Constitutional Law

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I Introduction

This entry records the election results from the 2017 general election and the configuration of the coalition government that was appointed. This continues the practice established 21 years ago, following the first mixed-member proportional (MMP) elections in 1996. These reviews have recorded the results of each MMP election (eight in total) and the make-up of the governments that were appointed. This review also traverses two further developments: the rationalisation of the superior courts (the High Court, Court of Appeal and Supreme Court) under the Senior Courts Act 2016, and the Supreme Court decision in *Osborne v Worksafe New Zealand*.[1] The Court held to be judicially reviewable the decision not to prosecute the chief executive of the company responsible for the Pike River Mine disaster.

This is a shorter entry than usual. Three public law cases have been argued in the Supreme Court but the decisions were reserved at the time of writing. Two decisions concerned Arthur Taylor's challenges to the Key Government's 2010 amendment to the prisoners' voting ban: Did the High Court have jurisdiction under the New Zealand Bill of Rights Act 1990 to grant a declaration of inconsistency,[2] and was the 2010 amendment enacted in breach of the entrenchment provisions of the Electoral Act 1993?[3] The third appeal concerned overlapping iwi claims in Treaty settlement negotiations.[4] Would it be an improper interference in the legislative process for the Supreme Court to rule on mana whenua rights in order to resolve such claims? These cases involve significant public law issues that must await the next Constitutional Law entry. This entry will record the Court of Appeal decisions and the questions on which the Supreme Court granted leave to appeal.

This entry is written at a propitious time. First, the intensely unpopular waka-jumping legislation has been dusted off and re-introduced in the House of Representatives. This entry revisits the criticisms levelled against that legislation when it was operative from 2001-2005. Secondly, this entry ends on

[1] *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447.
[2] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24.
[3] *Taylor v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643.
[4] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 554.

a lament for basic freedoms. Two unrelated incidents unfolding at the time of writing triggered intense debate over freedom of speech. In July 2018 the Auckland City Council refused two alt-Right Canadian provocateurs a council venue to propagate their contentious views. The Council's action provoked a range of responses. A second incident occurred while that debate still simmered. In August 2018 the Vice Chancellor of Massey University cancelled a speaking engagement by Dr Don Brash at the university's Manawatu campus. She cited hate speech and Brash's support for the ginger group, Hobson's Pledge. These provocative actions are concerning, calling for comment in this entry.

The 2017 elections

A *Return to coalition government*

The appointment on 26 October 2017 of the Labour-New Zealand First Coalition Government signalled a return to formal coalition government. This model prevailed throughout the first three MMP electoral cycles (1996-2005) but was then jettisoned. The early assumption was that government formation under MMP would necessitate political parties entering into formal coalitions, with Cabinet comprising ministers appointed from different parties. The first coalition agreement recorded: "A feature of MMP is the necessity for parties to consider coalition arrangements to enable the formation of a stable government."[5] However, the coalition "bear hug" soon placed that assumption under scrutiny. Junior coalition parties suffered disproportionately under the pressure of MMP politics, as the first two junior coalition parties discovered: the New Zealand First caucus unravelled when the National-New Zealand First coalition collapsed in August 1998 (nine of its 17 members became Independents or joined other parties),[6] and the Alliance Party in coalition with Labour from 1999 did not survive to contest the 2002 elections.[7] The Alliance held 10 seats following the 1999 elections but had effectively collapsed by mid-2002.

Junior coalition parties bear the brunt of unpopular government policies. The policies of the senior coalition party drive the political agenda and scramble the political branding of the junior coalition party, eroding that party's electoral support. Following the 2005 elections, Prime Minister Rt Hon Helen Clark jettisoned the coalition model and opted for looser confidence and supply arrangements. She entered into confidence and supply agreements with New Zealand First (seven members) and United Future (three members), which gave the Labour-Progressive coalition (51 members) a total of 61 votes on confidence. That configuration produced stable government throughout the Government's three year term. The three-term National Government (2008-2017) that followed

[5] National-New Zealand First Coalition Agreement (December 1996).
[6] See AP Stockley "Constitutional Law" [1999] NZ Law Review 173 at 173-180.
[7] See PA Joseph "Constitutional Law" [2003] NZ Law Review 387 at 388-389.

operated under similar arrangements. The confidence and supply model delivered stable government throughout four MMP electoral cycles (2005-2017), until the return to coalition government in 2017.

B *Election results*

The election breakdown for the parties that gained parliamentary representation in 2017 is as follows. The number in brackets on the far right indicates the number of seats each party held in the previous Parliament.

Party	**% of party votes**	**Electorate seats**	**List seats**	**Total seats**
National Party	44.4	41	15	56 (60)
Labour Party	36.9	29	17	46 (32)
New Zealand First Party	7.2	-	9	9 (11)
Green Party	6.3	-	8	8 (14)
Act New Zealand	0.5	1	-	1 (1)

C *Formation of the Government*

The Labour-New Zealand First Coalition Government was sworn in on 26 October 2017. Labour leader, Jacinda Ardern, became New Zealand's 40th Prime Minister. The 2017 elections confirmed what had always been known: that the largest party in Parliament need not be in government. National, with just four seats shy of governing alone, was consigned to the opposition benches. The mandate to govern under MMP reduces to simple arithmetic: which voting bloc can claim the magical 61 votes on confidence? Leader of New Zealand First, Rt Hon Winston Peters, was dubbed "king maker".[8] His party could have entered into coalition/confidence and supply agreements with either Labour or National, and have formed a government. In choosing Labour, Peters knew the coalition would need the Greens' support. This required a retreat from his "line in the sand" in 2005, when he said "no" to the Greens being in government.[9] The combined 10 votes of New Zealand First and United Future was all that Helen Clark needed to govern. In 2017, however, Peters had no option: the Labour and New Zealand First caucuses combined (55 members) were six votes shy on confidence. Labour and the Green Party concluded a confidence and supply agreement that gave the coalition 63 votes.

[8] As he was following the first MMP elections in 1996, when New Zealand First again held the balance of power.
[9] He adopted the same position in 1996 when he entered into coalition with the National Party in preference to the Labour Party. A Labour-New Zealand First Coalition Government would have needed the support of the Greens on confidence votes in order to govern.

A coalition government comprises cabinet ministers from two or more parties, usually in proportion to their relative voting strengths in the House. In Ardern's Government, Cabinet comprises 16 Labour ministers (including Prime Minister Jacinda Ardern), and four New Zealand First Ministers (including Deputy Prime Minister Winston Peters). New Zealand First also has one Parliamentary Under-Secretary. The Green Party sits outside the coalition, although it is properly part of *the government*. It has three ministers outside Cabinet exercising sundry portfolios, and one Parliamentary Under-Secretary.

D *Coalition/confidence and supply arrangements*

The Labour-New Zealand First Coalition Agreement is relatively standard.[10] It is a concise document running to a little over six pages. The parties commit to providing stable and effective coalition government and to working in the best interests of all New Zealanders, while maintaining their independent political identities. Both parties express a desire to promote their respective party policy platforms, together with public attribution of the party responsible for a particular policy. The parties agree to operate in accordance with the Cabinet Manual and undertake to work collaboratively in good faith, with no surprises.

The agreement incorporates the standard party distinction clause contained in earlier coalition agreements. The "agree to disagree" clause first appeared in the Labour-Alliance coalition agreement concluded in 1999,[11] but it is now codified in the Cabinet Manual.[12] The party leaders may negotiate to invoke the clause so as to allow the parties to differ publicly over particular issues or policies. Such processes may be used only to publicise differing party positions, not those of individual ministers.[13] The agreement sets out New Zealand First's policy priorities, which Labour agrees to support alongside its policy programme. The former's priorities cover a range of portfolio areas, commencing with New Zealand First's regional economic development fund.

[10] With the exception of the first coalition agreement entered into in 1996 to form the National-New Zealand First Coalition Government. That agreement ran to 74 pages setting out the agreed policy positions over the entire range of government portfolios: see PA Joseph "Constitutional Law" [1997] NZ Law Review 209 at 213-217.
[11] See the discussion in PA Joseph "Constitutional Law" [2000] NZ Law Review 301 at 304-307.
[12] *Cabinet Manual 2017* (Cabinet Office, Department of the Prime Minister and Cabinet, Wellington, 2017), at [5.27]-[5.28].
[13] At [5.28].

Under the confidence and supply agreement between Labour and the Greens, the Green Party agrees to provide the coalition government support on confidence and supply votes. The agreement specifies that Green Party ministers or associate ministers are bound by collective responsibility in relation to their respective portfolios, but reserves their freedom to speak as Green Party members on matters outside their portfolios. The agreement replicates several clauses contained in the coalition agreement, including those concerning consultation and co-operation, and good faith/no surprises dealings. Green Party ministers agree to be bound by the Cabinet Manual and to treat coalition briefings in confidence, unless otherwise agreed. The agreement sets out the Green Party's priorities to be progressed this parliamentary term under the headings "sustainable economy", "healthy environment" and "fair society". The parties to the confidence and supply agreement commit to consensus decision-making and to develop relationship-management processes to facilitate and develop the Labour-Greens relationship. The coalition parties and the Green Party undertake to maintain "full voting numbers present whenever the House is sitting and in Select Committee".[14] The Greens' undertaking is confined to matters on which the party has agreed to support the Labour-led Government.

E *Crystal ball gazing*

Is it chancing fate to return to coalition politics? The first two coalition governments did not give cause for confidence in government stability. The first coalition government (National-New Zealand First) was appointed in December 1999 and collapsed in August 1998. Rt Hon Jenny Shipley carried on as Prime Minister till polling day through the support of sundry members, who had either become Independent members or formed new parties. The second coalition government (Labour-Alliance) ended in the collapse of the Alliance in the third year of the electoral cycle, although confidence was never in issue. The Labour-Progressive Coalition Government (2002-2005) that followed was a coalition in name only: it was, in reality, a minority Labour government holding 54 seats, with the Progressive Party supplying just two seats. The United Future and Green parties entered into confidence and supply agreements that gave the government the votes to govern. The Labour-Progressive Coalition Government re-elected in 2005 was again in name only, with but one Progressive member re-elected (Jim Anderton). Anderton was, in truth, Labour "in drag", having reconciled his differences with the Labour Party.

[14] New Zealand Labour Party & New Zealand First Coalition Agreement, 24 October 2017 at 2; New Zealand Labour Party & Green Party of Aotearoa New Zealand Confidence and Supply Agreement, 24 October 2017 at 6.

During the period 2002-2017, confidence and supply arrangements worked well. These arrangements gave government support parties freedom to dissent and criticise government decisions outside of their leader's (or co-leaders') portfolio responsibilities. The party distinction clause ("agree to disagree") introduced in 1999 offered coalitions some flexibility, but even this could not prevent the collapse of the Alliance in 2002. Under the early coalitions (1996-1999, 1999-2002), the politics of government seemed complicated and riven, unable to provide a platform for stable administrations.

The principle of collective responsibility is the differentiating feature under coalition government. Under the Ardern Government, all four New Zealand First ministers are members of Cabinet and bound by collective responsibility.[15] Once Cabinet makes a decision, all ministers must publicly support it, regardless of their personal or political views.[16] New Zealand First ministers cannot dissent from government policies over matters outside of the portfolios they collectively hold, as they could under confidence and support arrangements. They must publicly support all cabinet decisions on whatever subject-matter. Their only recourse would be to invoke the party distinction clause and agree to disagree over a particular policy or decision. But, once Cabinet reaches a decision, all ministers must publicly support and implement it, regardless of a minister's personal opposition. Cabinet decisions are almost always reached through consensus. But, in the event of a vote, there is no doubt who would win: Labour has 16 cabinet ministers, New Zealand First four.

In politics, expect the unexpected. In 1998 Winston Peters and his New Zealand First colleagues could not abide the Shipley Government's decision to sell the Government's share of Wellington International Airport. They stormed out of Cabinet, leading to the Government's collapse. In the months ahead, Labour and New Zealand First will confront challenges that will test their resolve. Within the first year of the coalition, New Zealand First had imposed its will on four of Labour's signature policies: repealing the three-strikes legislation, increasing New Zealand's refugee quota from 1,000 to 1,500, re-instating industry-wide labour agreements, and establishing a new Crown-Māori agency to facilitate the Treaty relationship. Will the coalition model provide the malleability that allowed the former confidence and supply relationship to endure?

III Consolidation of the courts legislation

[15] *Cabinet Manual 2017* (Cabinet Office, Department of the Prime Minister and Cabinet, Wellington, 2017), at [5.24]-[5.33].
[16] At [5.25].

(a) *History of the reform*

In 2010 the Minister of Justice issued a reference to the Law Commission asking it to examine and report on a Consolidated Courts Act to consolidate the provisions of the District Courts Act 1947, the Supreme Court Act 2003 and the Judicature Act 1908 (so far as relevant to the exercise).[17] These statutes constituted respectively: the District Courts, the Supreme Court, and the High Court and Court of Appeal. The Judicature Act 1908 constituting two of those courts was over 100 years old, contained antiquated language and outdated provisions, had been amended over 40 times and lacked a logical sequence.

In February 2012, the Law Commission published an Issues Paper calling for submissions,[18] followed by a final report published in November 2012.[19] The Judicature Modernisation Bill introduced to implement the Commission's recommendations had a lengthy gestation. It was introduced in the House of Representatives on 27 November 2013 and received the Royal assent on 17 October 2016. At Committee-of-the-Whole stage, the Bill was divided into five parts that became: the Senior Courts Act 2016, the District Court Act 2016, the Judicial Review Procedure Act 2016, the Interest on Money Claims Act 2016, and the Electronic Courts and Tribunals Act 2016. This commentary concerns the first two of those Acts.

(b) *The constitutional dimension*

The Minister's reference raised an important constitutional issue. The Commission's task was to propose a consolidating courts statute. A consolidating Act aims to rationalise the law and make it accessible through ordered legislation in the one statutory instrument. Such Acts do not usually seek to introduce substantive changes, although the opportunity is often taken to modernise legislation. The Foreword to the Law Commission Issues Paper outlined the Commission's reference:[20]

> "The principal focus of this review is … on reorganisation, consolidation, and modernisation. It is not the intention that the Commission should revisit major matters of policy underlining the present legislation, such as the structure of the courts or matters of that character."

[17] Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (Wellington, February 2012, Issues Paper 29) ("Issues Paper") at [1.10].
[18] Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (Wellington, February 2012, Issues Paper 29).
[19] Law Commission *Review of the Judicature Act 1908: Towards a New Court Act* (Wellington, November 2012, Report 126) ("Report").
[20] Issues Paper at iii per the President of the Commission, Hon Sir Grant Hammond.

The President, Hon Sir Grant Hammond, observed that the Judicature Act 1908 had been "raddled" with amendments and that further legislation had been enacted affecting the superior courts: "We now have a distinctly patchwork quilt appearance of statutes relating to our trial and appellate courts, some of which overlap in various respects, or have problems or gaps in them."[21] The Commission's reference was clear: "the ultimate objective of this reference is to establish in one place, in clear and modern terms, the institutional and architectural basis of each of the New Zealand courts of general jurisdiction".[22]

One would not expect a consolidating Act to raise constitutional issues. The reference contemplated a unitary courts Act, embracing the Supreme Court, Court of Appeal, High Court and District Courts (albeit District Courts reconstituted as a single District Court).[23] The proposal was to consolidate in the one statutory instrument what were traditionally known as superior courts (High Court, Court of Appeal and Supreme Court) and inferior courts (District Courts). The Law Society, Judges of the senior courts and the writer submitted that it would be constitutionally inappropriate to lump all of the courts together in the one statutory instrument.[24]

My submission raised "like concerns" as the judges.[25] I wrote:[26]

> "The distinction between superior and inferior courts is deeply historically rooted in the institution of the judiciary as the third branch of government. To combine their constituent statutes in the statute is a conflation that defies their history and status. The High Court is New Zealand's court of general jurisdiction. The distinction between this Court and District Courts is fundamental to the structure of the judiciary and the maintenance of the rule of law. The High exercises the inherent jurisdiction of the superior courts of general jurisdiction in the United Kingdom (see section 16 of the Judicature Act 1908). District Courts, in contrast, are inferior courts of limited statutory jurisdiction, and are subject to the High Court's inherent supervisory jurisdiction. The High Court's constitutional function is to ensure that all public bodies – including inferior courts – comply with the law that confers their decision-making powers."

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[21] ibid.
[22] ibid.
[23] Issues Paper at [1.10]; Report at [1.7].
[24] Report at [1.9]-[1.14].
[25] Report at [1.13(fn 14)].
[26] Letter submission to the Commission, dated 25 May 2012.

> "In reforming the law, it can be a mistake to pitch for grand solutions with inordinate or comprehensive reach. Such solutions can quickly turn out to be a Procrustean bed. Grand solutions appeal to the tidy legal mind, if only the law were so obliging. Alas, it is not. Law is too much of *ourselves* to be anything other than organic, complex and unavoidably complicated. A case may be made to consolidate the constituent statutes of the superior courts in the one omnibus statute, as this would entail no confusion of status or functions between superior and inferior courts. A case might also be made to consolidate the District Courts and the Family Court in the one statute (the latter Court is already a division of the District Court), and to reconstitute the 63 District Courts as a single unitary court. These proposals would entail no mixed signals and might usefully rationalise the court structures. But it would be constitutional folly to lump these fundamentally different courts into one statute."

> "The distinctiveness of the High Court's general jurisdiction throws into sharp relief the proposal to include the High Court and District Courts under the one consolidating statute. The High Court is the only court of general jurisdiction in this country, and must be kept separate from the inferior courts. No objection can be made about consolidating the superior courts in one statute as the High Court does not sit in review of either the Court of Appeal or Supreme Court. In one sense, the superior appellate courts share in the exercise of the High Court's general (inherent) jurisdiction when they sit on appeal from judicial review decisions entered in the High Court."

The distinction between the High Court and District Courts was not one of aggrandisement or vanity on the part of High Court Judges. Rather, it was imperative to preserve the symbolic separation of the superior and inferior courts. The Commission considered the submissions but nevertheless plumped for a unitary courts Act for New Zealand. This comported with the Minister's reference, which was premised on a single courts Act for New Zealand, and the then provisional view of the Ministry of Justice.[27] The Commission made five points in support of a single consolidating Act: there would be no formal diminution of the jurisdiction of the existing courts; the objections raised by the judges had caused no difficulty in the United Kingdom under its unitary courts Act; a unitary Act would have functional importance in relation to clarity and simplicity of legislation; separate courts Acts would

[27] Report at [1.7].

necessitate repetition of provisions and subject-matter; and access to justice would be enhanced and the utility of the legislation improved under a single courts Act.[28]

(c) *Judicature Modernisation Bill*

In November 2012, the Law Commission issued its report recommending a single courts Act. One year on, the Judicature Modernisation Bill was introduced in the House of Representation to implement the Commission's recommendations – but with one important change. The Bill proposed a binary model to reflect the distinction between superior and inferior courts. Part 1 of the Bill proposed the repeal of the Supreme Court Act 2003 and Judicature Act 1908, and the enactment of the Senior Courts Act to reconstitute the High Court, Court of Appeal and Supreme Court. Part 2 proposed the repeal of the District Courts Act 1947 and the enactment of the District Court Act to reconstitute the District Court as a single unified court,[29] with divisions for the exercise of the civil and criminal jurisdiction of the court, a Family Court, a Youth Court and a Disputes Tribunal.[30]

(d) *Constituent Acts*

Under the binary model, the senior courts are reconstituted under the Senior Courts Act 2016 and the District Court is reconstituted under the District Court Act 2016. The constitution and jurisdiction of (respectively) the High Court, Court of Appeal and Supreme Court are set out in Parts 2-4 of the Senior Courts Act 2016, and the constitution and jurisdiction of the District Court are set out in Parts 1 and 4 of the District Court Act 2016. Both Acts provide for the practice and procedure of the respective courts, and the selection and appointment of judges. The purpose section of both Acts express the objective "to improve the transparency of court arrangements in a manner consistent with judicial independence".[31]

The new courts legislation raised a further constitutional issue. The Judicial Modernisation Bill omitted to carry over a provision from the former Supreme Court Act 2003. Section 3(2) of that Act read: "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament." In his final sitting speech upon retiring from the Bench, Justice Sir John McGrath interrupted his pleasantries to address this omission, and cautioned that there is "a risk that an important recognition of constitutional principle will disappear from our statute books".[32] The

[28] Report at [1.15]-[1.24].
[29] See now the District Court Act 2016, s 7(4).
[30] See now the District Court Act 2016, s 9.
[31] District court Act 2016, s 3(d); Senior Courts Act 2016, s 3(1)(d).
[32] "Final Sitting Speeches for Honourable Justice John McGrath, Supreme Court of New Zealand, 6 March 2015 (https://www.courtsofnz.govt.nz/speechpapers/Justice%20%). For commentary critical of s 3(2), see PA Joseph

Judicature Modernisation Bill had recently received its second reading in the House but, between the second and third readings, the omission was rectified. In Committee of the Whole, Labour opposition member (now Prime Minister), Jacinda Ardern, quoted Sir John's speech and had reinstated the statutory commitment to uphold the rule of law.[33] Minister of Justice, Hon Amy Adams, assured the House that the Government would support Ardern's Supplementary Order Paper.[34] Sir John's retirement speech achieved its purpose.

IV Prosecutorial discretion and judicial review

(a) *Pike River Mine disaster*

The tragic events at the Pike River coal mine on 19 November 2010 are thoroughly familiar. Twenty-nine men died following explosions at the mine. The company that owned the mine was found guilty of numerous offences under the Health and Safety in Employment Act 1992. It was sentenced to pay hefty fines and reparations to the families of the deceased, totalling $3.41 million. However, the company went into receivership and it was unlikely any fines would be paid or reparations made. WorkSafe charged W, a director and the chief executive of the company, with several offences under the Act. The Police conducted a parallel investigation into W's culpability but did not proceed with charges of manslaughter or criminal nuisance. There were difficulties with the manslaughter charge and the decision not to proceed with the criminal nuisance charge was made in the belief that WorkSafe was bringing prosecutions under the Health and Safety in Employment Act 1992.

The decision in *Osborne v WorkSafe New Zealand*[35] arose out of what happened next. WorkSafe offered no evidence on the charges against W and all charges were dismissed. W had offered to pay the $3.41 million in reparation ordered against the company (which was unlikely to be made) on condition that all charges be withdrawn. W's public liability insurance was not available to pay fines but could be used to fund reparation payments to the families. WorkSafe considered W's offer, along with several other factors (inter alia the high cost of the prosecution, the risk of obtaining convictions and the fact that the maximum penalties were fines), and accepted it on behalf of the families. A widow and mother of two of the deceased challenged this decision in an application for judicial review.

Constitutional and Administrative Law in New Zealand (4th ed, Thomson Reuters, Wellington, 2014) at [21.5.5(3)].

[33] (2016) 716 NZPD 13168-13170.

[34] (2016) 716 NZPD 13172.

[35] *Osborn v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447.

(b) *The litigation history*

The High Court dismissed the application for review, the Court of Appeal upheld the High Court's decision, and the Supreme Court allowed the appeal and granted declaratory relief. The High Court held that the claims were not amenable to judicial review as they did not amount to abuse of power or raise exceptional circumstances which could justify review of the prosecutorial discretion.[36] In any event, the Court held, there was no error to review. WorkSafe was entitled to take into account the reparation offer as it was not a binding agreement that payment would secure withdrawal of the charges.

The Court of Appeal dismissed the appeal but differed in its reasoning from the High Court.[37] The decision to offer no evidence was, it held, justiciable. However, the Court added that it would be rare for a judicial challenge to succeed owing to the breadth of the prosecutorial discretion and the wide range of considerations that might properly be considered.[38] Here, there was no "meeting of minds and striking of a bargain over the payment of reparation in return for withdrawal of charges".[39] To succeed, the applicants would need to have established that: (a) the decision to offer no evidence resulted from an unlawful bargain to stifle prosecution; or (b) the decision was inconsistent with the Solicitor-General's Prosecution Guidelines; or (c) WorkSafe had failed to act in accordance with the specified purposes of the Act.[40]

The Supreme Court allowed the appeal, and granted a declaration that WorkSafe's decision to offer no evidence was unlawful.[41] On the evidence, the offer of reparations was conditional on the withdrawal of the charges, and WorkSafe's decision to accept it amounted to an unlawful bargain to stifle prosecution. It did not alter the nature of the unlawful arrangement that WorkSafe had legitimately taken into account several other matters of relevance,[42] or that the parties had characterised the arrangement as "voluntary".[43] The nature of such agreements is "seldom set out on paper" but has to be "inferred from the conduct of the parties after a survey of the whole circumstances".[44] The Court was unanimous that an understanding or promise not to prosecute upon

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[36] *Osborne v WorkSafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485 at [42].
[37] *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.
[38] At [32]-[53].
[39] At [67].
[40] At [51].
[41] Relief would normally entail quashing the decision not to prosecute and requiring the prosecution to proceed with the charges: at [24]. However, that was no longer an available option owing to the passage of time: at [15].
[42] At [83]
[43] At [82].
[44] At [81], quoting *The Bhowanipur Banking Corp Ltd v Dasi* (1941) 74 Calcutta Law Journal 408 (PC) at 411 per Lord Atkin.

payment of money was contrary to the public interest and unlawful,[45] and that, on the evidence, the exchange entered into between WorkSafe and W amounted to such an arrangement.

(c) *Commentary*

The Supreme Court's decision was cautiously couched. The Court confined its decision strictly to the facts before it. It found that the conditional payment was unlawful,[46] but beyond that the Court would not venture: for example, whether, in the absence of an unlawful bargain, the decision to offer no evidence would have been unlawful, or whether the justifications for the decision advanced in the High Court and Court of Appeal "were adequate to pass the supervisory jurisdiction of the court".[47] The Court added the disclaimer that it should not be taken to agree with either Court as to the adequacy of the justifications.[48]

Previously, *Polynesian Spa v Osborne*[49] was the leading New Zealand authority on the prosecutorial discretion. That decision identified three exceptional situations where a court might consider intervening: if there had been a failure to exercise the discretion under an adopted policy that certain prosecutions would not be brought, or if the prosecuting authority had acted in bad faith, or if it had brought the prosecution for a collateral purpose.[50] Beyond those situations, the exercise of the prosecutorial discretion was non-justiciable.

Polynesian Spa personified the traditional reluctance of the courts to interfere with the prosecutorial discretion.[51] Nevertheless, the Supreme Court gave hints that the review jurisdiction might conceivably be broader. For example, the purpose section of the Health and Safety in Employment Act 1992 required "an appropriate response to a failure to comply with the Act depending on its nature and gravity".[52] The Court chided WorkSafe for its lack of "explicit focus" on the purposes of the Act as set out in that section when reaching its decision.[53] Nor was there any "explicit focus" on the emphasis in the Solicitor-General's Prosecution Guidelines on the significance of the seriousness of the breaches. "[T]here is no evident consideration," the Court observed, "of the seriousness of [W's]

[45] At [1].
[46] At [97], [101]. But compare *Carter v Coroner's Court at Wellington* [2018] NZHC 1781 where the High Court, following *Osborne*, held that "[i]t is now well settled that prosecutorial discretion is justiciable". The challenge to the exercise of the discretion raised issues of causation, irrationality/unreasonableness, improper purpose, permissible discretion and expert evidence. However, *Osborne* expressly disclaimed establishing justiciability beyond an unlawful bargain to stifle prosecution, which was not in issue in *Carter*.
[47] At [97].
[48] At [97].
[49] *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC).
[50] At [64], [69].
[51] At [61].
[52] Section 5(g).
[53] *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 at [98].

breaches of the Act and the creation of risk entailed in the breaches."[54] The Court also chided WorkSafe for not treating as relevant the withdrawal of the police prosecution for criminal nuisance, "because it would cut across the public interest in the WorkSafe prosecutions". [55] Each of those matters might indicate the potential reviewability of WorkSafe's decision to offer no evidence.

Given the Supreme Court's hints, disclaimers and cautions, we must await the vicissitudes of future litigation to piece together the law on the reviewability of prosecutorial decisions. Contrary to some suggestions, a decision not to prosecute warrants stricter scrutiny than a decision to prosecute, given that trials are controlled by due process and the presumption of innocence.

V Public law decisions under consideration

The decisions of three significant public law cases in the Supreme Court remained under consideration at the time of writing. The following records the Court of Appeal decisions appealed against and the questions on which leave to appeal was granted. The Supreme Court decisions will be reviewed in the next Constitutional Law entry.

(a) Taylor *and declarations of inconsistency*

Attorney-General v Taylor[56] involved the prisoners' voting ban under the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (the Act). This Act prohibited all prisoners serving a sentence of imprisonment on polling day from voting at a general election. Previously, the prohibition had applied only to prisoners serving a sentence of three years' imprisonment or longer. Five prisoners (including serial litigant Arthur Taylor) brought proceedings in the High Court for a declaration that the Act was inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA), s 12 of which affirms the right to vote. Heath J granted the application and issued the first declaration of inconsistency under the NZBORA.[57] On appeal, the Attorney-General did not contest the ruling that the Act was inconsistent with the right to vote and that the limit could not be justified under s 5 of the NZBORA (the "justified limits" section). Rather, the question was whether the higher courts of New Zealand had jurisdiction to make a declaration of inconsistency. The Court answered in the affirmative and held that Heath J had acted correctly in granting the declaration. On a collateral issue, the Court ruled that principal respondent, Arthur Taylor, lacked standing to seek a declaration; he was a long-

[54] At [98].
[55] *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 at [98].
[56] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24.
[57] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791.

term prisoner who was barred from voting under the former ban and could point to no material disadvantage under the Act.

The Supreme Court granted the Attorney-General and Taylor leave to appeal.[58] The approved questions were whether:

(i) The Court of Appeal was correct to make a declaration of inconsistency; and

(ii) Mr Taylor has standing.

(b) Taylor *and entrenchment under the Electoral Act 1990*

Ngaronoa v Attorney-General[59] were parallel proceedings brought by Taylor and others involving the same prisoners' voting ban under the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 (the Act). Taylor challenged the validity of the Act on account of the entrenchment provisions under s 268 of the Electoral Act 1993. These, he argued, required the Act to have been passed by a super-majority of 75% of all the members of the House of Representatives, not simply by the bare majority of members who had passed it. Section 268(1) lists six "reserved sections" and subs (2) stipulates the need for a 75% majority vote of the House or majority support at a national referendum for amendment or repeal. The question for the High Court and Court of Appeal was whether, as a matter of statutory interpretation, s 268(1)(e) entrenched all of the eligibility criteria prescribing the right to vote, or simply the minimum voting age. If the former, the Act was impeachable for failure to comply with the need for a super-majority vote in the House, and would be invalid. It was common ground that the Act altered the eligibility of prisoners to vote.

For the High Court, only the minimum voting age was entrenched and subject to the special enacting procedures,[60] and the Court of Appeal upheld that decision. The Supreme Court granted Taylor leave to appeal on the following terms:[61]

> "The application for leave to appeal is granted on the question of whether the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 purported to amend an entrenched provision of the Electoral Act 1993 and thus required a 75 per cent majority to be passed."

[58] *Attorney-General v Taylor* [2017] NZSC 131.
[59] *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643. Arthur Taylor was also a party to the appeal to the Court of Appeal.
[60] *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111.
[61] *Ngaronoa v Attorney-General* [2017] NZSC 183.

(c) *Mana whenua and overlapping Treaty claims*

The appeal against the decision in *Ngāti Whātua Ōrākei Trust v Attorney-General*[62] arose out of the Crown's policy for dealing with overlapping Treaty claims. The Minister for Treaty of Waitangi Negotiations proposed that two parcels of land in central Auckland be offered to two iwi in partial settlement of their historic Treaty grievances, and announced that legislation would be introduced to authorise the transfers. The land was in areas over which the appellant claimed mana whenua, and applied for declarations that the proposed transfers would breach the Crown's obligations and would unjustifiably erode Ngāti Whātua Ōrākei's mana whenua. The respondents applied to strike out the appellant's claim, and the High Court granted the application.[63] Ngāti Whātua Ōrākei appealed and the Court of Appeal dismissed the appeal. Legislation would be introduced to authorise the land transfers, and to grant the declarations would breach the principle of non-interference in the legislative process. The Crown's decisions to transfer the land were non-justiciable.

The Supreme Court granted Ngāti Whātua Ōrākei leave to appeal on the following question: Whether the Court of Appeal should have allowed the applicant's appeal to that Court.[64]

VI Waka jumping legislation: mark II

(a) *Mistakes of the past*

From time to time, public life spirals backwards in time to rehearse the mistakes of the past. On 13 December 2017, the coalition Government introduced the Electoral (Integrity) Amendment Bill, which is an almost exact replication of the Electoral (integrity) Amendment Act 2001 in force from 2001-2005. The only material difference is that the 2001 Act contained a sunset clause that caused it to expire on polling day 2005, whereas the proposed new measure does not.

This commentary adds to my earlier critiques of the legislation.[65] The legislation was bad law in 2001 and it will be bad law when re-enacted in 2018. A comprehensive critique of the Bill was made in the joint submission of 19 legal academics and political scientists presented to the Justice and Electoral

[62] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NZLR 648. I disclose a professional interest as lead counsel for the Interveners, Ngāti Kuri and Ngāi Te Rangi, in the Supreme Court appeal.
[63] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516.
[64] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 24.
[65] See PA Joseph "Mrs Kopu's Challenge to MMP" [1997] NZLJ 413; PA Joseph "Constitutional Law [1998] NZ Law Review 197 at 209-211; PA Joseph "Constitutional Law" [2000 NZ Law Review 301 at 308-313; PA Joseph "Constitutional Law" [2003] NZ Law Review 387 at 393-395; PA Joseph "Scorecard on Our Public Jurisprudence" (2005) 3 NZJPIL 223 at 236-239; PA Joseph "Constitutional Law" [2006] NZ Law Review 123 at 153-156; PA Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2007) at 348.

Committee (available on the parliamentary website).[66] My name was appended to that submission but Professors Claudia Geiringer and Elizabeth McLeay must take credit for the initiative and drafting of the submission. At the time of writing, the Electoral (Integrity) Amendment Bill had received its first and second readings and select committee examination.

(b) *Scheme of the legislation*

The Bill adds to s 55 of the Electoral Act 1993 an additional means by which a member's seat becomes vacant: namely, if the member ceases, under new s 55A, to be a parliamentary member of the political party for which the member was elected. A member ceases to be a parliamentary member of the political party for which the member was elected if:

- the member delivers to the Speaker a written notice that the member has resigned from parliamentary membership of the political party for which the member was elected, or wishes to be recognised as either an independent member of Parliament or a member of another political party; or
- the parliamentary leader of the political party for which the member was elected delivers to the Speaker a written notice that the leader reasonably believes the member's actions have distorted, and are likely to continue to distort, the proportionality of political party representation in Parliament, as determined at the last general election.

(c) *Criticisms*

Arguments opposing the electoral integrity legislation have been well chronicled.[67] A serious concern is the disproportionate power the legislation reposes in the parliamentary leader and/or leadership of a political party that gains election to Parliament. The leader or leadership might force a dissenting member out of the caucus, and thereto Parliament. The leading decision under the 2001 legislation accepted that a political party that expels a member from its caucus results in the member distorting Parliament's proportionality.[68] The Supreme Court adopted an expansive interpretation of proportionality and equated it with party representation. A member may distort proportionality without bringing about a change of voting strength in the House. ACT Party member, Donna Awatere Huata, was found to have distorted proportionality, although she had offered the ACT Party her proxy vote and had continued to vote alongside ACT on all but one issue. The Court found there was a causal

[66] https://www.parliament.nz/.../electoral-integrity-amendment-bill
[67] See my commentaries listed in note 65.
[68] *Awatere Huata v Prebble* [2005] 1 NZLR 289 (SC) at [43], [50] per Elias CJ.

link between Awatere Huata's conduct and the events that led to her expulsion from the ACT Party membership.

The legislation is aggressively anti-political free speech and intra-party dissent. Its very existence will inhibit parliamentary members from expressing dissenting views or antagonising the party leadership. It is constitutionally objectionable to resort to the law to repress and/or punish political dissent in a representative democracy that proclaims political free speech: [69]

> "The party-hopping issue presents a philosophical choice: whether to endorse the MMP principle of proportionality, or a member's right to exercise individual conscience and judgment. When all the arguments are weighed, the law should not seek to intrude. There is much to commend the political philosophy of Edmund Burke, who stressed a member's right to exercise individual conscience and choice. Issues of party loyalty are deeply *political*, and political issues should ultimately seek political – not legal – solutions. Responsibility should lie where it falls – with the party organisation. Parties must devise candidate selection procedures that will ensure the loyalty of those whom the party nominates for election. The political process should be as self-regulating as possible and should resist the intrusion of legal sanction."

VII Freedom of speech flashpoint

Two unrelated incidents in 2018 threw down the gauntlet to freedom of speech in this country. Separate speaking engagements were cancelled, prompting debate over citizens' right of free speech. The litmus test of a mature society is its willingness to tolerate unpopular speech, and we failed this test on each occasion. The persons who cancelled these events took deep offence at what the speakers were intent on propagating, and suppressed their freedom of expression.

(a) *Alt-Right provocateurs*

Two alt-Right Canadians, Lauren Southern and Stefan Molyneux, had an Auckland speaking engagement in July 2018. The venue was to be the City Council's Bruce Mason Centre on the North Shore. But, after the booking had been confirmed, the Council did a volte-face and cancelled the

[69] PA Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2007) at 348.

booking. Immediately beforehand, the Mayor of Auckland, Mr Phil Goff, had tweeted that he objected to a council venue being used to propagate "hate speech".[70] "Lauren Southern and Stefan Molyneux," he tweeted, "will not be speaking at any council venue":[71]

> "I am happy that we will not be using a ratepayer-funded council venue to hold an event that contravenes our values of diversity and inclusiveness … I am a strong advocate of free speech but not of hate speech, where people set out to be abusive and insulting of others based on their skin colour of faith … I just think we've got no obligation at all – in a city that's multicultural, inclusive, embraces people of all faiths and ethnicities – to provide a venue for hate speech by people that [sic] want to abuse and insult others, either [through] their faith or their ethnicity."

Goff appeared on Television One's *Q + A* programme to defend "his decision". However, the question who made the decision is disputed. Following the City Council's decision, a group of prominent New Zealanders founded the Free Speech Coalition to crowd fund a challenge to the ban on the use of council venues. The Coalition filed proceedings in the High Court seeking urgent orders to have the decision overturned. It then announced it was withdrawing its proceedings. It accepted that Regional Facilities Auckland had made the decision, not Goff. Regional Facilities cited health and safety issues, not repugnance to hate speech. Goff, on the other hand, claimed the kudos, contending that it was his tweet that banned the speakers from council venues.

The right to free speech was engaged, whoever technically made the decision. The Mayor of Auckland is a publicly-elected official who is subject to the New Zealand Bill of Rights Act 1990 (NZBORA). Section 14 of the NZBORA codifies the common law right to freedom of speech:

> "**14 Freedom of expression**
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

Southern and Molyneux, when within New Zealand, could assert that right. But so, too, could all the patrons who had purchased tickets to attend the event. They had the right to "receive … information and opinions of any kind in any form".

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[70] "Free Speech Coalition withdraws urgent legal action over Goff's Southern Molyneux decision", RNZ National News, 25 July 2018 (https://www.radionz.co.nz/news/national/362611/free-speech-coalition).
[71] Ibid.

(b) *Don Brash and the Massey Vice Chancellor*

An extraordinary thing happened at Massey University on 7 August 2018. A student politics society had invited ex-Reserve Bank Governor and former National Party leader, Dr Don Brash, to speak about his time in politics. Someone took offence at the invitation, wrote to the university's Vice-Chancellor, Professor Jan Thomas, who cancelled the speaking engagement. The decision is extraordinary in the context of a university, the statutory guarantee of academic freedom,[72] and the robust free flow of information and ideas that distinguish the international academy.

Thomas volunteered the reasons for cancelling the lecture. Brash, she said, was a founding member of the group Hobson's Pledge. This group, she observed, opposes separate electoral wards for Māori. She sought justification from a speech category that is unknown to the law – "hate speech". Thomas deposed:[73]

> "In my opinion the views expressed by members of Hobson's Pledge come dangerously close to hate speech. They are certainly not conducive with the university strategy of recognising the values of a Tiriti o Waitangi-led organisation."

Thomas also cited Brash's membership of the Free Speech Coalition, formed to contest the banning of council venues for the Canadian speakers, Southern and Molyneux. She alleged that Brash supported their views when, in fact, he claims he was unaware of them. He supported their right to speak, not their views.[74]

Thomas did not share the views Brash espoused and so cancelled his invitation to speak. How extraordinary, and how utterly dangerous in a free and democratic society. The guarantee of freedom of speech is worthless if all it protects is the right to propagate majoritarian views. Such views require no protection. The guarantee is meaningful if – and only if – it can protect the right to express unpopular speech, including repugnant or offensive speech. How depressing that we have become a

[72] Education Act 1989, ss 160-161.
[73] "ACT calls for Massey vice chancellor to resign after Don Brash ban", NZ Herald, 7 August 2018.
[74] "ACT calls for Massey vice chancellor to resign after Don Brash ban", NZ Herald, 7 August 2018.

complacent, majoritarian society. Even the Prime Minister, Jacinda Ardern, termed Thomas's decision an "overreaction".[75]

Professor Thomas encountered initial reactions to her decision, and contrived to justify her action. She proffered the fall-back justification that Brash would use provocative speech that might excite backlash and disruption, and cause security and safety concerns. Mea culpa would have been more sensible. A student organiser of the Brash lecture observed there were no serious threats. The university security assured the organisers the threat of disruption was minimal and could be contained if necessary.[76]

(C) *"Hate speech"*

There is a ready tendency today to hide behind the expression "hate speech". Goff and Thomas did so to muzzle speech of which they did not approve. But what is this concept called "hate speech"? It is unknown to law. A search of the New Zealand statutes for the expression returned no results. It is a pejorative term for speech which some, even most, might find repugnant or offensive. However, repugnance or offence is not the litmus test for fettering another's right to speak. Speech that is repugnant or offensive is not less worthy of protection than speech espousing majoritarian views. Public disapproval of repugnant or offensive speech requires blue skies openness and transparency, not suppression or censorship. American Supreme Court Justice, Louis D Brandeis, observed that:[77]

> "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

The only justifiable limits on free speech are those imposed by law. Section 61 of the Human Rights Act 1993 comes closest to a genuine "hate speech" law in New Zealand. This establishes the offence of inciting racial disharmony by using words that are threatening, abusive or insulting. Furthermore,

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[75] "Don Brash to speak about 'PC culture' at Auckland Uni", RNZ National News, 8 August 2018 (https://www.radionz.co.nz/news/natioal/363595/don-brash-to-speak-about -pc-culture)
[76] Ibid.
[77] Louis D Brandeis *Other People's Money and How the Bankers Use it* (Reprints of Economic Classics, AM Kelley, Fairfield NJ, 1986) at 92. Brandeis published *Other People's Money* in 1914 before he was appointed to the bench.

certain types of speech will attract civil liability[78] or criminal sanction,[79] and some speech might not qualify for protection under the NZBORA. This instrument permits limits on freedom of speech that are considered reasonable and proportionate under s 5 (the "Justified limits" provision). However, neither Goff nor Thomas could discharge the s 5 onus of establishing that their decisions reasonably and justifiably limited the right to freedom of expression under s 14.

[78] For example, under the law of defamation, copyright or passing off.

[79] For example, under ss 3-4 of the Summary Offences Act 1981 establishing the offences of disorderly behaviour or offensive behaviour of language. See *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91; *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.