The New Zealand
LAW JOURNAL

17 March No 5 1981

OPEN GOVERNMENT, MINISTERIAL RESPONSIBILITY AND PARLIAMENT

The Danks Committee, in the concluding section of its report "Towards Open Government" expressed the opinion that "while working practices are changing, the convention of ministerial responsibility and the neutral public servant will remain the constitutional basis of the working relationship between ministers and officials." It is difficult to disagree with that statement for the doctrine of ministerial responsibility has shown remarkable flexibility in adapting itself to the changing working practices of a Westminster-style Government. The occasions on which a minister should resign tend to be defined in terms of the occasions on which ministers have resigned, while the extent to which a minister, either individually or with his colleagues, should be held responsible for departmental actions has more to do with the practicality of managing a large department than with any form of constitutional theory.

So instead of taking a doctrinal approach and looking to see how greater access to information and greater participation in Government may affect the loose, many-faceted concept of ministerial responsibiity, it is more useful to look at the areas in which working practices may change and to perhaps question whether a public servant will indeed remain as neutral as he is today.

Two areas of change are suggested in the Report and both bear on the relationship between a Minister and his departmental officials. The first concerns the allocation of responsibility for decisions and the second a possible need for a sharper definition of areas of responsibility at senior levels. These points are not developed but simply identified as matters to be taken into careful account in mapping out the path of change.

That they are not developed is tantalising for they seem to hold a promise of departmental autonomy and this would certainly have constitutional implications. However it is likely that something very much less is envisaged.

In the context of a Report on open government references to allocation of responsibility and sharing of responsibility may easily and understandably be read as suggesting that, in defined areas, officials may be held directly responsible for their decisions — an interpretation that would have profound, not to say practical, constitutional consequences. Likewise reference to a sharper definition of areas of responsibility suggests a demarcation of exclusive areas of operation; an interpretation that would again shift responsibility — somewhere.

In discussing this the Committee refers to the Royal Commission on Australian Government Administration, and from that reference it may be inferred that it is more likely the Committee had in mind something much less drastic. Government departments not only advise Ministers but also provide serivces. Possibly the Committee has in mind no more than that an official, while remaining responsible to his Minister for the efficient management of his department to provide those services in accordance with policy, should largely be left to get on with the job.

It may also have in mind that effective management to provide those services will require participation by users of those services in the management decision-making process. Decisions based on directions from above that claim legitimacy through some nebulous concept of accountability to a Minister no longer attract unquestioning support.

This would be a change to the traditional order — arguably a change that is occurring anyway. It will have the effect of raising the public profile of officials, of forcing exposure of official opinion (something that is inevitable if

public servants are to engage in "sensible steps to involve [themselves] in public debate about policy options and national choices before decisions are taken") and generally increasing the likelihood of perceived conflict within a department, between departments, and between officials and Minister. If this conflict reaches the point where it threatens the integration of effective management with political control then there will be a constitutional problem that, if a guess may be hazarded, is likely to be resolved through changes to the manner of appointment to and tenure of senior public officials.

In effect the challenge of the future will lie in accommodating a lesser degree of public service neutrality while still preserving harmony with the policies of the Government of the day, the members of which will ultimately be held accountable by the electorate for their overall performance. In a country our size, that accomodation should not be impossible.

One other aspect touched on lightly by the Commission warrants a little deeper consideration. That is the role of Parliament. This point was not within the terms of reference and the Committee simply suggested it was for Parliament to decide "how active and detailed a role it wishes to take in supervising the policy we propose." Now one reason suggested in favour of greater openness was that it made politicians and administrators more accountable for their actions. Parliament, through its select Committees, should be our foremost watchdog, yet again and again criticisms are heard of procedures that limit the ability of these Committees to operate effectively. In other jurisdictions (Canada and Australia) it has been asked whether Crown privilege may be claimed before a Select Committee. So far this question has managed to evade a direct answer, but it could be a topic towards which Parliament should direct its attention when considering its role in a more open government.

TONY BLACK

DISTRICT COURT JUDGES

STYLES TITLES AND MODE OF ADDRESS

The following styles, titles and modes of address for the Chief Judge and Judges of the District Courts of New Zealand have been recommended by the New Zealand Herald of Arms, Mr P P O'Shea. His opinion is based on precedents in other Commonwealth Countries and those of our Maori Land Court and Arbitration Court.

SPOKEN
(Social): "Judge" or "Judge (surName)"
(On Bench): "Your Honour"

WRITTEN
(Formal): "His (or Her) Honour Judge (surname)"
(Informal): "Judge (initials and surname)"
"Judge (surname)" or "District Court Judge (surname)"

LETTERS
BEGIN: "Dear Judge" or "Dear Sir"
(Social) "Dear Judge (surname)"

SIGNATURE (Normal signature). The title "District Court Judge" may be shown below the signature.

CHIEF JUDGE
The Chief Judge of the District Court is Styled and Addressed as "Chief Judge".

RETIRED JUDGES
District Court Judges on retirement cease to use any of the above styles and titles. In social matters they may however be referred too as "Judge" but this is more in the nature of a courtesy than a Right.

COMPANIES

THE COMPANIES AMENDMENT ACT 1980

By MARK RUSSELL*

In his second article Mark Russell concentrates on the new provisions relating to Receivers, ending with a discussion of how the new Act has tackled the vexed problem of priority between receiver and liquidator.

III Receivers and managers

1. *Introduction*

Receiverships have become a commonplace in the commercial world of today. Various factors have combined to produce an economic climate in which it is likely that many companies with heavy borrowings and cash flow problems will experience financial hardships, and consequently find that a receiver has been appointed over their assets, either by the Court, or, as is more usual, under an express clause contained in a debenture or mortgage. In the light of the sustained economic recession, it is important that the law relating to company failure should be kept constantly under close watch. Both the Macarthur and the Jenkins Committees turned their attention to receiverships, and the 1980 Act contains a number of relevant provisions.

2. *Defects in appointment of receiver — s 345A*

The Macarthur Committee[1] drew attention to the fact that a person who appoints a receiver out of Court must comply strictly with the conditions of the clause relating to appointment expressed in the instrument under which he is appointed. Otherwise, if there is any defect in his appointment or for any reason the charge is invalid, when the receiver takes possession of the company's property, he is in no better position than a trespasser.

The Committee agreed with the Jenkins Committee that the Act should provide power for the Court in such circumstances to relieve the person purportedly appointed as receiver of any personal liability in whole or in part in respect of any act or omission which would have been validly done or omitted apart from such defect or invalidity, and to impose personal liability in his stead and to the extent of his relief on the person purportedly appointing him.

Section 345A provides precisely as recommended. The Court now has a discretionary power to relieve the receiver from personal liability, either in whole or in part, and upon such terms and conditions as the Court thinks fit.

3. *Receiver selling company property*

(a) *The new section 345B*

Section 345B seems to be an entirely new provision, with no apparent parallel in any other Commonwealth jurisdiction. It does not appear from recommendations of either the Macarthur Committee or the Jenkins Committee.

It provides that a receiver or manager of the property of a company who sells any of that property shall exercise all reasonable care to obtain the best price reasonably obtainable as at the time of sale. This duty is expressed to be one that is owed by the receiver to the company; and it is not to be a defence to any action or proceeding brought by the company against the receiver or manager in respect of a breach of that duty that the receiver or manager was acting as the agent of the company, or under a power of attorney given by the company. Neither is the receiver or manager entitled to be indemnified or compensated by the company for any liability he may incur as a result of the breach of his duty.

(b) *The duties of the receiver*

(i) *General*

Following upon his appointment by a debenture-holder, the receiver, upon taking charge of the company assets, is commonly faced with urgent decisions which he must make regarding the future of those assets. For instance, he must decide whether to sell all of the assets, or only some of them. If he does decide to sell, what price should he try to obtain? On a forced sale

[1] Para 432.

* Lecturer in Law, University of Canterbury.

assets usually fetch a lower price, and the receiver must be entitled to allow for this.

A receiver is usually appointed by a charge-holder, to whom he owes his first allegiance. It is the charge-holder's interests that he is primarily appointed to protect. The law has determined that the duties he owes are of a fiduciary nature.[2]

If, however, for some reason the receiver makes a wrong decision relating to the sale of company assets, whether under the pressure of events, or through some shortcoming of his own, the question then arises as to his liability to the company for any loss which might be incurred by it as a result of his error. The position prior to 1980 requires to be examined, in order to gauge the nature of the changes which have been brought about.

(ii) *The position before 1971*

In most cases the security will confer on the receiver wide powers to collect and realise the assets subject to the charge, with power to sell either at auction or privately, and without responsibility for any loss, such as that suffered by the company where the sale is at an undervalue. Prior to 1971, it was generally thought that a receiver owed only limited duties to the company when he was selling its property. These duties were broadly subsumed under a requirement of bona fides. No higher standard was required.

The starting-point is the case of *Re B Johnson & Co Ltd*.[3] In considering a claim of negligence made against a receiver for refusing to continue to carry on the company's business, the Court of Appeal made several points: First, it recognised that a person appointed as receiver was concerned not for the benefit of the company but for the benefit of the debenture-holders in realising the security.[4] Secondly, a receiver's position can be likened to that of a mortgagee seeking to realise his security, who has no duty of care to protect the mortgagor's equity by obtaining the best possible price, so long as the sale is a bona fide one.

This "narrow" view of a receiver's duty to the company has been adopted in some Australian cases, namely, *Re Neon Signs (Australia) Ltd*,[5] and *Duffy v Super Centre Development Corp Ltd*.[6] Most recently, in *Expo International Pty Ltd v Chant*,[7] Needham J took the same view, although only because he felt bound by higher authority to do so.

Therefore, the position was that a receiver could not be liable to the company for mere negligence; some form of mala fides was required to be shown. Shareholders of the company could not complain in Court that a better price for the asset or assets in question could have been obtained had the receiver waited to sell at a more favourable time.

(iii) *The Cuckmere Brick case*

However, in 1971, in *Cuckmere Brick Co v Mutual Finance Ltd*,[8] the English Court of Appeal appeared to recognise the existence of a duty of care. Before looking at that case, reference might be made to an earlier New Zealand case, *Nelson Bros Ltd v Nagle*,[9] which contains certain obiter remarks by Myers CJ on the duty of a receiver acting as agent of the company. He thought that the duty owed by the agent to the company in such circumstances was to exercise due care, skill and judgment in selling the goods, and obtaining the best results reasonably possible in the circumstances.[10] This constitutes a conflict with *Re B Johnson & Co (Builders) Ltd*.[11]

In the *Cuckmere Brick* case, the Court of Appeal had the task of deciding between conflicting dicta from previous cases. They held that a mortgagee exercising his power of sale owed a duty to the mortgagor to take reasonable care to obtain whatever is the true market value of the mortgaged property, at the time he chooses to sell it.[12] On the other hand, the Court was agreed that the mortgagee could sell whenever he liked, once the power of sale had accrued, even though the market was likely to improve if he held his hand.[13]

In other words, although a receiver could be liable in certain circumstances for negligence, such circumstances could not relate to his decision to sell, but only to his subsequent conduct

---

[2] See *Re Magadi Soda Co Ltd* (1925) 41 TLR 297, and *Re B Johnson & Co (Builders) Ltd* (1955) 1 Ch 634.

[3] Supra.

[4] This is notwithstanding the clause which appears in most debentures to the effect that the receiver acts as agent of the company.

[5] (1965) VR 125.

[6] (1967) 1 NSWR 382.

[7] (1979) CLC 40 513.

[8] (1971) Ch 949.

[9] (1940) GLR 507.

[10] At p 508.

[11] Supra.

[12] Per Salmon LJ, relying on *Tomlin v Luce* (1889) 43 Ch D 191, and *McHugh v Union Bank of Canada* (1913) AC 299.

[13] Per Cross LJ at 969; Salmon LJ at 965.

of the sale. Thus, in that case it was alleged that a mortgagee had been negligent when auctioning the mortgaged properties, in that he had failed to advertise the properties on the basis of planning permission having been granted to build flats on them, which omission had caused a lower price to be obtained at the auction. The Court of Appeal held the mortgagee liable for negligence, considering that a mortgagee, when exercising his power of sale, owed a duty to the mortgagor to take reasonable care to obtain the proper price or "true market value" as at the time of sale. It is submitted that the same principles applied by analogy to receivers.

(iv) *The present provision*

That was, then, the position prior to the passing of the 1980 Act. Owing to the lack of a clear decision on the point, the matter could still have been regarded as open in this country. Section 345B is clearly an attempt to enact the *Cuckmere* approach. If that is so, then presumably the receiver may still sell the charged property whenever he chooses. His obligation under the section is to "obtain the best price reasonably obtainable as at the time of sale". The section does not state that he must exercise reasonable care in deciding what the time of sale should be.

Reference has been made to s 345B(2)(a), which provides that a receiver may not avoid liability under s 345B(1) by pleading that he was acting as agent for the company, or under a power of attorney given by the company. The reference to a power of attorney is probably intended to forestall any attempt by a receiver to argue that in such circumstances the company has for valuable consideration committed the management of its property to the attorney, with whose actions it cannot interfere. This argument derives from the dissenting judgment of Rigby LJ in *Gosling v Gaskell*.[14]

Since the receiver may not plead that he was acting as agent of the company, he may therefore not argue that he is under no liability under s 345B by reason of his acts being imputed to his principal. That this should be so is completely fair, since the designation of the receiver as the agent of the company is in truth no more than a device for facilitating the realisation of the charged assets.

(v) *The particular difficulties of receivers*

The Court thus now possesses a statutory power to decide objectively whether or not a receiver has exercised the standard of care required of him in the circumstances of any particular case. In deciding this question the Court must, it is submitted, have regard to factors peculiar to receivers. It has already been remarked that a receiver may find himself in an invidious position. Usually for instance he would like to obtain at least one, and preferably two, independent valuations of the property to be sold. However, he may simply not have the time to do this. He must of course do the best that he can with the resources available to him. For this reason it has been thought in some quarters that the old "narrow" approach is preferable, since otherwise shareholders are likely to be tempted to re-open completed receiverships by making the complaint that some line that the receiver failed to pursue might have yielded a higher price. The receiver might now (it is thought) be too vulnerable to such claims.[15]

It is submitted that these fears are perhaps exaggerated. One can be sure that the Courts are reasonably aware of the particular difficulties which may confront receivers. The new section expressly enjoins the Court to have regard to the circumstances of each case. A general attack on receivers is therefore unlikely. The section does not place an obligation upon receivers to do everything that is theoretically possible; it only requires them to do what is reasonable. Beyond that, any further generalisations may not be particularly instructive, as the facts of each case will be of the utmost importance.

The writer agrees that it is commercially desirable that completed receiverships should not be allowed to be habitually re-opened. On the other hand, it is at least equally desirable that receivers should be expected to conform to what is, it is submitted, not an onerous duty of care. The rights of creditors and shareholders to a potential surplus on liquidation should be protected. It may be commercially expedient, but it is not morally right, that such persons should be owed no duty of care by a receiver. The attitude of the Courts will be most interesting to observe.

4. *Power to use common seal — s 345D*

The Macarthur Committee pointed to

[14] (1896) 1 QB 669, 692, approved by the House of Lords on appeal, at (1897) AC 575.

[15] See Gough (1980) NZ Company Director (October); Stevenson (1973) 44 ALJ, at p 441.

another difficulty which might face receivers:[16] a debenture frequently confers on the receiver power to execute documents on behalf of the company and for such purpose to use the common seal. Difficulties might, however, be experienced in cases where directors refuse to part physically with possession of the seal. The Committee recommended an amendment to provide for a procedure whereby a receiver might seek an order compelling such directors to deliver up possession of the seal.

Section 345D provides that such an order may be made on such terms and conditions as the Court thinks fit. In addition, the section empowers a receiver to affix the company seal to documents where the debenture expressly so provides, notwithstanding any other enactment or rule of law, or any provisions in the memorandum or articles. Therefore, the receiver may now use the company seal even though the articles provide that the directors must affix the seal personally.

5. *Receiver's power to make calls — s 345C*

A receiver as such possessed no power to make calls on shareholders, although the articles of association might provide that the directors could delegate their powers to make calls to the receiver, by an express clause in the debenture.

Where the debenture under which a receiver was appointed included uncalled capital as its security, it was plainly unsatisfactory that the receiver should have to call upon the directors or liquidator to exercise their powers on his behalf. The Macarthur Committee recognised that the rule was an "anomaly of history", flowing from the nineteenth-century view that it was impossible for a mortgagee to make foreclosure upon uncalled capital.[17] Accordingly, they recommended that the Act should be amended to permit the receiver to make calls upon his own authority, and s 345C carries that recommendation into effect.

6. *Advertising appointment of receiver*

Section 40 amends the provision of the principal Act (s 346) relating to the notification of the appointment, or termination of appointment, of a receiver or manager. Thus, any person who appoints a receiver under the terms of an instrument, or obtains an order for the appointment of a receiver, must ensure that written notice of the fact, signed by him or his solicitor, is advertised in the *Gazette* and a local newspaper, and is given to the Registrar within seven days. The notice must state the name and business address of the receiver or manager, and include a brief description of the property affected by the appointment. Due notice of the termination of an appointment must also be given to the Registrar.

The provision follows a recommendation of the Macarthur Committee,[18] which felt that the existing requirements for advertising the commencement of a receivership were inadequate. The new form of s 346 will still require that on the appointment of a receiver all documents and papers issued by the company shall duly note the fact of receivership.

7. *Priority between receiver and Liquidator — s 346A*

Priority between receiver and liquidator (b) In addition, a totally new s 346A is created. It provides that, where there is both a receiver and liquidator of a company that is being wound up by the Court or by a creditors' voluntary winding-up, the Court may, on the application of the liquidator, order that the receiver cease to act, or that he act in respect of certain assets only.

Again, the Report of the Macarthur Committee led to the passing of the new section, albeit indirectly.[19]

The Law Society had submitted to them that, where a company was in voluntary liquidation and a declaration of solvency had been filed, unsecured creditors and shareholders could expect to be paid. In such cases receivership seldom took place.

However, in cases where liquidation came about by reason of insolvency or dishonesty, unsecured creditors and shareholders appeared to have nobody to protect their interests if a receiver was appointed by a secured creditor, and while that receivership subsisted. Nowhere in the Act was there a provision to regulate priority between receivers and liquidators. This was a matter usually determined by reference to the contract which gave rise to the appointment of the receiver, or to the Court order which appointed him.[20]

It has already been remarked that a receiver

[16] Para 422.
[17] Para 423.
[18] Para 427.
[19] Paras 385-387.

[20] A winding-up, whether compulsory or voluntary, revokes the authority of the receiver to carry on the business as agent of the company and with it his power to bind the company: *Thomas v Todd* (1926) 2 KB 511. It does not,

is primarily concerned to see that secured creditors are paid out. In pursuing this goal, he might take charge of the assets of a company and arrange to sell the secured assets separately, at the expense of the company as a going concern and to the detriment of unsecured creditors and shareholders. The Law Society submitted that, except in the case of a members' voluntary winding-up, the Act should provide that the liquidator should supersede the receiver and have vested in him all the powers which would otherwise be exercisable by the receiver, and that it should be the duty of the liquidator to protect the interests of all creditors according to their respective rights, provided that the rights of holders of existing registered mortgages over land, and those of holders of registered chattels securities, should remain unaffected.

These submissions were contested by the New Zealand Bankers Association and by the New Zealand Finance Houses Association. They argued that usually a receiver endeavours to act in a way beneficial to all concerned, including unsecured creditors, and that he usually possesses greater knowledge and expertise than a liquidator appointed in a creditors' voluntary winding-up. It was thus said that unsecured creditors are often benefited, since the receiver frequently trades the company out of its difficulties, or obtains a more favourable realisation of the company assets, thereby enlarging distribution to unsecured creditors on winding-up.

The Committee preferred the latter view. It therefore did not favour the enactment of a provision along the lines of s 346A.This was largely because it had in mind what it considered to be a superior alternative, namely, a system of creditors' management, based on existing Australian legislation. A new regime of provisions on creditors' management was actually included in the first form of the Bill as it was introduced into Parliament but, for various reasons which are beyond the scope of this article, they were struck out at the committee stage.

The Legislature has therefore opted for s 346A as a form of protection of the interests of unsecured creditors. Some safeguards were, it is submitted, urgently required. Experience has tended to show that the optimistic view of receiverships which was expressed to the Macarthur Committee was perhaps misplaced. All too often, a receiver is appointed at too late a stage for him realistically to entertain any notions of rescuing the company as a going concern. Naturally, no fault lies with him because of this.

However, the receiver is not neutral. He is appointed to benefit secured creditors; this is an inescapable feature of the very nature of his office. His loyalty to those who appointed him is always likely in some way to prejudice unsecured creditors and shareholders where the company is either insolvent, or has only sufficient reserves to pay off secured creditors and leave a negligible surplus. Again, even though a receiver may have the expertise to trade a company out of its difficulties, the fact remains that once a company has gone into receivership third parties are usually reluctant to continue trading associations with it.

It should be remembered that the discretion which s 346A gives to the Court should mean that an order for the replacement of a receiver by a liquidator will be made only in circumstances where there is plainly some prospect of unfairness to unsecured creditors and shareholders. If indeed the receiver believes on good grounds that he has matters well in hand, and that he can either trade a company out of its difficulties or obtain a favourable realisation of the assets, then the Court will naturally give due weight to his expert opinion. Being reluctant to impose its own views in matters of business policy, it might even tend to accept his views as being conclusive in most cases. Section 346A will not give the liquidator automatic priority over the receiver, whom he supersedes in respect of the carrying on of the company's day to day business in any event.

Therefore, what the section is directed towards is the receiver's continuing power to deal with assets covered by the security under which he is appointed.

The effect of the section on the business community will be interesting to observe. In particular, close regard will be paid to the effect which it will have on the provision of loan finance. Will it reduce the availability of loan finance, by making banks and other lending institutions reluctant to lend except on the security of floating charges which can be realised quickly?

---

of course, affect his power to hold and dispose of property of the company that is subject to the security.

ADMINISTRATIVE LAW

THE MARGINAL LANDS BOARD LOAN AFFAIR

By F M BROOKFIELD*

The Report of the Commission of Inquiry into the Marginal Lands Board Loan Affair ("the Loan Affair")[1] *is in its conclusions partly an essay in the use of carefully differentiated terms of disapproval. The Commission criticised the approaches made to two Ministers of the Crown by persons related to or friendly with them, and resulting actions of the Ministers, variously as "wrong", "[not] correct" and "unwise"; but it found none of the actions scrutinised to be actually "improper" within a very limited definition (discussed below) given by the Commission to that word.*

I INTRODUCTION

The facts of the Loan Affair require only the briefest summary. In September 1979, Mr J M and Mrs A Fitzgerald applied to the Marginal Lands Board for a loan to assist the development of a wasting farm property called "Long Gully", near Wellington. The applicants were respectively son-in-law and daughter of the Right Hon Duncan MacIntyre, Minister of Agriculture and Fisheries, and both were friends of the Minister of Lands, the Hon Venn Young, statutory Chairman of the Marginal Lands Board.[2] The loan application was twice rejected by the Board and then finally granted on 17th June 1980. A member of the Board, Mr C R White, then resigned, publicly declaring that the loan was well outside the Board's normal lending criteria and had been granted as a result of political pressure by the Minister of Lands. The Governor-General in Council appointed a retired High Court Judge to be a Commission of Inquiry but he resigned after charges of bias (quite unsubstantiated) were made against him in the House of Representatives. Then a new Commission of three members was appointed whose inquiries and deliberations survived unsuccessful proceedings for prohibition[3] and have now come to fruition.

Terms of reference

The Order in Council of 25 August 1980, which appointed the Commission, after reciting that "allegations of impropriety" had been made in respect of the Board's approval of the Fitzgeralds' application, required the Commissioners to inquire into and report upon:

> "(a) Whether there was any impropriety on the part of any person in relation to the reference on any occasion of the application to the Board for consideration;
>
> "(b) Whether there was any impropriety on the part of any person in relation to the circumstances in which, or the basis on which, the application was considered on any occasion;
>
> "(c) In respect of the approval of the application by the Board, —
>
> (i) Whether there was any error of jurisdiction or otherwise; and
>
> (ii) Whether there was any impropriety by way of departure from previously accepted criteria for granting loans or from what had been previously accepted as proper conditions of loans, or otherwise;

---

* Dr Brookfield is Associate Professor of Law in the University of Auckland.

[1] *Report of the Commission of Inquiry into the Marginal Lands Board Loan Affair*, Part 1, "Impropriety" (November 1980; H 5); Part 2, "Jurisdiction and Legislation" (December 1980; H 5A).

[2] For the constitution of which see the Marginal Lands Act 1950, s 3. Under the Act the Board has the function of assisting farmers in the development of "marginal lands" as defined in s 2. See note 4 below.

[3] *Fitzgerald v Commission of Inquiry* (High Court, Wellington. 15 Sept, 1980. (A229/80); Hardie Boys J). The judgment is printed as Appendix 2 to Part 1 of the Commission's Report.

"(d) Whether any amendment to the legislation governing functions, procedures, and practices of the Marginal Lands Board is necessary or expedient."

In respect of (c)(i) and (d), the Commission deferred Part II of its report until the High Court had decided, on the case stated by the Commission under s 10 of the Commissions of Inquiries Act 1908, that the Governor-General in Council was empowered to include (c)(i) in the Terms of Reference, and, as to (d), pending the Commission's detailed examination of the procedures of the Board. Part I of the report deals with all the remaining items of reference — (a), (b), and (c)(ii) — and the issues of propriety contained in them.

The Commission found no "impropriety" in regard to all three items, but, incorrect, unwise or irresponsible conduct on the part of several of the persons involved. Here we shall briefly consider some of the Commission's findings of fact so far as is necessary to permit comment on its opinion on the conduct of those persons, particularly of the two Ministers. Other parts of the article deal with Part 2 of the Report (briefly) and with the Commission's understanding of "impropriety", the issue of ministerial responsibility and certain aspects of the Loan Affair that affect the Attorney-General.

II THE REPORT

1. The Loan Application

The Fitzgeralds' case for a loan survived two rejections of their application by the Marginal Lands Board, each of which had been preceded by an unfavourable report by the Marginal Lands Committee. Finally, the loan was granted after the Board's sub-committee had re-assessed the budgeting of the applicants' project and the Fitzgeralds themselves had rejected, for what the Commission recognised as arguably good reasons, an alternative offer of finance from the Rural Bank.

The Commission thought that Long Gully was indeed "marginal land" within the definition in s 2 of the Marginal Lands Act 1950[4]. The merits of the application were such that it should have been taken seriously, though the initial, unfavourable treatment of it was due to the Fitzgeralds' having inadequately prepared and supported their application. But, in the course of their persistent pursuit of the matter, its possible merits became plain. While opinions might still differ about those merits, it was impossible to say that the Board was wrong in the view it finally took of the application and in particular of the applicants' personal suitability to develop the land.

The Commission's view of the merits of the application was most important in its relationship to the issues of propriety. Not only did it mean that, in the Commission's words (at p 52), "the nature of the decision could [not] in itself indicate an improper approach" but also that the intervention of the two Ministers did not, obtain for the Fitzgeralds anything more than proper consideration and assistance.

2 The conduct of those involved:

(a) *The Ministers*

(i) *The Minister of Lands.* After the first rejection of their loan application, the Fitzgeralds obtained an interview with the Minister of Lands, ostensibly to inform him of their intention to apply for a review. He, correctly in the view of the Commission, interpreted it as a bid for his sympathy and support. To this end he wrote to the Board on 25 January 1980 (the letter being drafted by his secretary) in terms which could be interpreted either as giving general support to the application or merely as urging its reconsideration.

Then the Minister, as statutory Chairman of the Board, attended its meeting on 29 January 1980 at which the letter was to be discussed. He spoke to the letter and told the Board that, because he was too close to the Fitzgeralds, he would not participate in the decision on the case. The minutes also recorded his saying that "the application may well be so far outside policy that the Board should suggest he [Fitzgerald] come back for reconsideration of the application after a further nine months when given the opportunity and shown his farming ability" (sic).

In fact, the Board resolved at the meeting

[4] " 'Marginal land' means any land that in the opinion of the Board is used, or is capable of being used, for agricultural or pastoral production, but which, in the opinion of the Board, is not developed to its full productive capacity or is declining or tending or likely to decline in productivity or has suffered or is liable to suffer soil erosion or has suffered or is liable to suffer damage or loss of productivity from floods or similar disasters, and which, in the opinion of the Board, is worth developing, maintaining, or protecting". Strictly the Commission's opinion (p 71) must mean that the *Board* could properly regard the land as marginal land within the definition.

that the application be reconsidered and a sub-committee be set up for the purpose. Whether the Minister left the meeting before or (as the minutes recorded) after the Board so resolved, could not be established before the Commission but did not seem significant to it anyway (p 92).

In all this, the Commission acquitted the Minister of any "impropriety" within the definition it had adopted. But it found (p 86) that he could not be said to have "acted correctly" in discussing aspects of the Fitzgeralds' case with them and in having his secretary investigate the case.

As to the letter, the Commission (p 89) "observe[d] a rather fine line between 'personal advocacy' and 'additional information which happens to show appellants in a favourable light' ". Although clearly troubled by the letter (particularly its supportive final sentence)[5], the Commission accepted the testimony of the Minister and his secretary that the letter was solely related to the case for a review. It added however that "appearances were less than satisfactory". The sending of the letter was not improper but simply an extension (p 90) of the "imprudence" which had preceded it.

Finally, the Minister's attendance at the meeting was not in breach of s 8 of the Marginal Lands Act. It was not improper or even imprudent (not even, it would seem, an extension of the preceding imprudence: "in the light of events preceding the meeting, Mr Young handled the occasion as correctly as he could" (p 29). His conduct at the meeting put the letter in a better perspective. The Commission accepted his evidence that he had intended to dissociate himself from the application.

In summary, the Commission found that the Minister's "only correct course . . . was to stay outside the action altogether". The most serious aspect of his involvement, the sending of the letter was "distinctly unwise". But, in fact, there was clearly no intention on his part to obtain some improper advantage[6] to the applicants. In the absence of that, Mr Young's whole involvement in the affair remained "within the bounds of propriety'. [His] conduct was unwise, but was neither improper nor illegal" (p 93).

(ii) *The Minister of Agriculture and Fisheries.* For a brief part of the period covered by the progress of the application, Mr MacIntyre became also Acting Minister of Lands. Shortly before he did so, complaints were made in his presence at the dinner table by the Fitzgeralds about the handling of their loan application.[7] Then, as Acting Minister, Mr MacIntyre referred the substance of the complaints to a secretary (in fact the person who drafted Mr Young's letter of 25 January 1980) who in turn prompted action on the complaints by an officer in the Department of Lands and Survey.

Of the complaints the Commission found only one was justified, namely that the Department's Field Officer had not discussed with the Fitzgeralds the seasonal budgets for the proposed development of the land. The Minister's intervention (which involved an approach by him to another departmental officer also) led to this omission being rectified and a copy of the budget was supplied to the Fitzgeralds.

The Commission found that Mr MacIntyre as Acting Minister of Lands had moved to remedy alleged inefficiencies in the Department, but without any intention to secure an advantage for his relatives.[8] Further, the intervention was

---

[5] "In view of the above considerations, I would ask that the Board reconsider their decision, as I am confident that the applicants have the ability to successfully farm their property, given the opportunity."

[6] Some advantages beyond the merits of the application. See further below.

[7] The complaints were recorded by one of the officers concerned in a memorandum headed *"Confidential — Not for File"* which in the Commission's findings (p 99) "quite properly and to ensure that no unwanted gossip or rumour arose" remained deposited in a safe until it was produced at the Inquiry. The memorandum (amplified a little for clarity) read in part: "The Minister's secretary advised me [that] the Minister of Agriculture has expressed concern to him regarding the [Marginal Lands Committee's] handling of the case, particularly. (sic)

(a) [Senior Field Officer] did not discuss the seasonal budgets with Fitzgerald.

(b) The farmer member of Committee not too interested — asked only one question of Fitzgerald.

(c) General approach by Committee.

(d) New [Ministry] representative on Committee.

The Minister of Agriculture is concerned that, because Mr Fitzgerald is his son-in-law he may be disadvantaged. The Minister of Agriculture is absolutely satisfied Fitzgerald can and will succeed and should be given the chance."

The Commission comments (p 99) that there was no action the Department could take on items (b), (c) and (d), since "they were either past history or not within the department's control".

[8] ". . . we must consider whether it is proved that Mr MacIntyre, in this intervention, *intended* to secure an advantage for his relatives. We are satisfied no such intention was present" (p 103; emphasis in the original).

"in an area and in a manner which precluded any improper advantage accruing to the applicants". It could only secure for them "the same facility as should be available to any other applicant" (pp 103-104).

The Commission's findings on these points exonerated the Minister from allegations of impropriety. But the appearance of impropriety was there. The Minister "gave insufficient thought to his actions before embarking upon them" (p 103). "They were the consequence of an inadequate and faulty judgment of the responsibilities of, and the public image essential in, a ministerial appointment" (p 104).

(iii) *Comparison of the Ministers.* The Commission made some implied contrasts in the conduct of the two Ministers and their demeanour as witnesses. On the one hand, Mr Young's actions in writing to the Board and attending the meeting on 29 January were done publicly and were matters of record; he acted openly throughout (pp 90 and 110). As a witness he was "entirely sincere and convincing" (p 84). His view that he had acted correctly ("I would do the same again": p 90) was in the Commission's opinion held "with absolute sincerity" (p 92).

By contrast, the private nature of Mr MacIntyre's interventions is emphasised (pp 110-111). But, further, he is described (p 95) as a "troubled and concerned witness" who "no doubt wished to be frank with the Commission" but whose mind was more directed elsewhere.[9] Consequently he appeared to the Commission "somewhat taciturn and blunt while at the same time cautious, defensive, and even unhelpful".

The final contrast between the two Ministers is that, while the actions of neither were "improper", some of those of Mr Young were "unwise" but some of those of Mr MacIntyre were "extremely unwise".

(iv) *The relationship between the ministerial interventions and the final granting of the loan.* The Commission in effect attributes the final granting of the loan to the reappraisal of the "budgetary and forecasting basis" which followed the Board's second rejection of the application. The Commission found as a fact that "this last step [of re-appraisal] did not follow as the result of any ministerial intervention" (p 41).

(b) *The Others*

(i) *Those exonerated.* The Commission found no impropriety or other incorrectness of conduct and no serious error of judgment on the part of any of the departmental officers concerned. Except for precautions properly taken because of the "political overtones",[10] the officers acted as they would have done on any other application. The members of the Marginal Lands Board (except for the Minister of Lands and Mr White) are similarly generally exonerated.

(ii) *Those criticised, The Fitzgeralds.* Their approaches to their friend or acquaintance, the Minister of Lands, and to their relative, the Minister of Agriculture and Fisheries, were both criticised by the Commission but in neither case was it found that the evidence established impropriety on their part "beyond reasonable doubt". (Pp 106-107, 111).

As to the approach to the latter Minister (the dinner table conversation) the Commission more explicitly states that it was not satisfied beyond reasonable doubt that the incident was deliberately staged by the Fitzgeralds in the hope that Mr MacIntyre might act on the complaints made during dinner. Had it been so satisfied, it would have had "no hesitation in saying that they had acted with impropriety".

Mr C R White, whose resignation and public complaints precipitated the inquiry, was criticised by the Commission in terms arguably as strong as those used against any of the other persons involved. The adverse findings of the Commission relate largely to his motives and to his delay in acting (6 months) on what he claimed to

---

[9] The Commission thought it "evident that his mind was more directly attuned" to the outcome, which in the event was favourable to him, of the inquiries by the Privileges Committee of the House of Representatives regarding statements he had made to the House about the Loan Affair.

[10] The standard precaution, employed in this case, was to operate the Lands and Survey Department's "early warning system", by which an application from a person with ministerial connections was referred to Head Office and not dismissed out of hand as it would have been on its original apparent lack of merit had there been no such connections (pp 62-63). The Commission's comment (p 113) is that this tended to give such cases not necessarily more favourable but "certainly more careful treatment" which might in itself be "ground for misunderstanding". In the present case, the "more careful treatment" was expected to and did in fact support the departmental officers' original view that the application was on its face hopeless. But one may comment that the events which ensued from the more careful treatment did in fact assist the application. However, no doubt the persistent Fitzgeralds might have obtained reconsideration and ultimately have triumped on the merits, even had the application been rejected outright originally.

be an improper intervention on the part of the Minister of Lands.

The Commission accepted Mr White's sincerity (p 60). But it found (p 59) that he had "irrevocably convinced himself that his true reason for his stand was what he now believed was the impropriety of the Minister's action in January", in writing to the Board and attending the meeting on the 29 January. The Commission thought Mr White had told no "deliberate falsehoods" about the reasons for his resignation and his public statements. But in reality he had become intractably and irrationally opposed to the Fitzgeralds' application for unconscious reasons which the Commission had not been able to ascertain. The Commission credited him with courage, but with a courage born of obsession. There was no valid foundationt to justify his public assertions of political interference and his conduct is finally described (p 110) as "irresponsible, inexplicable, and out of character".

3. Standard of Proof of Misconduct

The Commission specifically applied a test of proof beyond reasonable doubt in Part 1 of the Report in regard to the Fitzgeralds. In Part 2, by way of a postscript, the Commission mentioned (p 187) that it had used this test generally:

> "We were conscious that our unanimous view of the evidence would necessarily involve criticism of the conduct of some persons involved in the Marginal Lands Board Loan Affair and that such criticism was bound to attract some publicity. Therefore, in considering whether the conduct of anyone involved was less than desirable, we took the view that only the highest standard of legal proof could be appropriate. That is proof beyond reasonable doubt."

4. The Commission's Conclusions on the Matters in Part 1 of the Report

These are preceded by criticism of the public reaction to Mr White's statement of his reasons for resigning from the Board (p 108):

> "The intervention of the Minister of Lands on behalf of the Fitzgeralds as 'personal friends' and relatives of a Cabinet colleague was predictably seen as a rank piece of political corruption.
>
> "But a moment's reflection might have shown that it was most unlikely that the true explanation of events could be as simple as that. For one thing, political corruption in this particular field can operate only if there are public servants who will allow themselves to be corrupted. It takes at least two to tango. Any final decision to grant the Fitzgeralds a loan had to depend not only on the action of the Marginal Lands Board, which consisted of high-ranking officers of two Government departments, and four reputable farmer members, but also on the actions of the Board's administrative officers. So, if there was corruption in this case, it would have to be corruption involving a large number of people, nearly all of whom would have much to lose if it were ever disclosed."

The Commission went on to conclude that there had been "no Watergate", "no great issues". Through an entirely proper process, the Marginal Lands Board had come to change its mind about the Fitzgeralds' application. The considerations which led it to do so, culminating in the revised budgeting in May 1980, are precisely identified in the evidence. The application had finally succeeded on its merits and the Fitzgeralds' political connections had nothing to do with that. They did not get their loan "because of corrupt political influence".

5. Its recommendations on the above

Part I of the Report clearly recognises that, while a Minister is responsible for seeing that all persons who approach his Department, whoever they may be, are treated fairly, his dealing with friends and relations creates a special problem. While not condemning the "early warning system"[11] operated by the Department of Lands and Survey where "political repercussions" might arise, the Commission preferred and recommended procedures giving Ministers more specific guidelines in such cases (p 113).

The Commission's tentative suggestion for a suitable procedure (Appendix 4) would require a Minister to refer all representations made to him by friends or relations to the permanent Head of Department concerned to whom all necessary delegation would be made to deal with the matter. A formal record of all details of the matter would be conveyed to the Speaker of the House of Representatives for

---

[11] See note 10 above.

[12] See note 1 above.

[13] *Re Commission of Inquiry etc* (High Court, Wellington, 28 November 1980 (M568/80); Davison CJ.) The judgment is printed as Appendix 5 to Part 2 of the Report.

him to draw to the attention of the leaders of the parties and to keep accessible to all members of the House.

6. Jurisdiction and Legislation; Part II of the Report (Items (c)(i) and (d) of the Terms of Reference)[12]

The High Court decided,[13] that it was within the power of the Governor-General in Council to require the Commission to inquire into and report whether there was "any error of jurisdiction or otherwise" in the Board's approval of the loan application. This cleared the way for the Commission to proceed to item (c)(i) of its terms of reference.

The argument that there had been error of jurisdiction in the Board's final approval of the Fitzgeralds' loan on 17 June 1980, when it had already twice declined their application, rested on the somewhat obscure provisions of s 16(4) of the Marginal Lands Act 1950. This provides that the decision of the Board on any application or rehearing shall be "final".

The Commission concluded that the application finally approved was in substance a new application, so that s 16(4) could not apply and that, in any event, the last-mentioned provision correctly contrived did not bar successive rehearings. So there had been no error of jurisdiction.

The Commission commented favourably on the functioning of the Board under its present procedures, noting that its future was in any event at present subject to reconsideration by the Government. The Commission thought that, as the Marginal Lands Act stands at present, some amendment to it was necessary "to remove ambiguity and facilitate future interpretation" (p 200). In particular, the difficulties it had encountered with s 8 (personal interests of Board members) and s 16 (finality of decisions) led it to recommend the amendment or replacement of each of those sections. The Commission preferred in the case of the former the formula in s 10 of the Rural Banking and Finance Corporation Act 1974.[14] It also thought that amendment to s 12 of the Marginal Lands Act, to clarify the Board's role as a lender of last resort, was desirable.

Our immediate concern, however, is mainly with the Commission's recommendation that s 7 of the Marginal Lands Act should be amended. This section, in the Board's words, "directs that the members of the Board and its staff keep confidential the affairs of any applicant". Commenting (apparently by way of a finding) that "details of the Fitzgeralds' loan proposals were disclosed to the news media prior to this inquiry in a manner which . . . was detrimental to the applicants and offended against section 7", the Commission recommended that s 7 include a provision, that breach of confidentiality without permission of the Board should be a criminal offence.

Comment

The definition of "propriety" by which the Commission gauged the conduct of the persons concerned is separately considered below. So, also, is its ruling that the Minister of Lands in attending the meeting of the Board on 29 January was not in breach of s 8 of the Marginal Lands Act 1950. Apart from those two matters, the findings of the Commission, detailed and carefully argued as they are, nevertheless invite some comment.

The Letter. The openness of Mr Young's intervention in his letter to the Board and attendance at the meeting on 29 January is perhaps given more favourable weight than it should. Indicative of a good conscience, it might also indicate insensitivity to proper standards. There are similar indications in the Minister's persistence in his belief that he acted correctly. One may hope that, if the Minister will not publicly acknowledge the error of judgment which the Commission ascribes to him, he will, nevertheless not "do the same again".

The Meeting. Whether or not the Minister's attendance at the meeting on 29 January was in breach of s 8 of the Marginal Lands Act and despite his dissociating himself from the application, his presence and his words certainly helped rather than hindered the Fitzgeralds. On one view they surely compounded the imprudence of his previous actions.

The general approach. One of the Fitzgeralds' complaints,[15] passed on by Mr MacIntyre for departmental action, related to the "general approach" of the Marginal Lands Committee in its handling of the application. It is true that the departmental officer, apparently regarded this as justified in so far as the ideas of the Committee and staff might have been "preconceived" because of the Field Officer's report (p 98). But

[14] This section requires the disclosure by directors of the Corporation of direct or indirect interests in arrangements or agreements made with the Corporation.

[15] See note 7, above.

the complaint was not sustained by the Commission and its vagueness is disturbing.

What range of advantages might not be gained by applicants if the "general approach" in the handling of their case was changed in response to a direction initiated by a Minister closely related to them?

Happily, in the present case, the unfortunate phrase was discounted by the Commission's findings that (i) the Minister was innocent of improper intent, (ii) all the actions of the departmental officers in response to the Minister's intervention were correct, and (iii) no improper advantage in fact accrued to the applicants.

The Department. The complete exoneration of the departmental officers and the members of the Marginal Lands Board is, of course, most welcome. Indeed, the correctness of their actions and attitudes, and the innocent interpretations they placed upon the various ministerial interventions, seem to have influenced the Commission in its finding that the latter were unwise rather than improper. No-one need quarrel with that.

However, the Minister's letter of 25 January to the Marginal Lands Board caused the Commission much concern and was certainly an intervention by the Minister on behalf of his friends. Even if Mr White's ultimate reaction was too extreme, should the Board have received the letter without some query or comment? The question stands, whatever the Minister said at the meeting to dissociate himself from the application.

The complaints raised with Mr MacIntyre. It is not clear why the Commission would necessarily have regarded the Fitzgeralds' raising of complaints with Mr MacIntyre as improper if they had done so deliberately with the intent that he might act upon them. That would only follow if the complaints then acted on would in fact have obtained an improper advantage. The Commission (which generally rejected all except the complaint about non-disclosure of budgets) made no comment on this aspect of the matter.

Mr White. One, whose public actions and statements bring about an official inquiry, must expect to have to give an account of his motives and even to establish his good faith. But, having satisfied itself of Mr White's sincerity, his conscious good faith, ought not the Commission to have left the matter at that and refrained from wondering about his unconscious motivation? The criticism of his delay, that if the Minister's intervention was improper "it was improper on 29 January and remained improper whether the application was granted or not" (p 56), is to the point, but seems unduly moralistic in the circumstances. Whatever the degree of unconscious and unknown motivation for Mr White's resignation and public statement, the ministerial intervention to which he objected was found by the Commission to be unsatisfactory in appearance and unwise. Further, Mr White's action led to the revelation of other incorrect ministerial conduct. Certainly, there was no Watergate; but the need for correct ministerial conduct was a great enough issue to justify both Mr White's actions and the Commission's own careful and deliberate proceedings.

Both the Minister of Lands and Mr White maintained that their respective actions had been correct. The Minister, as we have noted, "would do the same again". His persistence must surely be regarded as wrong-headed. Surprisingly tolerant of the Minister's stubborness, the Commission might have modified its criticism of Mr White's.

The possibility of corruption. The Commission's, rather patronising criticism of the public reaction to Mr White's resignation and statement is unfortunate. A (further) "moment's reflection might have shown" that the situation could have been much more complicated than the obviously unlikely one of a large number of corruptly compliant departmental officers and Board members consciously doing the bidding of corrupt Ministers. After all, pressure may be exerted unconsciously by those who, in intervening, think they are doing no more than urging or assisting a meritorious case; and it may be yielded to unconsciously.[16] It may exist, though

[16] The point is illustrated by a very different case, the more clearly however because of the difference. In 1977, the Attorney-General of the Australian Commonwealth, who was outside the Cabinet and therefore at arm's length from it, resigned his office, partly because he thought he was under pressure from the Cabinet to end the private prosecutions brought by Mr Sankey against Mr Whitlam and other members of the former Ministry. What the Attorney General interpreted as improper pressure, the Cabinet interpreted as merely the expression of its views. (See 1977 Commonwealth Parliamentary Debates (HR) 724, 727; Brookfield "The Attorney-General" [1978] NZLJ 334, 343.

It is unnecessary to question the good faith of either side, whether in such a case or in one like the present where departmental officers and ministerially appointed members of the Marginal Lands Board might be more susceptible to pressure (consciously or unconsciously) than an Attorney-General.

conscientiously disavowed on the one side and not consciously recognised on the other.

This is often inevitable in the government of human affairs but must obviously be avoided where (i) there are close personal relationships between the interveners and those who may benefit from intervention, and (ii) those who may be subject to pressure are in any way subordinate or vulnerable to the interveners.

The Commissioners appeared to lose sight of this in supposing that in the Loan Affair public fears were necessarily directed only to the possibility of conscious wrongdoing.

Reform. In view of the persistence of the Minister of Lands in his belief that he acted correctly, there may well be a need for more definite guidelines for Ministers who are approached by persons closely connected with them than can be inferred from the report of the Ministers' Private Interests Committee. Whether a procedure involving the Speaker of the House is desirable is another matter, that being somewhat distant from his customary role. The Chief Ombudsman might be a more suitable officer of Parliament for the purpose, though of course legislation to extend his functions would be required.

Standard of proof. The Commission's specific statement of the standard of proof it employed in considering the conduct of persons involved is welcome. But one may respectfully doubt whether the Commission was right in choosing the standard of proof applicable in criminal proceedings as appropriate. It simply does not follow, that, because criticism of the conduct of certain persons "was bound to attract some publicity", the standard should be so high. Indeed, in civil proceedings, where the test of balance of probabilities generally applies, the publicity to which the conduct of persons involved may be subjected can often be as adverse and detrimental to them as any finding of a Commission of Inquiry.

Further, the inappropriateness of requiring proof beyond reasonable doubt may be demonstrated from the purpose of the Commission's inquiry. Under item (a) of the terms of reference, the Commission was to inquire into "whether there was any impropriety on the part of any person in relation" to the Fitzgeralds' application. So far as the two Ministers and the departmental officers were concerned, this came directly under s 2(d) of the Commissions of Inquiry Act 1908. This authorises inquiry into "[t]he conduct of any officer in the service of the Crown". Referring to that paragraph, the Court of Appeal said in *Cock v Attorney-General* (1909) 28 NZLR 405, 425:

> "Such an inquiry is in order to ascertain whether [an officer] should be retained in the service, or dismissed, or be otherwise made subject to official discipline."

Today, as in 1909, Ministers of the Crown are dismissible at will. For officers of the Public Service the law and procedures relating to dismissal have changed somewhat since that year. But the quotation from the judgment illuminates the question of the proper standard of proof before the Commission.

In the case of the two Ministers, one would think that even findings showing grave suspicion of impropriety, let alone proof of impropriety on the balance of probabilities, would justify dismissals for which in law no justification is required.

In the case of the departmental officers, it appears that disciplinary procedures under the State Services Act 1962 would have had to follow adverse findings of the Commission.

In neither case could it be appropriate for proof beyond reasonable doubt to be required.

Nor, it is suggested, was it appropriate in the case of those members of the Marginal Lands Board who were not departmental officers, since they hold office at the pleasure of the Minister of Lands.[17] The same considerations, mutatis mutandis, apply to them as to him.

As is suggested below, clearance from impropriety (whatever standard of proof is employed) should not *necessarily* mean that persons so cleared remain in office if their conduct has nevertheless been found to be imprudent or has otherwise been seriously criticised by a Commission of Inquiry. However, use of too high a standard of proof before a Commission is generally not in the public interest. It might lead in some inquiries to a "clearance" from impropriety when the gravest doubts about an officer may remain and it may be quite undesirable that he should stay in office.

For the Fitzgeralds, occupying no office, the significance of a finding of impropriety would have been somewhat different from that in the cases of the Ministers, departmental officers, and Board members. Nevertheless, it is difficult to see what claim the Fitzgeralds had to the protection of the standard of proof used in criminal

[17] See Marginal Lands Act 1950, s 3(1)(f) (as substituted by Marginal Lands Amendment Act 1969, s 2(2)) and Acts Interpretation Act 1924, s 25(f).

proceedings. After all, to enlist (without bribery) the help of one's friends or relations in the Ministry to give oneself some advantage may be grossly improper; but it is not in itself a criminal offence. That it should require to be proved as if it were seems inappropriate.

What if the Commission had tested the conduct of those involved by, proof on the balance of probabilities? It is likely that there would have been no change in the positive findings in favour of the departmental officers and the members of the Board, or in those, perhaps a little less positive, in favour of Mr Venn Young.

On the other hand, the clearance of Mr MacIntyre might have been in doubt.[18] That of the Fitzgeralds would certainly have been, when one has regard to the emphasis of the Commission that impropriety was not proved against them beyond reasonable doubt.[19]

Disclosure. The Commission's finding that details of the Fitzgeralds' loan application were released to the media in breach of s 7 of the Marginal Lands Act was unsupported by any particulars of the disclosures referred to. It is not clear whether the finding is directed against Mr White's releasing some details of the matter when he publicly announced his resignation.

A breach of s 7 presumably already attracts the possibility of prosecution under s 107 of the Crimes Act 1961.[20] However, it may be desirable to make such a breach an offence under the Marginal Lands Act itself as the Commission recommends, provided that a defence of disclosure in the public interest is allowed. Presumably the Commission would agree that, if it had found Mr White's actions justified, he ought not to be prosecuted for breach of confidentiality, if in fact any occurred.

[18] See note 8, above. It is true that the Commission's conclusions in Mr MacIntyre's favour, as to his intentions, are expressed positively. But it is not clear to what extent they rest upon the high standard of proof of impropriety required by the Commission. The Commission describes the arguments of counsel assisting the Commission that Mr MacIntyre had been guilty of impropriety as "cogent" and "convincing" but (among other things) was "equally cognisant of arguments advanced by counsel for Mr MacIntyre concerning standards of proof and the danger of judging by appearances alone" (p 104).

[19] See, however, the observations in Comment (5), above.

[20] See note 32, below.

(To be continued)

CORRESPONDENCE

Dear Sir,

National Development Act

In your editorial at [1981] NZLJ 41, you suggest that Planning Tribunal inquiries under the National Development Act 1979 may be prevented, by the operation of s 9(2) of that Act, from considering "matters of national importance", as is required under s 3 of the Town and Country Planning Act 1977. You note that "all points to an intention to preserve the wider issue of national interest solely to the Government".

I agree that there is difficulty in interpreting s 9 of the NDA. I have previously discussed this (to shamelessly self-advertise) in a note on the NDA; (1980) 9 NZULR 200. But I feel that the tone of your editorial is too pessimistic (assuming that one wants the Tribunal to discuss these larger matters). There are several powerful arguments for the proposition that s 9(2) does not prevent the Tribunal from considering the matters set out in s 3 of the TCPA.

First, s 9(1) does not express itself to be subject to subs (2). Neither is subs (2) expressed to be a proviso to subs (1). We are surely entitled to assume that Parliament knew just what matters it was requiring the Tribunal to consider in stating (subs (1)) that these matters are to be those which would have to be considered if the applicant applied in the normal way. Further, subs (2) speaks specifically of "the criteria set out in s 3(3) of this Act" and I would argue (with D A R Williams, *Environmental Law* (1980) para 911) that, if this restricts the investigation into s 3 TCPA matters at all, it does so only to the extent that these matters are *identical* to those dealt with in s 3(3) of the NDA. There is much room for argument as to whether any or all of the matters set out in s 3 of the TCPA are identical to those set out in s 3(3) of the NDA.

Secondly, if there is repugnancy between the statutes (and the thrust of my first point is that there may very well not be), then there are various maxims and principles of statutory interpretation which assist in resolving the difficulty. Specifically, the maxim *generalia specialibus non derogant* might come into play. The various "consent" statutes bundled up by the NDA are all particular and special in their application and subject-matter. The NDA is a general Act which subsumes them all in an attempt to rationalise and expedite their operation. The *generalia* maxim requires that a Court not hold the earlier particular legislation to have been impliedly repealed, altered, or derogated from by general words in a later statute, unless there is a clear indication otherwise.

Is the NDA clear enough?

Yours faithfully,
John Hannan
Barrister,
Lecturer in Law

MAORI AFFAIRS

COLONISING ATTITUDES TOWARDS MAORI CUSTOM

By Alex Frame

An examination of the attitudes of pakeha officials towards Maori customary law

The purpose of this short Paper is to consider the attitudes of pakeha officials towards Maori customary law, and to trace the policy choices made by the colonising authorities with regard to this body of law. This cannot be the occasion for an exploration into the nature or characteristics of "customary law", although I should declare my own assumption that law exists where it is found that *reasons, conventially known and approved, are needed for adverse treatment of others.* The methods for ascertaining the nature of the convention, for deciding whether it has in any particular case been infringed, and of visiting infringers with consequences are, of course, most interesting, and differ widely among cultures. However, it is the existence of the reasons themselves which indicates the presence of law.[1] Within Maori culture it is the expression *take*[2] which denotes this value, as may be seen from the following observation:

> "The word *take* is lisped by every Maori child, and no-one, it is imagined, can so far forget himself as to utter even an angry word without a *take* or cause, much less is he supposed to be capable of violating the dearly cherished notions of justice and honour, which have been handed down from father to son through a long line of almost deified ancestors"[3]

My impression is that the presence or absence of *take* becomes important both in the support which the "aggressor", by which I mean the person or group seeking to change the status quo, might expect from other groups, and "psychologically" in determining the outcome of the struggle itself. Many legal orders left the victor of a court action to enforce the judgment of the Court. He did not always succeed, but he had an important advantage.

The Early Attitudes

The earliest formulation of official British policy with regard to Maori custom appears to have been the responsibility of James Stephen, principal adviser to successive ministries around the time of the Waitangi Treaty.[4] His view seems to have been that British authority in New Zealand should be exercised through native laws and customs.[5] Certainly, this early attitude appears to recognise the existence and coherence of Maori custom: the British Minister instructed Governor Hobson in 1840 that:

> "(The Maori people) have established by their own customs a division and appropria-

---

*Until recently Senior Lecturer in Law, Victoria University of Wellington.

[1] In this view I find myself in the footsteps of such continental European writers as von Gierke, Ehrlich, Weber, and more recently Pospisil who surveys the tradition which rejects the confining of the expression "law" to the monolithic, statecentric models so favoured by the English tradition as represented by Hobbes and Austin, in "Legal Levels and Multiplicity of Legal Systems in Human Societies", *The Journal of Conflict Resolution*, Vo XI, March 1967, pp 2-26. My reasons are somewhat different from those of the writers mentioned.

[2] In Maori, and in many polynesian languages, the expression *take* has the significance of "foundation" or "root".

[3] C O Davis, *Maori Mementos . . .*, 1855. Davis was an interpreter in Government service and is probably referred to in Governor Gore Brownes' memorandum to H Merivale (June 2, 1856): "There is too much reason to believe that our ablest interpreter is not to be trusted; nor dare I dismiss him unless I could also send him out of the country, as he has very great influence amongst the natives, and would not scruple to use it to our disadvantage". Later, Davis became an adviser to Tawhiao and the King movement.

[4] Sir H Taylor, in his *Autobiography* (1855) states that "During Lord Glenelg's tenure of office (1835-1839) and for many years before and after he literally ruled the Colonial Empire" (p 233). James Stephen was the father of the jurist and administrator Sir James Fitzjames Stephen who, in his turn, was to have a profound effect on the shape of modern New Zealand criminal law.

[5] McLintock AH, *Crown Colony Government in New Zealand*, Government Printer, Wellington, 1958, pp 393-4. McLintock cites Lord Stanley's memorandum of 23 August 1842 suggesting that *tapu* be incorporated in the legal system.

> tion of the soil . . . with usages having the character and authority of law . . . it will of course be the duty of the protectors to make themselves conversant with these native customs, and to supply the Government all such information"[6]

There is, however, no mistaking the fact that this early attitude envisaged recognition of Maori custom as a temporary measure or, as one writer puts it, a "transitional phase."[7]

The signing of the Treaty of Waitangi itself gives rise to two comments in relation to Maori customary law. First, Article the Second of the Treaty might be considered as protecting Maori custom; it provided that:

> "Ko Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira, ki nga Hapu, ki nga tangata katoa o Nu Tirani, to tino Rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa . . ."[8]

The expression "o ratou taonga katoa" might be regarded as extending beyond physical property and encompassing culture generally, including customary law.[9] Secondly, it is interesting to note Colenso's description of one of the incidents surrounding the signing of the Treaty of Waitangi on 6 February, 1840. Colenso, an eye witness, records that a discussion took place concerning what we would today call "religious freedom". The Governor, Hobson, agreed to the following statement, which was read to the meeting prior to signature of the Treaty:

> "E mea ana te Kawana, ko nga whakapono katoa, o Ingarani, o nga Weteriana, o Roma, *me te ritenga Maori hoki*, e tiakina ngatahitia e ia."[10]

The New Zealand Constitution

The early attitude which I have sketched was to find some expression in the *New Zealand Constitution Act* 1852. This enactment, in no sense a comprehensive written constitution of the type found in the United States and elsewhere, was the result of settler pressure for self-government in the period following the Treaty of Waitangi. Such a document had been prepared and approved by the London Parliament in 1846, but was suspended on the urging of Governor Grey and finally brought into effect in 1852.

It is interesting to note that it had, in 1846, been envisaged that Maori custom would, in designated areas, apply not only as between the tangata maori, but also to pakehas within those districts. The proposal was that:

S 2 "Within such districts (as may be declared) the laws, customs, and usages of the aboriginal inhabitants, so far as they are not repugnant to the general principles of humanity, shall for the present be maintained".

S 3 "Chiefs and others appointed shall interpret and carry into execution such laws . . . in all cases in which the aboriginal inhabitants themselves are exclusively concerned".

S 4 "Any person, not being an aboriginal native, and being within any such district, shall during his continuance therein, respect and observe such native laws, customs, and usages as aforesaid . . ..

S 5 "The jurisdiction of the Courts and magistrates . . . shall extend over the said aboriginal districts, subject only to the duty . . . of taking notice of and giving effect to the laws, customs, and

---

[6] Despatch from Lord John Russell to Governor Hobson, 9 December 1840, *Parliamentary Papers*, New Zealand, 1841, No 311, p 24. George Clark, the earliest appointed "Protector of Aborigines", complied with this direction and provided accounts of maori customary law.

[7] Peter Adams, *Fatal Necessity*, Auckland/Oxford University Presses, 1977. Adams devotes Chapter 7 of his book to "Law and Custom".

[8] "Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand, and to the respective families and individuals therof, the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries, *and other properties* which they may collectively or individually possess . . .".
I have given the Maori text as the primary document. It seems little appreciated in New Zealand that it was the Maori text which was actually signed by most chiefs. As Ruth Ross observes in her most useful article, "Te Tiriti o Waitangi: Texts and Translations", *New Zealand Journal of History*, Vol 6, No 2, October 1972, p 129, only 39 of the 541 signatures were to the English text.

[9] The words are rendered somewhat blandly in the English translation as "other properties". It is for more adequate scholars of maori language than I say to whether the extended meaning is appropriate, although it is interesting to note that Tregeara's *Comparative Dictionary* cites the following usage of "taonga": "Tenei taonga o te tangata Maori, te Makutu".

[10] *Signing of the Treaty of Waitangi*, W Colenso, 1890, p 31-32. The statement is translated into English as "The Governor says the several faiths (beliefs) of England, of the Wesleyans, of Rome, and *also the Maori custom*, shall be alike protected by him". I have *emphasised* the significant words in both versions.

usages of such aboriginal inhabitants".[11]

The wording chosen for enactment as s 71 of the *New Zealand Constitution Act* was more limited than the 1846 proposal. Areas could be designated within which Maori custom was to apply, but only as between *tangata maori*. Section 71, which remains to this day part of New Zealand law, provided as follows:

> S 71 *Provision as to Maori laws and customs* — And whereas it may be expedient that the laws, customs, and usages of the aboriginal or (Maori) inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should so be observed:
> it shall be lawful for Her Majesty . . . from time to time to make provision for the purposes aforesaid, any repugnancy of any such (Maori) laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding".

The section has never been used. No areas have been "set apart" in terms of the Act. Some Maori political movements, such as *te Kotahitanga* and the King movement have sometimes pointed to the section as authorising separate political institutions. It may be that such claims will again be made in the future[12] in which case it is forseeable that opponents of such a step will reject it on the grounds that it involves *apartheid* of the kind practised officially in South Africa. Such a comparison would, of course, be inappropriate: the South African philosophy has the effect of *denying* to a majority rights enjoyed by a minority and is rightly objected to for that reason. Implementation of s 71 would *grant* to a minority the right to maintain their traditional customs where they chose to do so.

The Pakeha Dilemma

The choices facing the New Zealand Government by the late 1850's, as it began to assume full responsibility for the conduct of "native affairs" are well illustrated in the speech of C W Richmond in the House of Representatives on 18 May 1858.[13] Richmond perceived two possible courses: the first was to maintain Maori custom in the manner contemplated by what I have termed the "early attitude". Richmond cited Lord Stanley's view that:

> "I know of no theoretical or practical difficulty in the maintenance under the same Sovereign of various codes of law for the governance of different races of men. In British India, Ceylon, at the Cape of Good Hope, and in Canada, the aboriginal and the European inhabitants live together on these terms . . ."[14]

The second possible course, believed Richmond, was to supersede custom with British law, without reference to the opinions of the Maori people. Richmond considered that neither course was possible. His rejection of the first course — that contemplated by the Constitution Act — is on basically racist lines:

> "The objection . . . may be condensed into the dogma that barbarous laws perpetuate barbarism. The hindoos and the Chinese are examples of a low civilisation, and to races in that state Lord Stanley's rule may properly apply; but we agree that it is a great mistake to act upon that principle with a race of primitive barbarians".

The second course he regarded as not practicable:

> "Under existing circumstances, as we have now got representative institutions, and looking to the change which that has introduced in our relations with the Mother-country, it is neither humane nor possible . . ."[15]

---

[11] Chapter 14 in "Draft Instructions" to 1846 Constitution, CO 881/1, XXXIII, at the Public Records Office, London.

[12] Professor Hirini Mead of Victoria University in Wellington has suggested, for example, that *marae*, the areas around Maori meeting houses, might be designated under s 71, pointing out that, *de facto*, it is already the case that maori custom prevails on *marae*, to the exclusion of pakeha law and in respect of pakehas as well as maori.

[13] *New Zealand Parliamentary Debates*, 1858 p 442-et seq. C W Richmond was Minister of Native Affairs at this time. From 1862 he was a judge of the Supreme Court.

[14] Lord Stanley to Governor Fitzroy, 10 Feb 1844.

[15] The meaning here appears to be that the military means are not available, since self-government, for the subjugation of the Maori tribes.

There was a third course however, which commended itself to Richmond:

> "to insinuate or induce the acceptance of British law . . .".

It is this course which can be seen to dominate Government policy over the critical period from 1857 to the beginning of the war. The experiments with travelling magistrates, such as F D Fenton in the Waikato, native assessors, the *runanga* system, and other features of the "new policy", are admitted by their authors to be aimed at the suppression of Maori custom *with maori consent*. For example, the leading Minister, Stafford, is found writing to the Governor, Gore Browne, in praise of the "new policy" in 1857:

> "In this manner many objectionable customs might be got rid of, the good sense of the Native Meeting being guided by a British Magistrate. We advert particularly to such usages as those mentioned by your Excellency, of Taumau (or betrothal); of making Tauas upon the innocent relatives of an offender; of punishing the imaginary crime of witchcraft; and of the Tapu. These need nothing to their abolition but the general consent of the Maoris themselves — and, this once obtained, acts of violence attempted by individuals in pursuance of such customs might be repressed and punished".[16]

It is perhaps interesting to follow the plan of attack on one particular custom to which reference is made in the Stafford memorandum just quoted: "of making tauas upon the innocent relatives of an offender". This refers, of course, to *muru*, the procedure by which ritual seizures of property were made in compensation for wrongs committed: often, the *hapu* of the offender was levied collectively.[17]

First we see that the book of English law translated into the Maori language which was prepared by Fenton at the request of Governor Gore Browne as part of the "new policy" is quite specific about *muru*:

> "It is certain that the 'Taua Maori' is contrary to law . . . The officers of justice should do their best to suppress and put an end to this bad custom.[18]

Again, in the *Native Districts Regulation Act* 1858, the purpose of which is stated in the preamble to be "to make and put in force, within districts over which the Native title has not been extinguished, such regulations on matters of local concernment . . . as may appear to be adapted to the special wants of the inhabitants . . . as far as possible with the general assent of the persons affected thereby", we find specific power:

> "For the suppression of injurious Native customs, and for the substitution of remedies and punishments for injuries in cases in

---

[16] Stafford to Gore Browne, May 6 1857, *App JHR* 1858, E-5.

[17] The taua muru is the band which carried out the muru. Williams' Dictionary of the Maori Language gives as the meaning of muru. 1. Wipe, rub, rub off; 3. Pluck off (leaves); 5. Plunder; 6. Wipe out, forgive. A list which perhaps conveys the complex function of the procedure in restoring balance to a disrupted situation, and in bringing honour to all participants including the "victims". For an interesting account of a muru, see the anonymous description of an episode in Taranaki in 1873 appearing in the Journal of the Polynesian Society, Vol 28, p 97-102. Also, by way of further explanation of the function of muru, and illustration of the importance of take which was stressed at the beginning of this Paper, see the following two extracts from Bruce Biggs, Maori Marriage, A H and A W Reed, 1960, p 50-52.

> "The *taua*, involving as it did all who could possibly be interested, had the desirable effect of making public and memorable the event . . . the persistence of the custom of underlining the importance of any event by quarrelling and dissenting opinion is noticeable today, particularly with regard to the place at which a corpse shoud be buried . . .
>
> "An incident related by Yate shows the need for a cause of complaint *(take)* before a *taua muru* could be launched . . . the missionary's servant, a former slave, was married to a free girl. This of course conflicted with custom. The girl's mother had told Yate privately that she was well pleased with the match but that she must be angry about it with her mouth lest the tribe should come and take away all her possessions and destroy her crops. She accordingly protested against the marriage in public and demanded compensation which, in the form of a blanket, was given to her by Yate. So by simulating dissatisfaction and by demanding compensation . . . the mother deprived others of a *take* or a *taua muru* directed against herself as a consenting party".

[18] The Laws of England; compiled and translated into the Maori Language, by direction of His Excellency Colonel Thomas Gore Browne, CB, Governor of New Zealand, Auckland, 1858, p33. Some New Zealand bibliographers have attributed the composition of this work to the Chief-Justice of New Zealand, Sir William Martin. It is probably now accepted that this attribution is mistaken, the true author being F D Fenton, the controversial Magistrate in the Waikato and later judge of the Maori Land Court. For some account of the circumstances leading up to the composition of this work, see Frame, A, "The Law's Missionaries at the Frontier", Spleen, Vol 3, 1976.

which compensation is now sought by means of such customs".[19]

The notion that Maori consent is required is also seen to be slipping away, as we discover that:

> "The issue of any Order in Council under the Act shall be conclusive proof of . . . general assent to any regulation thereby made".[20]

This, then, is the policy of the Government in 1858—"to insinuate or induce the acceptance of British law". We know that it did not outflank the King movement, as it was intended to do, but collided head on with it in the fighting of the 1860's.

The Post-War Reversal

We have seen that pakeha policy has so far been struggling with the problem of what to do about Maori custom. We are now to see the new solution: *to deny that it exists at all.* It is the Chief Justice of New Zealand, Sir James Prendergast[21] who provides this elegantly simple solution, in the case *Wi Parata v The Bishop of Wellington* decided in 1877.[22] In the same case, Prendergast declared the Treaty of Waitangi to be no treaty at all. In the course of his judgment in the case, the Chief Justice observed:

> "Had any body of law or custom capable of being understood and administered by the Courts of a civilised country been known to exist, the British Government would surely have provided for its recognition . . .".[23]

We have seen that the British Government *did* provide for its recognition, and *did* repeatedly assert the existence and coherence of maori custom. Indeed, the basis for dealing with land in New Zealand had throughout been predicated upon the existence of customary Maori land law. As recently as 1865, in the *Native Rights Act*, Parliament had enacted that:

> "Every title to or interest in land over which the Native Title shall not have been extinguished shall be determined according to the Ancient Custom and Usage of the Maori people so far as the same can be ascertained".[24]

His Honour the Chief Justice was undeterred by this legislative recognition, dismissing it mockingly:

> "As if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being".[25]

The outrageous logic is thus advanced that Maori custom does not exist because it is not recognised by statute whilst any statutory recognition can be disregarded because Maori custom does not exist! The fact is that the *Native Rights Act* of 1865, and the *Native Lands Act* of 1862 and 1865 simply faced the reality which was inescapable: that the *only* standard by which Maori land claims could be adjudged was Maori custom. Indeed, a good example of routine inquiry into and application of maori custom is provided by the Native Land Court in the *Te Aroha* case.[26] The Court, consisting of Judges Maning and Monro had to determine whether the outcome of the battle of Taumatawiwi, between Marutuahu and Ngatihaua in 1830 was such as to justify a claim to title to certain disputed lands according to Maori usage and custom.Many other instances could be cited.

In a later case, the Judicial Committee of the Privy Council, the ultimate Court of Appeal within the New Zealand judicial system, rejected the view of Sir James Prendergast. Their Lordships observed:

> "It was said in (*Wi Parata's* Case) which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of law can take cognisance. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court".[27]

---

[19] Native Districts Regulation Act, 1858, s 2(16). Clearly aimed at muru.

[20] Section 6 of the Act.

[21] Prendergast had in 1869, as Attorney-General, shown himself to be no friend of the Maori people in his opinion on the status of Maori rebels. The same Prendergast is later found, in the absence of Governor Gordon, smoothing the way for Bryce's military operation against Te Whiti at Parihaka.

[22] Wi Parata v The Bishop of Wellington (1877) 3 Jur (NS) 72.

[23] Wi Parata's Case, p 77-78. This cannot be the place to discuss the decision as it relates to the validity of the Treaty: I should simply indicate that I believe the decision to be wrong in law. The other judge sitting in the case was Richmond — see note 13 supra.

[24] Native Rights Act 1865, s 4.

[25] Wi Parata's case, supra, p 79.

[26] Important Judgments Declared in the Compensation Court and Native Land Court 1866-1879, Auckland, 1879. The Aroha case was decided in 1871 and is reported at p 109.

[27] Nireaha Tamaki v Baker (1901) NZPCC 371, at p 382. It is particularly curious, in view of this decision, to find the

What of the future? Perhaps when we consider the value of Maori custom we might note the comment made with respect to myths but which can apply to other cultural institutions, including law:

> "The life of myths consists in reorganising traditional components in the face of new circumstances or, correlatively, in reorganising new, imported components in the light of traditions".[28]

It is this possibility of creative interaction between Maori customary concepts and pakeha law — a possibility unique to New Zealand — which is lost when, in accordance with an ill-considered model for "law", one system is exalted into unshakeable dominance and the other defined into darkness. If one of the central problems of modern legal systems is the gap between state-law and the life of ordinary people, between *gesellschaft* and *gemeinschaft*, between technical signals and felt values, then the existence in a culture of a system of customary law should be seen as a national asset, not as a "problem" to be defined away.

Certainly, and signs everywhere in contemporary New Zealand society offer warnings on this score, we should note the destructive effects of State-made law and regulations on culture. As Stanley Diamond has put it:

> "We live in a law-ridden society; law has cannibalised the institutions which it presumably reinforces . . . the relation between custom and law is, basically, one of contradiction, not continuity".[29]

Having traced the cycle of colonising attitudes towards Maori custom, it is perhaps appropriate to end on a note which suggests a fresh turn of the wheel:

> "*Tohunga Needed to Lift Curse, Magistrate Tells Violent Man:* . . . I really and truly believe (said Mr Bergin, SM) that you need exorcising by a tohunga, supplementary to psychiatric treatment which you can obtain from competent pyschiatrists".[30]

There is no golden age, or else all ages are golden. All each of us can do is to respect other cultures and work to change our own.[31]

New Zealand Prime Minister, Sir Joseph Ward, telling the Imperial Conference in London in 1911 that:

> "Our people in New Zealand . . . consider that in matters relating to native land which come before the Privy Council here what is a custom, as far as the native law in New Zealand is concerned, may not in the ordinary sense be fully recognised by the Privy Council when dealing with those laws".
>
> Sir Joseph Ward at Imperial Conference 1911, Minutes of Proceedings.

[28] P Maranda, Mythology, Penguin, 1972, p 8.

[29] Stanley Diamond, "The Rule of Law versus the Order of Custom", in The Rule of Law, ed R P Wolff, Simon & Schuster, 1971, p 115.

[30] Evening Post, 23 November, 1977. I know nothing more of this case than is revealed in the newspaper account, nor do I wish to overstate the significance of such isolated recognition of Maori custom. A "tohunga" is an expert, in a particular field, within maori culture.

[31] The sentiment, and perhaps the words, are those of Professor Claude Levi-Strauss of the College de France in Paris.

RECENT ADMISSIONS

Barristers and Solicitors

Abbott, C A	Auckland	20 February 1981
Aitken, E M	Auckland	20 February 1981
Anderson, G A	Auckland	20 February 1981
Bazzard, C J N	Auckland	20 February 1981
Bilham, C G	Auckland	20 February 1981
Blacklock, J M	Auckland	20 February 1981
Bradburn, P G	Auckland	20 February 1981
Bulewa, K R	Auckland	20 February 1981
Burcher, R L	Auckland	20 February 1981
Burgess, R L	Auckland	20 February 1981
Burnett, M L S F	Auckland	20 February 1981
Carter, B H	Auckland	20 February 1981
Carter, I C	Auckland	20 February 1981
Cawthorn, P G	Auckland	20 February 1981
Clark, S R	Auckland	20 February 1981
Coltman, J R	Auckland	20 February 1981
Cooney, H O	Auckland	20 February 1981
Cornish, R H	Auckland	20 February 1981
Davies, S J	Auckland	20 February 1981
Davis, C J	Auckland	20 February 1981
Dean, M R	Auckland	20 February 1981
Dillon, R M	Auckland	20 February 1981
Dobson, K B	Auckland	20 February 1981
Donald, R D	Auckland	20 February 1981
Drake, A R	Auckland	20 February 1981
Dunleavy, P A	Auckland	20 February 1981
Farquhar, D K	Auckland	20 February 1981
Fitzgerald, G M	Auckland	20 February 1981
Godinet, C F L	Auckland	20 February 1981
Gray, W M	Auckland	20 February 1981
Green, M I	Auckland	20 February 1981
Gruar, P F	Auckland	20 February 1981
Hames, A M	Auckland	20 February 1981
Healy, R A	Auckland	20 February 1981
Hetherington, K B	Auckland	20 February 1981
Hooker, J K	Auckland	20 February 1981
Ion, J P	Auckland	20 February 1981
Jury, D N	Auckland	20 February 1981
Kennedy, A J	Auckland	20 February 1981
Kohler, G J	Auckland	20 February 1981
Konijn, J G	Auckland	20 February 1981
Larkin, E D	Auckland	20 February 1981
Lawler, B J	Auckland	20 February 1981
Leahy, M E	Auckland	20 February 1981
Levett, M J	Auckland	20 February 1981
Lewis, D M	Auckland	20 February 1981
Longdinprisk, M L	Auckland	20 February 1981
McCarthy, S J	Auckland	20 February 1981
McDermott, B A	Auckland	20 February 1981
McDermott, J R	Auckland	20 February 1981
McFadden, E M	Auckland	20 February 1981
McGowan, N E	Auckland	20 February 1981
MacKinnon, J J	Auckland	20 February 1981
McLean, S A	Auckland	20 February 1981
Mayne, L S	Auckland	20 February 1981
Moran, P M	Auckland	20 February 1981
Morgan A K G	Auckland	20 February 1981
Morris, M S B	Auckland	20 February 1981
Muir, M A	Auckland	20 February 1981
Muston, C	Auckland	20 February 1981
Ohms, V R	Auckland	20 February 1981
Orr, P M	Auckland	20 February 1981
Parshotam, S C	Auckland	20 February 1981
Paterson, A M	Auckland	20 February 1981
Perkins, A J F	Auckland	20 February 1981
Piper, J W	Auckland	20 February 1981
Podwin C A	Auckland	20 February 1981
Prasad, R M	Auckland	20 February 1981
Ramsdale, C P	Auckland	20 February 1981
Refoy-Butler, J T	Auckland	20 February 1981
Riddell, K M	Auckland	20 February 1981
Rogerson, D J	Auckland	20 February 1981
Rota, J L	Wanganui	27 February 1981
Scott, O H M	Auckland	20 February 1981
Sheetz, E C M	Auckland	20 February 1981
Sibbald, J L	Auckland	20 February 1981
Smith, G R C	Auckland	20 February 1981
Spence, J A	Auckland	20 February 1981
Taylor, C J	Auckland	20 February 1981
Taylor, M L	Auckland	20 February 1981
Thompson, A K	Auckland	20 February 1981
Thompson, G W	Auckland	20 February 1981
Town, G R	Auckland	20 February 1981
Uehlin, B R J	Auckland	20 February 1981
Unkovich, Z	Auckland	20 February 1981
Wade, M J	Auckland	20 February 1981
Walsh, B M	Auckland	20 February 1981
Waring, K E	Auckland	20 February 1981
Washer, P C	Auckland	20 February 1981
Waterhouse, M K	Auckland	20 February 1981
Watson, B J	Auckland	20 February 1981
Welson, E P	Auckland	20 February 1981
Western, C D	Auckland	20 February 1981
Whale, P J	Auckland	20 February 1981
Williams, G B M	Auckland	20 February 1981
Wills, S C B	Auckland	20 February 1981
Willox, R J	Auckland	20 February 1981
Wilson, A J	Auckland	20 February 1981
Wilson, W T M	Auckland	20 February 1981
Wiltshire, L W	Auckland	20 February 1981
Young, K	Auckland	20 February 1981

"The Startling Reality: Toward Unconstitutional Government" – Some Changes

The writer of the article "The Startling Reality: Toward Unconstitutional Government", published in Part 2 of this year's NZLJ, proposes the following changes:

Under the heading "D. The Oversight", subheading (a) "The Members' disagreement", change the third sentence, first paragraph, to read:

> "The assumption of many, however, including members of the House in 1977, is that a candidate elected or returned at a general election is, in law, a member of Parliament as from the Returning Officer's declaration of the result of the poll.[23]"

Under the same subheading (dealing with the second view held by members), the sentences following the statement of the Acting Prime Minister, corresponding to footnote 30, should be changed to read:

> "The Minister of Justice explained that 'the legislation' to which the speaker was referring was the Electoral Act 1956,[31] an Act in which nowhere is it 'set out' that membership dates as from the return of the writs (or, indeed, the date *fixed* for their return). It will be seen that even at this stage a candidate is still a Member *elect*, not a member.[32]"

Under subheading (c) "The judicial acceptance", change the second to last sentence in the third paragraph, following footnote 60, to read:

> "This, if not acceptance of, is consistent with the fact that the election is not the event constituting the House; that it does not, of itself, resurrect the House upon ceasing to exist."

These changes should allay the confusion resulting from the reference to "the date fixed for the return of the writs declaring the results of the polls" in introducing the first of the Members' views (hence the first correction under "(a) The Members' disagreement"). This, the first of the Members' views, was intended to relate to the formal declaration of the successful candidate's election. The second and third corrections follow as a consequence of this.

The Press and Politicians

Most MPs dislike the Press. The bitterness often comes out into the open. As when Mr Charles (later Lord) Pannell asserted: "One of the comforting reflections of these times is that the tripe which goes into the *Daily Express* today, wraps up the fish and chips tomorrow."

A verdict on politicians by a politician was given in the House of Commons by Sir John Hall, when he was MP for Wycombe: "People are becoming increasingly cynical about governments and politicians . . . If one were to put on a tombstone today, *'Here lies a politician and an honest man'* one would immediately be asked 'Why bury two men in one grave?"

George Clark, Political Correspondent of the Times in Hand in Hand (cu) Nov 1980

The Evils of Drink — in the Commons

Sometimes a Member riding his or her particular "hobby horse" can provoke a sarcastic response. I remember one stormy exchange of words between Lady Astor, the first woman who sat in the House of Commons and an advocate of total abstinence, and Winston Churchill. Churchill liked his brandy. It was after dinner. "Mr Churchill, you are drunk!" she declared. "And you, Madam, are ugly, but I shall be sober tomorrow," he retorted.

Lady Astor's toughest adversary in the Commons was a man who was fond of his pint, Mr Jack Jones, a former builder's labourer, who sat for Silvertown. One day, Lady Astor was raging about intemperate men with "beer bellies" who drank stuff that was no good for their stomachs. Mr Jones rose in his full glory to defend the drinkers: "I would put my stomach up against the Hon Lady's any day of the week!" he declared.

George Clark, Political Correspondent of the Times in Hand in Hand (cu) Nov 1980

Ouch!

"The Government must steel themselves and attune themselves to what will be a growing, high-pitched scream from the emasculated British aircraft industry."

House of Commons