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Between 5 and 6 August 1993 the New Zealand Legal Research Foundation conducted a conference in Auckland on the subject of courts and policy. The participants included some of New Zealand's leading lawyers. Overseas participants included Lord Woolf of Barnes (UK), and Professor G de Q Walker and the writer (Australia). At the close of the conference the President of the Court of Appeal of New Zealand, Sir Robin Cooke, offered a summary of the principal themes. What follows is a precis of some of the main points raised during the conference.[1]

Appointment and removal of judges

After an introduction by Justice Bruce Robertson, President of the Foundation, the participants settled down to the energetic presentation of an eighty page paper prepared by Sir Geoffrey Palmer, the former Prime Minister of New Zealand and now Professor of Law at the Victoria University of Wellington. The paper dealt with judicial selection and accountability. It described the features of judicial independence as practised in the United Kingdom, Australia and New Zealand. It then examined the practice of appointing judges in New Zealand. Sir Geoffrey revealed, apparently for the first time, that changes in judicial superannuation in 1990,

designed to close off the government's superannuation scheme, had elicited a suggestion that the judges would sue if their entitlements were disturbed in breach of constitutional convention. This revelation, not subsequently carried into effect by the judges, became front page news in the New Zealand newspapers.

Sir Geoffrey Palmer confronted the apparent paradox of how judges could be independent and accountable at the same time. He listed ten qualities which, while in government, he had looked for when considering the suitability of a person for appointment to the judiciary.[2] He described his (unsuccessful) efforts to appoint a woman and a Maori to the New Zealand High Court bench. It should be noted that the first woman has since been appointed to the High Court, following the elevation of Dame Sylvia Cartwright, formerly Chief Judge of the District Court of New Zealand. As yet no person of Maori descent has served on the New Zealand High Court or the Court of Appeal.

Sir Geoffrey Palmer's paper examined the various schemes operating in the United States of America designed to ensure both the independence and accountability of the judiciary. In only eight States of that country does the Governor appoint judges, and in most of these the appointment must be confirmed by the State Senate. In three States, the legislature elects the judges. In thirteen States, party nominees are elected. In eighteen States, there are elections on a non-partisan basis. In nineteen States, the so-called "Missouri Plan"

operates. Under that Plan a commission is established to nominate candidates for appointment as judges. When a position falls vacant, the commission draws up a short list, usually consisting of three names. The Governor may then appoint a person from that list. Thereafter, voters may decide whether or not to retain the judge.

A recent and well known example of the "recall" of a State judge of the United States is that of Chief Justice Rose Bird of California who, with one of her colleagues, failed to secure re-election following a highly political campaign directed at the judges' alleged refusal to uphold any sentence of capital punishment.[3]

Having reviewed the systems of judicial selection in the United States, including that followed in respect of Federal judges (which requires the advice and consent of the Senate, following the President's nomination), Sir Geoffrey Palmer concluded that the present system in New Zealand served that country well, and should not be altered. Specifically, he rejected the suggestion that a judicial commission should be established to appoint judges in New Zealand. He suggested that such a course of action might result in an unacceptable surrender of power by the judiciary and the legal profession. He acknowledged that, as judicial work increasingly involved important policy questions, not least under the New Zealand Bill of Rights, it might become necessary for Ministers to consult more widely about appointments than had occurred in the past. Specifically, he considered that it should be mandatory for the Attorney-General to

consult with the Justice and Law Reform Select Committee of Parliament, the Deans of the New Zealand Law Schools, as well as the judiciary and other members of the legal profession. On the subject of the removal of judges, Sir Geoffrey Palmer proposed that District Court judges should be afforded the same level of protection from removal as that enjoyed by High Court judges - something which has been achieved in some States of Australia.[4] Recent discussion papers and protocols for changes to the methods of appointing judges in Australia and England make this session highly relevant beyond the New Zealand legal scene.

Democratic v elitist judicial solutions

Sir Geoffrey Palmer's address was followed by a paper by Professor William Hodge, of the Faculty of Law of the University of Auckland. Its title - "Lions under the Throne - the Least Dangerous Branch" - recalled the well known instances in English legal history where the subjection, even of the King, to the law, was asserted by the judges. The high point in the assertion of curial superintendence - reaching even to the enactments of Parliament - was reached in Dr. Bonham's Case.[5] There, Sir Edward Coke asserted that:

> "... [When an Act of Parliament is] ... against common right and reason, the common law adjudges the said Act of Parliament as to that point void ... ."

The contrary assertion by Dicey, an apologist for Parliamentary sovereignty, presented the battle ground which was explored in a number of papers which followed, including that of Professor Hodge. Born and educated in

the United States, Professor Hodge drew upon numerous examples from American jurisprudence where the power of the courts over laws made in the other branches of government has been successfully asserted.

One of Professor Hodge's main points was his contention that this assertion of curial power often introduced a premature and elitist solution to a complex problem deserving of a more democratic resolution. He cited an article by Justice Ruth Bader Ginsburg, now confirmed as a Judge of the Supreme Court of the United States, suggesting that the abortion decision of that court in Roe v Wade, whilst providing a solution of sorts to the public controversies about abortion in the United States, had interrupted an orderly process of legislative reforms then underway:

> "Roe v Wade sparked public opposition and academic criticism ... searing criticism of the Court, over a decade of demonstrations, a stream of vituperative mail addressed to Justice Blackmum, annual proposals for over-ruling Roe by constitutional amendment, and a variety of measures in Congress and State legislatures because the Court ventured too far in the change it ordered and presented an incomplete justification for its action ..."[6]

Professor Hodge contrasted the way in which New Zealand, with its unicameral legislature, had quite quickly achieved important reforms of the law. It had done so by a more legitimate democratic process. Against this background he noted recent amendments to the Human Rights Bill, adopted by the New Zealand Parliament on 28 July 1993, which added to the list of proscribed grounds

discrimination on the grounds of sexual orientation and (in effect) HIV status.

From the point of view of foreign participants, the most interesting part of Professor Hodge's paper was probably the section which described the line of authority in the New Zealand Court of Appeal which suggests that "some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them".[7] This idea has some supporters in other common law jurisdictions. To date this view has not attracted majority support in courts in either Australia[8] or England.[9] However, the question has been reserved by the High Court of Australia[10]. Recent decisions of that Court concerning implied constitutional rights to free speech, although derived ultimately from the language, structure and purpose of the written Federal Constitution of Australia, suggests that the thinking in the High Court of Australia is progressing along lines similar to that found in the New Zealand decisions collated by Professor Hodge.

Growing impact of international law

The third paper was given by Professor Kenneth Keith, President of the New Zealand Law Commission. It addressed the topic of "Policy and Law: Politicians and Judges (and Poets)". The reference to poets picked up Shelley's famous line that:

> "Poets are the unacknowledged legislators of the world."

Professor Keith described the way in which domestic law, including that of New Zealand, had been affected by developments in international law. He mentioned a number of areas in which the New Zealand Bill of Rights Act had been applied to help judges solve difficult questions which otherwise had no clear legal answers. Thus, he referred to the decision of Justice Thomas in a case concerning the lawfulness of the withdrawal of life sustaining treatment and medical support procedures from a patient who was unable to consent to treatment, who had no hope of recovery, and who could gain no medical benefit from the treatment and support. Professor Keith appealed for the use of a wider range of source materials in uncovering the principles which lie behind the common law. He suggested that, although common law judgments provide much assistance, there was a need for judges today to explore a fuller range of sources to ensure that the appropriate principles are identified, tested against the facts, and against one another, and then, as necessary, abandoned or qualified.

Judicial review of Ministerial action

Lord Woolf's paper returned to the issue of the judicial role in identifying and applying policy in curial decisions. The paper, entitled "Separation of Powers in the United Kingdom", examined the role played by the courts in the United Kingdom in applying policy, and in scrutinising the appropriateness of executive and legislative action in particular cases where it was challenged.

Lord Woolf recounted the way in which leaders of the English judiciary, including members of the House of Lords - the Lord Chief Justice and the Master of the Rolls - had with increasing energy called for the enactment in United Kingdom domestic law of the European Convention on Human Rights. He pointed out that English legal decisions could now be taken to the European Court of Human Rights in Strasbourg. He suggested that it was more appropriate, at least in the first instance, that citizens should be entitled to have the opinion of the English courts upon the application of the Convention to domestic law.

The peculiarities of the English constitutional arrangements tend to surprise New Zealanders, and shock Australians, Canadians and United States lawyers who are brought up on a stricter notion of the separation of the judicial branch of government from the others. The Lord Chancellor combines in his person all three branches. The Law Lords not infrequently take part in debates on policy questions in the chamber of the House of Lords, a course described by Lord Woolf.

Lord Woolf described the recent decision of the House of Lords in In re M[12]. That decision had been delivered shortly before the commencement of the Auckland conference. It provided a timely statement of the relationship of the judges with the other branches of government in England. Lord Templeman, for example, said in his speech:

> "Parliamentary supremacy over the judiciary is only exercisable by statute. The judiciary enforce the law against individuals, against institutions and against the executive. The judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong but judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown .... To enforce the law the courts have power to grant remedies including injuctions against a minister in his official capacity. If the minister has personally broken the law, the litigant can sue the minister ... in his personal capacity. For the purpose of enforcing the law against all persons and institutions, including ministers in their official capacity and in their personal capacity the courts are armed with coercive powers exercisable in proceedings for contempt of court."[13]

Lord Woolf pointed out that the decision in In re M had vindicated criticism of earlier English authority voiced by the noted public law expert, Sir William Wade. The Crown's officers were shown not to be above the law. The courts would enforce the law, if necessary, by orders directed to the Crown's officers to bring them into compliance with law.

Following the United Kingdom's announced intention to ratify the Maastracht Treaty on Europe, proceedings were brought in the High Court in London by Lord Rees-Mogg, challenging the proposed ratification on legal grounds. The Speaker of the House of Commons (Miss Betty Boothroyd) gave an unprecedented "warning" to the judiciary. She stated that the Bill of Rights of 1689 would be "required to be fully respected by all those appearing before the court". The "warning" rather missed its target, given that Lord Rees-Mogg was not questioning the validity of the proposed statute but was arguing that it was not sufficient to permit the government to ratify

the treaty. The High Court proceeded to hear and dismiss the challenge. At the time of the Auckland conference, an appeal was still pending.

Lord Woolf also mentioned important developments in Scottish law, consistent with the new authority of the House of Lords. His paper represented a clear exposition of the new assertiveness of the English judiciary in its use of judicial review to secure the triple objectives of lawfulness, fairness and reasonableness in administrative action.

Criticism of excessive judicial law making

By way of contrast, the succeeding paper was given by Professor Geoffrey Walker, Dean of the Faculty of Law at the University of Queensland. He described what he saw as a "polity drift" in the Australian judicial response to a number of issues considered by the courts in the past decade. Singled out for particular criticism was the decision of the High Court of Australia in the Tasmanian Dams case[14] and in Mabo v Queensland [No 2][15]. Of the latter, Professor Walker said:

> "... [T]he court ... proceeded to overturn the long-established legal doctrines concerning the legal order of a territory occupied by way of settlement rather than conquest, and asserted an entirely new legal doctrine for the Australian mainland, retrospectively to 1788. In effect, the court created a Treaty of Waitangi structure for land rights but dispensed with the need for a treaty. The economic consequence of that abuse of judicial power is already becoming apparent ... ."

Professor Walker called for a return to what he described as the rule of law and a respect by the judiciary for their proper role and limited province. As

disclosed in earlier writings, Professor Walker is not a doctrinaire supporter of Dicey's theory of parliamentary omnipotence. He found attractive some of the theories expounded in the New Zealand Court of Appeal concerning common law rights which "lie so deep" that they cannot be overridden, even by Parliament. Whilst applauding the results of the High Court's decisions in the Capital Television[16] and Nationwide News[17] cases, Professor Walker's basic thesis was that the courts should withdraw from inventing new law. Instead, the democratic forces in society should restore "the rule of law, a democratic or republican agenda for constitutional change ... [and] a restoration of the separation of powers and indeed perhaps its extension". By way of example, Professor Walker urged the introduction of citizen initiative referenda and citizen powers to recall judges who exceeded their mandate. This was a provocative paper. Time does not allow a full discussion of some of Professor Walker's views. The tension in his comments between the criticism of judicial innovation and the praise of judicially discovered fundamental rights (such as the constitutional right to free speech) was never fully resolved in this writer's respectful view.

One of the participants in the audience at the seminar was Justice Robert French of the Federal Court of Australia. He described some of the reaction to the Mabo decision in Australia. He put the criticism in the context of heightened criticism of judges generally, including on grounds of alleged gender bias. He expressed

concern about community ignorance about the role of the judiciary and suggested that this ignorance was often shared, in full measure, by legislators.

Constitutional fundamentals: Waitangi Treaty

There was quite a contrast in the next presentation - that of Sian Elias QC - on "The Treaty of Waitangi and Separation of Powers in New Zealand". Ms Elias described the way in which the Treaty formed the foundation upon which the British assumption of sovereignty in New Zealand was based. To the Maori, it is a "sacred compact", with an entrenched status which the courts of New Zealand should uphold as a fundamental principle of the (unwritten) New Zealand constitution. Ms Elias pointed out that the compact was seen (and explained at the time by the missionaries) as a personal one between the Queen [Victoria] and the Maori chiefs of New Zealand. Parliament did not feature in these discussions. Nor was there any suggestion that the Queen herself was constitutionally unable to exercise the powers which the Maori chiefs conferred upon her personally. This emphatic relationship between the Maori and the Sovereign presents a particular issue of interest to Australian lawyers, considering the legal implications of the suggestion that Australia should become a republic. In New Zealand, a particular difficulty which would be presented by a like proposal, would be the personal relationship between the Crown and the Maori people established by the Treaty.

Ms Elias criticised the way in which legislative and other "reforms", designed to achieve "corporatisation and

privatisation" in New Zealand, had reduced the Crown's capacity to perform its Treaty guarantees to the Maori. Of relevance to the theme of the conference, Ms Elias suggested that the doctrine of parliamentary sovereignty may not have any application to the "fundamentals of the New Zealand constitution", including the obligation of the Crown to respect the Treaty of Waitangi and of the courts to uphold that obligation. She explained this notion upon the footing that the doctrine of parliamentary sovereignty is a feature of the possession of territorial sovereignty. As, in New Zealand, that territorial sovereignty was secured by the Crown in the terms of the Treaty, the conditions laid down by the Treaty attached to and controlled the grant of sovereignty and all the laws and rights which derived from it.

Ms Elias believed the early decisions of the New Zealand Court of Appeal on the Treaty of Waitangi had defused a potentially destabilising situation in New Zealand:

> "By the Treaty an independent people lost their standing at international law. With the loss sovereignty the Maori as a people have no effective forum in which to insist upon performance of the Treaty, except the forums afforded by domestic law. The protection of Maori culture and the authority and dignity as a people is fundamental to the legitimacy of our political and legal structures. If effective redress is denied, the result is unjust. The effect of injustice will be alienation and social disruption."

Judicial lawmaking and separation of powers

The succeeding paper was delivered by the writer on "Courts and Policy: the Exciting Australian Scene". It began with a description of the earlier Australian legal authority on the separation of powers. As the Executive must sit in Parliament under the Australian Constitution[18], the doctrine has been explored mainly, but not exclusively, in relation to the separation of the judicial branch.[19] Separation had, in turn, sustained the earlier approaches to judicial restraint on the part of Australian courts, led by the High Court of Australia. Curial and extra-curial statements of Australian judges describing that approach were listed. The latest in a long series of explanations of judicial restraint was that contained in State Government Insurance Commission v Trigwell.[20] There it was pointed out that why the High Court of Australia lacked the legitimacy and the methodology to replace the English law on liability for sheep, straying from adjoining land, by a legal principle more suitable to the Australian farming environment. Mention was made of the differing views concerning candour in the abolition of judge-made rules of the common law, at least where these affect matters of procedural law where the judges can be expected to take a more active and creative role.[21]

By way of contrast with these earlier cases, a list of recent decisions of the High Court of Australia was presented illustrating the extent to which, in the past two years, that court had entered with energy and

creativeness into important issues of legal policy and principle. The list includes decisions altering the law on privity of contract[22]; the law on verbal confessions to police[23]; the approach to prospective over-ruling of earlier legal authority[24]; the law on rape within marriage[25]; the law on constitutional rights to free speech[26]; the law on mistake on payments made under a mistake of law[27]; the law on rights to legal representation in criminal trials[28]; and the law on native title to land[29].

Some of the criticism, unprecedented in its vigour, expression, variety and persistence, which has followed the foregoing decisions was recounted. The paper ended with an appeal for greater candour by the judges in explaining to the community the legitimate role of the judiciary in a common law system in developing legal principle which reflect changing perceptions of legal policy.[30]

The last substantive paper of the conference was delivered by Professor Richard Mulgan, a New Zealander, now of the Australian National University in Canberra. Titled "The Westminster System and the Erosion of Democratic Legitimacy", Professor Mulgan took to task the democratic politicians in a number of countries (including Australia, New Zealand and the United Kingdom) who had lost the confidence of their communities by succumbing to the advice of "poll-driven media advisors" and repeatedly attempted to deceive the electorate. This, he claimed, had caused a crisis of legitimacy and a

vacuum which the courts, as a still relatively trusted branch of government had, naturally enough, begun to fill.

Professor Mulgan considered that the only remedy for this erosion of respect for elected government was substantial electoral reform. As it happened, coinciding with the conference in Auckland, a debate was occurring in the New Zealand Parliament concerning proposals for reform of the system by which that country's unicameral legislature is elected.

Responding to the words of praise concerning the New Zealand Parliament in matters of abortion, human rights and other reforms, Professor Mulgan pointed out that these were achieved generally upon free or "conscience" votes. Where, however, Parliament voted according to party whips, there was no such assurance that it would reach the right conclusion.

Summary of the conference

The conference closed with a remarkable summary offered by Sir Robin Cooke. He was prompted, by one remark of Professor Walker, to express a personal view that, in Sir Anthony Mason, Australia had probably the best Chief Justice of the High Court of Australia it had ever had, "not excluding Sir Owen Dixon". He said that the cases coming before that court today were much more difficult than those in earlier times. It was therefore fortunate that it had at the helm a Chief Justice with a "breadth of vision".

Nonetheless, Sir Robin agreed with Professor Walker's views about A V Dicey. He pointed out that, apart from Dicey's "dogma" about parliamentary sovereignty, he had also been wrong about Home Rule for Ireland and other topics.

In an interesting comment on Sian Elias's paper, and referring to the particular relationship between the Maori and the Sovereign, Sir Robin observed a possible application of his thesis that some laws were beyond parliamentary power. Specifically, he mentioned that if the New Zealand Parliament were purportedly to abolish the Monarchy in New Zealand, without, for example, consulting the people by referendum, the courts would have to "think very seriously" whether the existence of the Monarchy, under the New Zealand constitution, was not a "fundamental postulate". He pointed out that Sir Owen Dixon had once suggested that the supremacy of the Crown, as the guardian of the law, was the fundamental rule of both Australian and English law.

Sir Robin Cooke pointed out that the decision of the High Court of Australia in Mabo was not revolutionary when seen from beyond Australia. It had the "soundest of legal antecedents". He said that it was "totally unfair" to venture the suggestion that it was not solidly based upon "a wide range of jurisprudence which exists outside Australia".

Sir Robin was less enthusiastic about the description of the New Zealand Court of Appeal as "activist". He preferred to adopt Lord Woolf's

description of the present House of Lords, viz "virile". He supported the writer's appeal for "absolute honesty". For judges this meant not only pecuniary honesty but also intellectual honesty, demonstrated by reasons which would be seen as both candid and compelling.

Sir Robin Cooke resisted one suggestion made by Sir Geoffrey Palmer, that judges should refrain from public discussion of legal policy issues. He said that, increasingly, judges in all of the countries represented at the conference were invited to take part in conferences and public activities. Such obligations had to be accepted. Nowadays they "go with the job". If this sometimes upsets politicians it may nonetheless contribute to better informed decisions within the community, especially upon matters of legal and judicial significance.

Sir Robin Cooke declared himself in favour of a judicial appointments commission, although not necessarily comprising a majority of judges. In terms of accountability, he pointed to the fact that judges must be accountable to a longer time frame than most politicians. A good judge will be thinking ten, twenty and even fifty years ahead. That judge's duty is to explore wider horizons and to look beyond his or her own jurisdiction to the "world as a whole". It is in that context that universal human rights, reflected in the New Zealand Bill of Rights and in the International Covenant on Civil and Political Rights had a part to play in influencing the development of domestic law.

Courts and policy: a concern for laywers and citizens

The Auckland conference concluded with a dinner at the Northern Club in Auckland. Sir Robin Cooke was admitted as a Fellow of the New Zealand Legal Research Foundation, one of only six such Fellows admitted in the twenty year history of the Foundation. The dinner finished with civilised speeches extolling the links between lawyers, judges and the legal systems of common law countries.

The conference demonstrated the similarity of the issues coming, at the same time, before the judiciary of Australia, New Zealand and England. The high similarity of the judicial responses; the advancing notions of fundamental rights; and the increasing demand for judicial review to defend lawfulness, fairness, and reasonableness came out of all of the contributions. Whilst there was no unanimity about the success of the various responses to the common problems, the sharing of experience was valuable in itself.

In his closing comments, Lord Woolf pointed to the much greater use being made in England today of cases decided in Australian and New Zealand courts. In the area of administrative law and judicial review, the antipodean decisions have sometimes led the way and provided a stimulus to the legal system from which they had originated.

It is to be hoped that the New Zealand Legal Research Foundation will publish the papers of the conference. They concern issues of fundamental importance

both to substantive public law and to the future role and methodology of the judiciary. Those issues deserve the most careful consideration by judges and lawyers - and of all concerned citizens - in all common law countries at this time.

M.D. KIRBY*

1. The expected publication of the conference papers will most likely reflect the format of an earlier conference on the problems and prospects for judicial review in the 1980s. See M Taggart (ed) Judicial Review of Administrative Action in the 1980s - Problems and Prospects, OUP, Auckland, 1986. See also note M Bowman (1986) 5 Auckland Uni L Rev 360.
2. His list included: experience; knowledge of the law; integrity, honesty and uprightness; industry; impartiality; appropriate age; good health; community experience; skills in communication and collegiality.

3. See J R Grodin, "Developing a Consensus of Constraint" 61 So Cal L Rev 1969 (1988).

4. See eg Constitution Act 1902 (NSW), s 53(2) read with s 52(1).

5. (1610) 8 Co Rep 113b; 77 ER 646 at 653.

6. R B Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v Wade" 63 NCLR 375 (1985).

7. Fraser v State Services Commission [1984] 1 NZLR 116 (CA) 121; New Zealand Drivers' Association v New Zealand Road Carriers [1982] 1 NZLR 374 (CA), 390.

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

9. Pickin v British Railways Board [1974] AC 765 (HL), 782.

10. Union Steamship Company of Australia Pty Limited v King (1988) 166 CLR 1, 10. See also 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.

11. Auckland Area Health Board v Attorney-General [1993] 1 NZLR 235 (HC). cf Airedale NHS Trust v Bland [1993] 1 All ER 821 (HL).

12. In re M [1993] 3 WLR 433 (HL) overruling Factortame [No 1] (R v Secretary of State for Transport; ex parte Factortame Ltd [1990] 2 AC 85 (HL).

13. ibid at 437.

14. The Commonwealth v Tasmania (1983) 158 CLR 1; 46 ALR 625 (HC).

15. (1992) 175 CLR 1.

16. Australian Capital Television Pty Limited & Ors v The Commonwealth (1992) 66 ALJR 695 (HC). See N F Douglas, Freedom of Expression under the Australian Constitution (1993) 16 UNSWLJ 315.

17. Nationwide News Pty Limited v Wills (1992) 66 ALJR 658 (HC).

18. Australian Constitution, s 64.

19. See eg R v Kirby; ex parte Boilermakers' Society of Australia (1956) 94 CLR 254 (HC); affirmed Attorney-General (Commonweath) v The Queen (1957) 95 CLR 529 (PC).

20. (1979) 142 CLR 617.

21. Halabi v Westpac Banking Corporation (1989) 17 NSWLR 26 (CA) 38, 45, 57.

22. Trident General Insurance Co Limited v McNiece Bros Pty Limited (1988) 165 CLR 107.

23. McKinney v The Queen (1991) 171 CLR 468.

24. Discussed in R v Savvas (1991) 55 A Crim R 241 (NSW CCA), 291.

25. The Queen v L (1991) 66 ALJR 36 (HC).

26. Australian Capital Television above n 16; Nationwide News above n 17.

27. David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 66 ALJR 768 (HC).

28. Dietrich v The Queen (1993) 67 ALJR 1 (HC).

29. Mabo v Queensland [No 2] (1992) 175 CLR 1.

30. Referring to the criteria suggested by Deane J in Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197, 252; 62 ALJR 389 (HC), 413. See also D Solomon, "The Political Impact of the High Court", Allen & Unwin, 1992, Sydney, 184 ff.

* President of the New South Wales Court of Appeal. Fellow of the New Zealand Legal Research Foundation.