation of the international community' and 'The contemporary values of the Australian people'. This is all a mite curious. As for the 'international community', who are they? How does one discover their 'expectations'? ... One has the uneasy feeling that all which is meant by the latter term is the overseas members of the chattering classes, Miss Sontag, Mr Chomsky, the unspeakable Pilger and the like. And in determining the 'contemporary values of the Australian people', where does one go? Not to the past Justices of the High Court, not to the Judges of the lower courts, nor to the States of Australia, not to the people in referendum, but, again, one feels, to one's very own chattering classes, who have thus ceased to be a mere nuisance and have become translated into a source of law."*

In more moderate language the former Justice J T Ludeke, whilst acknowledging the arguability of constitutional change observed[85]:

> *"We have a Federation made up of the Commonwealth and the States and Federalism is the fundamental theme of the Constitution. There is a process for alteration of the Constitution, and difficult though it might be in practice, the process enshrines the essential democratic feature of the vote of the people at referendum. It is*

our right and privilege as Australian citizens to be involved in the alteration of the Constitution. We should not acquiesce in that right being assumed by the government and the High Court."

A past Justice of the High Court, Sir Ronald Wilson, now President of the Human Rights and Equal Opportunity Commission defended the Judges pointing out that they could not defend themselves in respect of a particular decision. But the defence of the High Court's opinions both in Parliament and in the legal profession has been discriminating and often scarcely audible. Little wonder that Chief Justice Mason is contemplating a new national institution of Chief Justices to respond more effectively to criticism of judges and their courts.

CONCLUSION: OUT OF ALLADIN'S CAVE

This saga of the operation of the separation of powers in Australia demonstrates how things have changed in recent years. For the "fairy tale" generations, nurtured in the declaratory theory of the law, it was all so simple. The judicial task was mechanical. Find the facts; declare the pre-existing law; apply the one to the other. Presto! The inevitable, unarguable and single solution emerged.

It is amazing that generations of highly intelligent people fell victim to this fiction and were able to sell it to a naive community. We now realise in the judiciary that things were never so simple. Words - whether of constitutions, statutes or earlier judicial decisions - are all too often ambiguous. Reasoning by analogy is a chancy business. Situations and social conditions change so much that one judge's logic is another's unreality. The judges of the common law have always been creative. How otherwise could the system have expanded to flourish for a quarter of humanity in wildly different social conditions and over centuries beginning

with the feudal age up to our own time of interplanetary travel, informatics, nuclear fission and the double helix?

Where judges of our generation have fallen down is in failing to explain and adequately to support the essential and legitimate function of the judiciary in continuously creating new law at the margins. All too often, the judges of today have disdained candour in their legal reasoning. They have grasped at the straws of false distinctions and dubious logic pretending mere "development" of the law, denying creation of new law. The legal profession has aided and abetted these techniques. We have failed to reform our procedures in court to permit the better identification of legal principle and the more analytical presentation of relevant legal policy. Instead, all too frequently, our courts continue to focus exclusively on legal authority, ignoring the two other props of our mature common law system - principle and policy.[86]

If, then, the community and its politicians are surprised when new legal rights emerge from the common law, it is because most of them remain blissfully unaware of the true nature of the judicial function in our system of our law. They cherish the mechanical notion of the judicial rôle. They yearn for a return to the fairy tale. It pictures a world which accords with their simple views concerning the separation of powers. Yet it is entirely inappropriate to any common law country. It is especially inappropriate to one operating under a written constitution, designed to endure indefinitely and framed to uphold a democratic polity with a Federal, Parliamentary and representative system of government.

The judges and the legal profession have also been less then fully frank about the brilliant inter-action which our system of law permits between the stable, unelected, continuing elements of government (in the courts and in the permanent Executive) and the

democratic, creative but sometimes timorous and often unreliable elements of the temporary changing scene of political government (represented in Parliament and in the Ministry). Out of the inter-action between these branches of Government one hopes that a harmony will emerge. Ordinarily it does. From time to time, however, there are cacophonous and discordant notes. So it was, when Parliament and the Ministers were supreme and the courts were supine in defending basic rights. *Liversidge v Anderson* in England[7] and the *Jehovah's Witnesses* case in Australia[88] probably represent the nadir of curial assertiveness.

In Australia, we are now going through a period of unprecedented creativity by the courts. It is probably more noticeable because long postponed. It is probably more necessary in order to right many earlier judge-made wrongs. It is not to be thought that the judiciary of Australia is ignorant of the implications of the separation of powers and of the limitations which still clearly exist upon creating new legal rights and effectively abolishing old ones. The lesson of recent times is, however, the need better to inform the community about the very nature of the judicial function. This means communicating more effectively with politicians, public servants, the media and ordinary citizens. It means improving the techniques by which law, principle and policy are constantly reviewed and occasionally refreshed in the courts. It means greater candour within the legal profession and amongst ourselves about what the judicial function involves.

To act as I would urge may occasion more legitimate searching public scrutiny and robust public criticism. It may even eventually require new procedures for the appointment and confirmation of judges whose task is then seen as going beyond the merely mechanical. But

if this is what is required by the honest understanding of the true nature of the essential judicial function, then so be it. Honesty, including intellectual honesty, is an absolute pre-requisite of the judicial function. It would be a comfortable response to recent controversies in Australia to rush back to Alladin's cave, bar the door and resume the fairy tale. But it is not possible. Nor is it desirable. Legal principle and legal policy are now out in the open. The sooner our politicians, public servants, journalists and citizens realize this (and understand why it must be so) the better.

Judges and lawyers have their own duties of explanation and justification from which they should not shirk. The immediate challenge is the clarification of the boundary between the judicial function and the territory marked "Important new principle and policy Judges go no further!". Devising this boundary and marking its extremities upon the shifting sands of changing times and in a minefield of strongly held opinions is no easy task. But it is an intellectual challenge worthy of lawyers who serve in a high calling and in a legal tradition which approaches its second millennium.

FOOTNOTES

* President of the Court of Appeal of New South Wales, Australia. Chairman of the Executive Committee of the International Commission of Jurists. Fellow of the Legal Research Foundation of New Zealand.

1. 9 May 1993, 45.
2. *Ibid*, 46.
3. *Id.*
4. (1992) 175 CLR 1; 66 ALJR 408 (HC).
5. In *Marbury v Madison* 1 Cranch. 137 (USSC). Cf *The*

Communist Party Case, (1951) 83 CLR at 262. B Galligan, *Politics of the High Court*, Uni of Queensland Press, St Lucia, 1987, 249ff.

6. No 47.

7. 277 US 189 (1928), 201.

8. The particular issue concerned Privy Council appeals. See *Australian Constitution*, s 74.

9. *Ibid*, s 64.

10. See eg *Giris Pty Limited v Commissioner of Taxation* (1969) 119 CLR 365, 373, 379.

11. See eg Griffith CJ in *Huddert Parker & Co Pty Limited v Moorehead* (1909) 8 CLR 330, 355. See also *Waterside Federation of Australia v J W Alexander Limited* (1918) 25 CLR 434.

12. *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HC) affirmed *Attorney-General (Commonwealth) v The King; ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529 (PC).

13. *Ibid*, 540-1.

14. See L Zines, *The High Court and the Constitution*, (Second ed) Butterworths, Sydney, 1987, 159. See eg *R v Joske; ex parte Australian Building Construction and Builders Labourers' Federation* (1974) 130 CLR 87, 90.

15. This is the view expressed by Kitto J in *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Limited* (1970) 123 CLR 361, 374. See also *Shell Company of Australia Limited v Federal Commissioner of Taxation* (1930) 44 CLR 530.

16. (1951) 85 CLR xiv.

17. Lord Reid, "The Judge as Law Maker" (1972) 12 JPTL 22.

18. D I Menzies, "Australia and the Judicial Committee of the Privy

Council" (1968) 42 ALJ 79, 81.

19. "Legal Dynamics" (1965) 39 ALJ 81.

20. (1979) 142 CLR 617.

21. At 633.

22. The expression is that of Denning LJ in *Candler v Crane Christmas & Co* [1951] 2 KB 164 (CA), 178.

23. (1989) 17 NSWLR 26 (CA), 38. See *ibid*, 45, 57.

25. *Ibid*, 39.

26. (1976) 136 CLR 529, 567.

27. [1987] AC 460 (HL) 28 (1988) 165 CLR 197; 62 ALJR 389 (HC) at 413.

28. (1988) 165 CLR 197, 252; 62 ALJR 389 (HC) at 413.

29 *Ibid*, 252; 414.

30. *Id*, 257; 416.

31. (1988) 165 CLR 107.

32. See (1987) 8 NSWLR 270 (CA).

33. Mason CJ, Wilson, Toohey, Gaudron JJ; Brennan and Dawson JJ dissenting.

34. See *Swan v Law Society* [1983] 1 AC 598 (HL), 611.

35. *Olsson v Dyson* (1969) 120 CLR 365, 393 (Windeyer J).

36. *Beswick v Beswick* [1968] AC 58 (HL), 72 (Lord Reid).

37. *In Jesting Pilate*, 1965, 152 at 158 cited *ibid*, 141, 161.

38. (1991) 171 CLR 468.

39. See M D Kirby, "Miscarriages of Justice - Our Lamentable Failure?", The Child & Co Lecture, 1991, in [1992] *Denning Law Jl* 97.

40. Brennan J in *McKinney*, above, 479.

41. *Ibid*, 485f.

42. (1991) 55 A Crim R 241 (NSWCCA).

43. (1988) 165 CLR 314, 325.

44. *Ibid*, 291.

45. (1991) 66 ALJR 36 (HC).

46. Vol 1, 629.

47. See eg *Bartlett v Bartlett* (1973) 50 CLR 3, 22.

48. See *The Queen v R* [1991] 3 WLR 767 (HL).

49. Above, n 45 at 46.

50. *Ansett Transport Industries (Operations) Pty Limited v The Commonwealth* (1977) 139 CLR 54, 88.

51. *Miller v TCN Channel 9 Pty Limited* (1986) 161 CLR 556.

52. *Ibid*, 579.

53. (1992) 66 ALJR 695 (HC).

54. *Ibid*, 722.

55. (1990) 169 CLR 482.

56. (1992) 66 ALJR 658 (HC).

57. See eg New Zealand *Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA), 390. Cf *Pickin v British Railways Board* [1974] AC 765, 782.

58. *Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations & Anor* (1986) 7 NSWLR 372 (CA), 397.

59. *Union Steamship Company of Australia Pty Limited v King* (1988) 166 CLR 1, 10. See also *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 and G Rumble, "The Role of the Courts in the Protection of Individual Rights Through Constitutional Interpretation" in M McMillan (ed) *Administrative Law: Does the Public Benefit*, AIAL, Canberra, 1992.

60. (1992) 66 ALJR 768 (HC).

61. Mason, Deane, Toohey, Gaudron and McHugh JJ; Brennan and

Dawson JJ contra.

62. See eg *Werrin v The Commonwealth & Anor* (1938) 50 CLR 150, 159, 168; *South Australian Cold Stores Limited v Electricity Trust of South Australia* (1957) 98 CLR 65.

63. (1992) 67 ALJR 1 (HC).

64. (1979) 143 CLR 575.

65. See *ibid*, 590, 592.

66. N 63 above, 15.

67. See n 4 above.

68. See eg (1992) 67 ALJR at 30. The reference is to the *International Covenant on Civil and Political Rights*, Article 14(3)(d).

69. See (1992) 66 ALJR at 422.

70. See J Toohey, "A Government of Laws and Not of Men?", unpublished paper 4 October 1992, Darwin, NT. As to Justice Brennan's speech see M Kingston, "A High Court Bill of Rights", *The Age*, 7 October 1993, 13.

71. See report, "Court Blasted Over Rights" in *Courier Mail*, 8 October 1992, 1. The concern was by no means confined to the Labor Party. See eg "Liberal High Court Fears" in *Canberra Times*, 10 October 1992, 1.

72. See *The Age*, 7 October 1992, 3.

73. R Lightfoot, "Challenging Law's Final Arbiter" in *The Australian*, 3 October 1992, 8.

74. L Hollings, "Don't Let the Judges Govern", *Sunday Telegraph*, 4 July 1993, 105.

75. 9 October 1992, 17.

76. See eg G Barker, "The Court's Role on Rights", *The Age*, 10 October 1992, 11; W Brown, "Top Judges Only Doing Their Jobs" in *Sunday Mail*, 18 October 1992, 46; P McGuinness

"Citizens Bills Got the Right Stuff" in *Weekend Australian*, 24-25 July 1993, 2.

77. See eg D Forman, "Why *Mabo* Has Freed No Genie" in *Business Review Weekly*, 18 June 1993, 31; H Wootten "*Mabo* Means Simple Justice and No Cause for Hysteria", *Sydney Morning Herald*, 29 July 1993, 11.

78. Quoted W Brown, *Sunday Mail*, above n 76.

79. Quoted B Gallagan, "The Power of Seven" in *Weekend Australian*, 17 July 1993, 20.

80. See eg *Rajski v Powell* (1987) 11 NSWLR 522 (CA); *Yeldham v Rajski* (1989) 18 NSWLR 48 (CA); *Rajski v Wood* 91989) 18 NSWLR 512.

81. See M D Kirby, address noted, (1993) 5 *Judicial Officers Bulletin*, 41.

82. See A F Mason in B Virtue, "High Court is Planning New Rules" in (1993) 28 *Australian Lawyer*, 18, 26 (July 1993).

83. See Gallagan, above n 79. The reference is to *Sykes v Cleary [No 2]* (1992) 67 ALJR 59 (HC).

84. R P Meagher, address to the Samuel Griffith Society, Melbourne, 19 November 1992. See also the remarks of the former Justice P Connolly reported *The Australian*m 2 August 1993, 2 ["This is a naked assumption of power by a body quite unfitted to make the political and social decisions involved"].

85. J T Ludeke, "The High Court Exceeds Its Brief" in *Australian Financial Review*, 30 July 1993, 19.

86. See *Oceanic Shipping* above n 28 at 252; 414.

87. [1942] AC 206 (HL).

88. *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116.