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SEMANTICS AND THE STATE

With major legislation before Parliament it is easy to overlook the little Bills. Very often these little Bills will introduce major changes almost unnoticed. In some cases these changes are clearly intended. In others, they could be regarded as accidental.

Consider, for example, the Manapouri-Te Anau Development Amendment Bill. Instead of the maximum and minimum levels of those lakes being fixed by legislation as at present, it is proposed that operating levels be determined under guidelines promulgated by the Minister of Energy. These operating guidelines are to be "based on recommendations submitted to him by the Guardians of Lakes Manapouri and Te Anau." The first problem — these bodies have no legal status. They have no statutory basis and no corporate personality. They are but informal groups formed by some Minister or other. It is quite meaningless to refer to them in a statute. Surely one of the many caucus lawyers spotted this, and given that nothing has been done, one questions motives and even fears for the Guardians.

These guidelines are "aimed to protect the existing patterns, ecological stability, and recreational values of their vulnerable shorelines . . ." — so far so good — "and to *optimise* the energy output of the Manapouri Power Station". What does optimise mean? There are several possibilities.

Firstly it could mean "to make optimum" with optimum defined as the best compromise between opposing tendencies (*Concise Oxford*). Presumably the opposing tendencies would be ecological stability (as stated) and electricity demand (as implied), with the Minister being judge. But how that decision could then be said to be "based on recommendations" submitted by the Guardians it is hard to see.

Secondly, it could mean to "make the most of". This is the most common definition and possibly the intention is that the operating levels should be such that optimum, or most favourable (perhaps maximum) levels of energy should be generated but within the absolute constraints recommended by the Guardians. (Of course those *recommendations* may do no more than produce a basis for ministerial departure). However, that state of affairs is not described by the words "optimise the energy *output*." Within the context of this definition would not making the most of the energy *output* involve the best allocation of that energy among competing users? — something quite different from what this provision is about which, if the awful word must be used, is optimisation of energy production.

There will be those who say the intention is clear and this is quibbling with the obvious. But if the intention is clear, why cannot it be clearly and obviously put without reference to legally non-existent bodies and without obfuscatory jargon which, with apologies to Wilde, sends us seeking the decision that dare not speak its name — at least yet.

The Official Information Bill also has aspects that invite questioning. This Bill, when enacted, will repeal the Official Secrets Act 1951 but add new offences covering much the same ground as the Crimes Act 1961. The changes in toto require careful study, but firstly, the offence of wrongful communication of information is one that may be committed by "a person who owes allegiance to the Queen in right of New Zealand". Now that expression is not new and indeed its interpretation exercised the Courts in *Joyce v DPP* (Lord Haw-Haw) and other cases. But if "aerodrome" is of such uncertain meaning as to require definition in the Public Works Bill, does not this expression also invite

definition, just so we do know, without lengthy research, precisely who may be liable to fourteen years imprisonment? The other point is that the offence is wrongful communication of information "likely to prejudice the security, defence, or *international relations* of New Zealand". No more explanation for the addition of "international relations" is given than "the phrase suggested for inclusion . . . is . . .".

The Prime Minister's well known aversion to the oveseas activities of HART representatives and also of the President of the Federation of Labour, Mr Knox gives these words perhaps undeservedly sinister connotation. But the case of HART illustrates how dangerously uncertain the new provision may prove. In earlier times the then president of HART Trevor Richards was accused of stirring up trouble for New Zealand overseas. Now, at the Heads of Government Meeting, Commonwealth leaders have in effect said activities in New Zealand, for which HART may claim credit, have improved New Zealand's image, at least in their eyes. So did HART prejudice New Zealand's international relations as earlier feared or not? It is also strange that prejudicing our international relations should be a crime, while prejudicing New Zealand's "substantial economic interests" is but a Police Offences matter.

Again then we have important policy changes in a section of a Bill of which, in the explanatory notes, no more is said than that it is "designed so that it can be severed from the Bill and divided into eight amending Acts".

Next up is the Human Rights Commission Amendment Bill which is a consequence of the *Eric Sides* case. The Human Rights Commissioner was not consulted on this amendment. Doubtless, this was intended to indicate that it was all his fault. However, it is the Act that is being changed, not the incumbent of that office. The amendment will allow preferential treatment based on religious belief by an adherent of a particular belief where special circumstances govern the manner in which the duties of a position are required to be carried out. Unless meat companies have suddenly become Moslems and there are special circumstances requiring that petrol purchased from Arabs be dispensed by Christians, the amendment would seem to assist in neither of the two cases most commonly spoken of in New Zealand. It does though undercut the basic principle underlying the Act itself.

The amendment also gives the Commission a discretion to decide not to further investigate a complaint if, ". . . having regard to all the circumstances of the case, any further investigation is unnecessary." Was further investigation of the *Sides* case "unnecessary"? So that does not seem to help matters either. What is being achieved?

Finally, this topic can hardly be left without mentioning the Holidays Bill. This Bill consolidates the Annual Holidays Act 1944, the Public Holidays Act 1955 and some sections of the Factories Act 1946. After its passage, holidays will be protected by this new Act, and by the Sovereigns Birthday Observance Act 1952, the Anzac Day Act 1966, The Waitangi Day Act 1976 and provisions in the Industrial Relations Act 1973 and the Banking Act 1908. The protection accorded to this particular institution must make the Commissioner for the Enviroment turn green.

TONY BLACK

BUTTERWORTHS TRAVEL AWARDS 1981

Christine French is the daughter of an Invercargill practitioner. As an undergraduate at the University of Otago she was awarded numerous prizes, including the Joshua Williams Memorial Prize. While on a teaching fellowship in 1980 she wrote what the Dean of the Law Faculty describes as "a very distinguished dissertation on the overlap between Contract and Tort". She is to take up a Rhodes Scholarship at Oxford University, where she will read for a BCL Degree.

Derek Johnston and *David Poole* both hold degrees of LLB (Hons) from the University of Auckland. Derek Johnston, who holds also a degree of M Jur, has been awarded a Fellowship at the University of Toronto to read for a Doctorate, while David Poole holds a Frank Knox Fellowship to read for an LLM Degree at Harvard University.

CONFERENCE OF AUSTRALASIAN AND PACIFIC OMBUDSMEN

The annual Conference of Australasian and Pacific Ombudsmen was held this year in New Zealand, for the first time since 1974. It was attended by eight Australian Ombudsmen, including the Ombudsman for the Australian Commonwealth, two Ombudsmen from Papua New Guinea, the Fiji Ombudsman and the new Solomon Islands Ombudsman. Attending as observers were the newly appointed Ombudsman for Sri Lanka, and the British Parliamentary Commissioner for Investigations. The Conference lasted a week, and this time as an experiment it was decided to throw one day open to the public. Accordingly, on Tuesday 29 September, the guests in the Legislative Council Chamber were welcomed by **Mr G R Laking**, the Chief Ombudsman.

In the course of his opening remarks, Mr Laking contrasted the value which he saw in the role proposed for the Ombudsman in the new Official Information Bill ("an entirely appropriate responsibility for an Ombudsman") with earlier roles which — misguidedly in his opinion because of their basic incompatability with the Ombudsman function — his office had been asked to include. Among them had been Race Relations Conciliator and Privacy Commissioner, and now ex-officio member of the Human Rights Commission.

Mr Laking proceeded to consider "whether there is any general agreement on the criteria which should determine the acceptable limits of the Ombudsman function, bearing in mind always that the primary justification for his existence is to help maintain a reasonable balance between the interests of the citizen and those of the State; and that in doing so he is acting as an agent of the Legislature and not of the Government."

"The Ombudsman", said Mr Laking "stands in a special relationship with the Courts, who are the ultimate guardians of individual rights and to whose jurisdication the Ombudsman, like everyone else, is subject. There is not confusion of function as between the two. The Ombudsman is not an extension of the judicial process; he is an extension of the legislative process."

One of the Ombudsman's hardest tasks, said Mr Laking, is to decide, in cases where there is an alternative legal remedy, whether special circumstances exist that make it unreasonable for the complainant to be required to exercise it before any intervention

by the Ombudsman. "In short", said Mr Laking, "another question to which the conference will be addressing itself is whether the two systems are fully complementary or whether there is perhaps a gap between the two which needs to be filled by other means".

Mr Laking concluded by quoting the following paragraph from an article by Professor A W Bradley which appeared in Cambridge Law Journal 39(2) November 1980 at pp 331-2:

> ". . . many problems of administrative law which are in the course of receiving judicial answers are at the same time coming before the Ombudsman, there to be answered for his own purposes. For the time being, and subject to the rather unlikely possibility of a radical reform that might bring the administrative work of the courts and that of the Ombudsman together into a single institution, parallel processes exist, each having certain advantages and disadvantages relative to the other. Each system has acquired and is acquiring experience that could be valuable to the other. Hitherto the Ombudsman's discretion to investigate complaints that might be the subject of a remedy in the courts has been generously exercised, and I hope this will continue to be the case. Even though the authority of a court may be needed to establish the principle that a government department is liable for incorrect advice given to the citizen by an official, this is no reason why every citizen who complains that he received incorrect advice should be forced to sue the department before he can expect any redress. The two forms of procedure are in fact likely to remain very different and so

is the constitutional status of the two systems, although there may be a need for a few key links between the two to be established."

The Conference was formally opened by the Right Honourable D Thomson, Minister of State and Leader of the House. He was followed By Mr F D O'Flynn QC MP who was deputising for the Leader of the Opposition.

The first principal speaker was the Chief Justice, the Right Honourable **Sir Ronald Davison,** who took as his subject "The Courts and the Ombudsman: Protectors against Maladministration".

Sir Ronald referred to the establishment of the Ombudsman in New Zealand in 1962 and to the formation of the Administrative Division of the High Court by the Judicature Amendment Act 1968. He continued:

> "There are thus two complementary organs in New Zealand whose aid a citizen can enlist to right alleged wrongs of maladministration. They are the Administrative Division of the High Court, and the Ombudsman."

He then posed three questions for consideration:

(a) *Do the Court and the Ombudsman provide a comprehensive cover of remedies for a citizen aggrieved by maladministration?*

After discussing what he described as "an apparent blurring of what was once considered as a fairly clear line of demarcation between errors of law with which the Courts would deal and errors of fact which they considered largely outside our province", Sir Ronald concluded that "there are areas of administrative decision-making which are not at present subject to review by the Courts. They are, consideration of facts on their merits, and the exercise of discretionary powers within the statutory jurisdiction of the administrative body." "Where", he asked, "does the aggrieved citizen then go in order to seek a remedy on the merits?"

The citizen can, Sir Ronald pointed out, appeal to the Court on the merits if the relevant statute gives him that right. If it does not, he can go to the Ombudsman. The Administrative Division of our High Court does not, unlike the Australian Administrative Appeals Tribunal, have power to adjudicate on the merits of the case. "Whether our administrators are yet prepared to surrender to the Administrative Division the right to review administrative decisions on the merits, I do not know. This is an area where the frontier of our own administrative law may yet be advanced another step, he said.

"But what the Administrative Division cannot do, the Ombudsman can do to the extent permitted in the First Schedule and subject to the limitations imposed by s 13(7) of the Act . . . . This wide power of investigation appears to me to cover all grounds which a citizen may have to challenge an administrative decision or to remedy maladministration, including the right of review on the merits which is not available in the Court except for such matters as are excluded by the Act from the Ombudsman's jurisdiction.

"From my examination of the powers involved I have reached the conclusion that the powers of the Administrative Division of our High Court and of the Ombudsman are complementary, and that between them they do not leave the citizen to any great extent without the right to seek a remedy except for matters excluded from the Ombudsman's jurisdiction where the Administrative Division has no right of review on the merits."

(b) *Are the Ombudsman's powers to compel acceptance of his remedies adequate?*

Sir Ronald summed up the extent of the Ombudsman's existing powers as follows:

> "The Ombudsman can reach a new conclusion on the merits, but he can only
> (a) report his opinion on the decision to the body concerned
> (b) give his reason for reaching that opinion
> (c) make a recommendation as he sees fit (s 22 of the Act)

"If the citizen's grievance is not remedied, the Ombudsman can report to the Prime Minister and may thereafter make a report to Parliament as he sees fit. As persuasive and as powerful as the recommendation may be, in the final analysis it lacks the sanction of a Court Order to enforce it."

After considering the issues involved he suggested that if the decisions of the Ombudsman were made enforceable by leave of the Court this might provide a sufficient sanction to ensure compliance with the Ombudsman's decision.

(c) *The reviewability of the Ombudsman's decisions*

After carefully examining the wording in s 3 of the Judicature Amendment Act 1972, Sir Ronald concluded, "There is little doubt in my mind that . . . the Administrative Division effectively has jurisdiction under its Act to engage in a review of the exercise of a statutory power by an Ombudsman." The

privative clause was indeed a formidable barrier. However, a small gap in it was provided by the words, "except on the ground of lack of jurisdiction". The scope of judicial review on the ground of lack of jurisdiction had taken great strides in the past twelve years, since the decision in *Anisminic*. After briefly reviewing these developments Sir Ronald concluded that, notwithstanding the terms of the privative clause, the Administrative Division could in appropriate cases review a decision of an Ombudsman. (Readers are referred to the article by John Smillie on privative clauses in [1981] NZLJ 274.)

"This topic," said Sir Ronald, "raises for consideration the wider question of whether or not the Ombudsman's decisions should be reviewable by the Courts. There may be some who say not. For myself, I am of the view that, in a country governed by the rule of law, there should be no personal body which is either above the law or outside the law — all should be subject to control of the Courts. But on that matter there may be other views."

The next speaker was **Mr L J Castle**, New Zealand Ombudsman, who took as his subject "The Ombudsman — a developing concept in the field of administrative law?"

Mr Castle began by tracing the genesis of the New Zealand Ombudsman, remarking "The watchdog philosophy and the Ombudsman's role in the field of administrative review were transplanted to New Zealand in 1962 (cross-pollinated in Denmark en route), and in the last two decades have become a growth industry world-wide".

He then turned to the Australian scene and outlined the workings of the Australian Administrative Appeals Tribunal. He recalled how in this country in 1960 Mr R B Cooke, Barrister, (now The Right Hon Sir Robin Cooke, Judge of the New Zealand Court of Appeal), had advocated in a paper presented to the Dominion Legal Conference the establishment of a Supreme Administrative Court which would have power, inter alia, "to hear consensual appeals on the merits; on the fairness, reasonableness and expediency of administrative action, not merely on its legality." In the event, of course, the New Zealand Government decided to adopt the Ombudsman concept, a course followed a little later by Australia. This sequence led Mr Castle to the wry comment "It is my experience that when, in the opinion of Australian State Ombudsmen, their legislation is working satisfactorily, it is the state law draughtsmen and those associated with the introduction of the legislation who are to be commended for its simplicity and clarity. When the legislation is less than clear or is too restrictive then the blame can properly be laid at the door of New Zealanders!"

He then summed up the position in the two jurisdictions as follows:

"To summarise, in Australia there are three avenues for review — the Federal Court, involved with legalities, the Administrative Appeals Tribunal, involved with the merits, and the Ombudsman, involved with both legalities (not definitively) and merits but without power of decision. In New Zealand, just the two avenues, namely review under the Judicature Amendment Acts of 1972 and 1977 (again the legalities) and the Ombudsman (again the legalities, not definitively), and the merits, with recommendatory powers urging reconsideration or a decision change."

The Ombudsman is not constrained, as the Courts are, in considering the merits of an administrative decision, and his jurisdiction has been described as "the new equity". However, he must himself observe the principles of fairness and natural justice, and there was no doubt that he was subject to administrative review by the Court. "The judicial system is paramount — the Ombudsman's functions are supplementary", said Mr Castle.

On the other hand the speaker had no doubt that, where a complainant's application for judicial review of an administrative decision had been refused on the ground that there was no jurisdictional error warranting the relief sought, the Ombudsman could assert his jurisdiction to consider whether the administrative body had taken relevant factors into account.

He drew attention to the provisions of s 19(6) of the Act which, broadly speaking, preclude the use of material gained in the course of an investigation as evidence against any person. He continued, however, "The reason for this prohibition of the use of the Ombudsman's reports and the information gathered in the course of an investigation is obvious, but in this field of administrative review, are we not endeavouring to resolve problems expeditiously and at minimal cost? If the Ombudsman is unable to achieve a settlement, the common ground that has been established ought to be available to the parties to any litigation which ensues. Is there room for a reconsideration of whether or not that constraint should continue? In any event the information disclosed in the report will obviously be used by experienced counsel without disclosing the source. Questions of the report's evidentiary worth will arise, but before the Ombudsman issues a report, he obtains agreement as to the facts from the department or organisation concerned and from the com-

plainant upon the basis of which he has formed an opinion on the merits of a complaint. There is thus an agreed statement of the facts. Moreover, one is bound to give reasons for one's opinion on the merits of the complaint. Are there not similarities here with the Australian Judicial Review Act?"

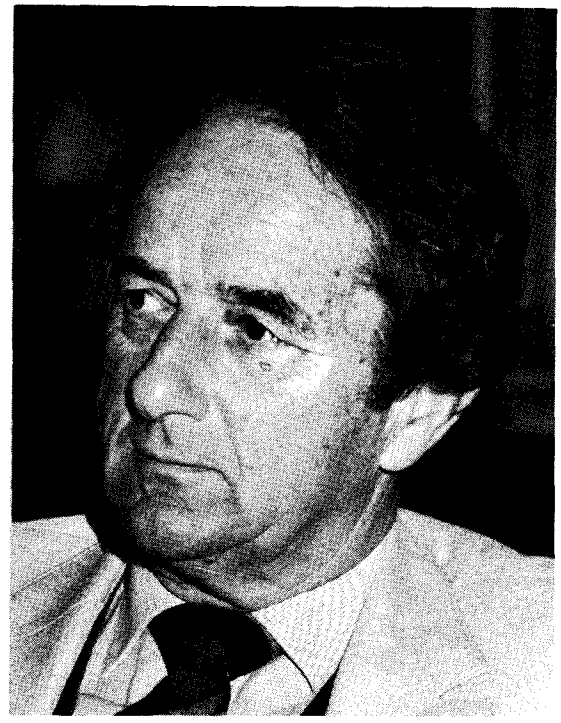
Mr Castle ended his address with a reference to the role assigned to the Ombudsman in the Official Information Bill.

"Of particular significance is the (proposed) extension of the Ombudsman's jurisdiction under the Official Information Bill. As presently drafted ministerial decisions will, for the first time, but only in the new context, be within the Ombudsman's purview. There is neither the time nor is this the place to embark on a detailed dissertation on this Bill, but there is no question but the workload of the Office will be substantially increased if it is to be the complaint handling agency on behalf of citizens who, for example, consider that the department and/or the minister has unreasonably withheld information to which they consider they are reasonably entitled. As one would expect, the review powers of the High Court (limited to the legalities) are incorporated in this new Bill but the privative clause in the current Ombudsmen Act is not carried forward. I do not see any significance in this omission, for in any event it seems proper, as I hope I have earlier demonstrated, that our High Court should continue to be supreme.

The next speaker was **Professor J E Richardson,** the Chief Ombudsman of the Commonwealth of Australia. The topic of his paper was "Availability of Alternative Remedies", a discussion of the circumstances in which the Ombudsman could properly investigate a complaint even though some other form of legal remedy might be available to the complainant. However, his interest sparked by certain passages in the addresses given in the morning session, Professor Richardson proceeded to enlighten and entertain his audience with an address of a less formal kind, in the course of which he found it necessary to depart substantially from the text he had prepared. He took issue with Mr Castle's view that the Ombudsman supplemented the Court: he preferred the Chief Justice's word "complemented" The Ombudsman, in Professor Richardson's view, was not just another forum of judicial review — in reality his office could be regarded as almost a fourth arm of Government. Hence there should be no question of the Ombudsman's decisions being subject to review by the Court.

Professor Richardson placed the origin of the Ombudsman somewhat further back than the Danish experiment. An enlightened Emperor of the Han Dynasty in China, in the third century BC, after he had finished constructing the Great Wall of China, appointed a person who was required to carry to the Emperor personally any complaints about maladministration by his officials. That person was seen by Professor Richardson as the first Ombudsman.

He pointed out that the 27% of the total



Australian Budget which is spent on social services is effectively spent free of Ministerial control over actual details and circumstances of expenditure. To this extent, he suggested, the doctrine of Ministerial responsibility had become quite unreal.

Professor Richardson described briefly what he considered to be the chief advantages of the Administrative Appeals Tribunal recently established in Australia compared with the Administrative Division of the High Court which operates in New Zealand. First, the Australian Tribunal has much more scope for getting at any evidence it considers necessary than has the Court; secondly, and of considerable importance, is the far lower cost of an appeal to the Tribunal compared with an appeal to the Court; thirdly, the Tribunal appoints specialist laymen to sit in specific cases who have expert knowledge of the subject in hand.

With regard to the enforcement of the Ombuds-

man's decision Professor Richardson said that the ultimate sanction available for the Australian Ombudsman is to put his recommendation in front of Parliament and ask Parliament to enforce it. He had not, he said, ever had to resort to this expedient, but he had on several occasions had to take a complaint to the Prime Minister, and had always had his recommendation upheld.

Turning to the main topic of his address, Professor Richardson emphasised that, under the Australian Ombudsman Act, the Ombudsman is precluded from investigating a complaint where the complainant has a right to have the action reviewed by a Federal statutory Court or Tribunal, unless the Ombudsman forms the opinion that "in all the circumstances of the case, the failure to exercise the right is not or was not unreasonable".

It is the duty of the Ombudsman to determine whether an alternative right of review exists, and it is not for the complainant to show that he does not have such a right. The Australian Ombudsman, said Professor Richardson, never refused jurisdiction under this section unless satisfied that the alternative right of review or legal action was likely to provide a remedy that was both effective and also sufficient, and furthermore that the costs likely to be involved in pursuing such legal remedy would not be prohibitive for the complainant. Finally, the Ombudsman was entitled to allow his decision to be influenced by compassion, which in some cases can, he said, override the general concept of equality before the law. In this context Professor Richardson mentioned a particular example which some of us would find startling. A complainant who had imported a yacht in the confidence that he would be exempt from payment of import dues because he had owned it abroad for the necessary statutory period was forced to pay several thousand dollars in customs duties, because it transpired that the beam of the vessel was slightly larger than the limit laid down by the relevant regulations. The Ombudsman had decided that it would be fair for the Customs Department to refund to the complainant the duty which had been legally exacted. An ex gratia payment was accordingly recommended and made.

The next speaker was **Miss Deborah Shelton**, a Lecturer in the Faculty of Law at Victoria University of Wellington, who addressed herself to a number of cases illustrating the complementary and sometimes overlapping roles of the Courts and the Ombudsman.

She pointed to the contrast between Case 9158, in which the Ombudsman's investigation had shown that the revocation of an immigrant's temporary residence permit had been prompted by a Police report to the department which contained crucial errors of fact, and the case of ***Daganayasi*** in which only one of the Judges of the Court of Appeal had considered that an error of this kind was a ground for judical review. She commented, "It is the first reported case where the Crown has conceded in argument that the Minister of Immigration was required to act in accordance with natural justice. I suspect this was the combined result of nearly twenty years of gentle persuasion by the Ombudsman in immigration cases, plus of course the development of the doctrine of fairness by the Courts which the Chief Justice and Mr Castle referred to this morning".

Has the Ombudsman power to prevent abuse of process? The potential for the Courts to do so was canvassed in the Court of Appeal in *Moerao v Department of Labour* [1980] 1 NZLR 464. Meanwhile, in Case W13522, in what Miss Shelton described as an almost identical fact situation, the Ombudsman had succeeded in persuading the Department to seek leave of the Court to withdraw a prosecution for overstaying, on the ground that the decision to prosecute was unreasonable and unjust.

These cases indicated the limitation, from the complainants' viewpoint, of the legal review procedure, and justified the liberal interpretation of the relevant statutory provisions which Professor Richardson advocated.

As an example of a case in which the Ombudsman had provided an effective remedy after the Court of Appeal had refused certiorari because a statutory time limit had not been complied with, Miss Shelton cited the English case of *R v Secretary of State for the Environment, ex p Ostler* [1977] 1 QB 122.

She then turned to the question of the reviewability of the Ombudsman's decisions by the Court, referring to difficulties of timing which may arise under s 25 of the Act, and of the wording of s 13(9), which she called "a most unusual provision". It appears "she said," to allow the Ombudsman to determine his own jurisdiction and confer on him, and him alone, the discretion to apply to a Court on the question of jurisdiction."

Miss Shelton briefly discussed the question of the Court's power of review. She thought that, on the basis of the principles laid down in this regard by Lord Wilberforce in his judgment in *Anisminic*, the Courts in New Zealand should be reluctant to intervene, and she referred to a Canadian case in which the Court said, "We do not think it is ap-

propriate to apply to the Ombudsman the rules that govern a Court as to when new evidence can be produced and given effect."

At the beginning of her address, Miss Shelton had referred to a statement by Lord Scarman in *Inland Revenue Comrs v National Federation of Self-employed and Small Businesses Limited* [1981] 2 All ER 93, 112, in which he asked "Are we in the twilight world of maladministration where only Parliament and the Ombudsman may enter, or on the commanding heights of the law?". She concluded as follows: —

> "If the Crown's argument in the House of Lords case I referred to at the start is anything to go by, the discussion in ten years' time will be, is there any room for judicial review? The Crown argued that the appropriate place for the plaintiff in that case to seek a remedy was not in the Courts but from the Ombudsman. Perhaps the Official Information Bill before the New Zealand Parliament at the moment will be setting a trend; under cl 33 one may only seek a review of the Department's decision if one has first complained to the Ombudsman and the Department has rejected his advice".

From the floor **Mr C M Clothier QC**, the British Parliamentary Commissioner for Investigations, made some forceful points. He emphasised at the start that in England the connection between the Ombudsman and Parliament was so close as to render any attempt to review the decision of an Ombudsman tantamount almost to contempt of Parliament.

He gave two examples of cases in which the Ombudsman had had to go to Parliament. One was the case of the money provided by the West German Government to compensate victims in Britain of a Nazi concentration camp, where the Foreign Office decreed that certain victims who had been incarcerated just outside the confines of the camp but had undergone similar sufferings were not entitled to share in the compensation, and the Ombudsman had decided that this would be unfair to them. The Foreign Office would not budge, and so the matter was taken to Parliament and debated, with the result that the Ombudsman's view prevailed. It prevailed again in a case where Mr Wedgwood Benn refused to accept responsibility on the part of his Ministry for failing to foresee and warn the public of the impending failure of a large travel agency, which resulted in many people losing their money. The Ombudsman had recommended that those who had suffered loss should be compensated by the Ministry. Once again the matter was debated in Parliament and finally compensation was agreed to be paid.

Mr Clothier had himself been largely concerned in investigating complaints relating to the National Health Service in Britain. These investigations had involved close contact with numerous hospital staff throughout the country, who had been prepared to speak very frankly to his investigators. This essential confidence between the medical and nursing staff on the one hand and his investigators on the other would have been impossible to sustain if those questioned had considered there was a risk that what they said could be used in evidence in Court proceedings. Accordingly, Mr Clothier had adopted the practice of exacting an undertaking from complainants in these cases that, whatever the outcome of his investigations, they would not litigate. Though legally unenforceable, these undertakings had in fact been honoured in practically every case.

In the brief final discussion that followed, Mr Laking suggested that one example of the way in which the work of the Courts could be linked with that of the Ombudsman was in dealing with accusations of maltreatment by the police. Where the accused pleaded guilty, or other circumstances precluded a Court from investigating such a complaint, it would be appropriate, Mr Laking considered, for the Judge to refer it to the Ombudsman for investigation.

It seems that in this country any conflict between the Ombudsman and a Minister arising out of an Ombudsman's report has been resolved in nearly every case without recourse to Parliament. One may perhaps wonder whether, if a controversial issue resulted in deadlock between the Ombudsman and a Minister, the climate of our Parliament would allow the issue to be debated on non-party lines and to be treated as other than a political attack on the competence or integrity of the Minister concerned.

Peter Haig

THE MINING ACT 1971 RE-ASSAYED

By GERARD McCOY BA, LLB, MSc, AMRSH

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With the renaissance of the mining industry and the parallel increase in the price of gold, the Mines Division of the Ministry of Energy has been deluged with objections to mining privilege applications. Such is the reaction that tiny Waihi District Court received 1,200 objections to one application. The explanation for this phenomenon is to be found in the terms of the Mining Act 1971, the enduring capacity of the mining industry for obfuscation, and the fears of landowners.

Mining Act 1971

In a timeous article by P M Salmon (1981 NZLJ 311), the author carefully argues that the philosophy behind the present Act is in urgent need of exegetical repair. I agree entirely. The philosophy is an anachronistic expression of the great extractive mentality, exemplified by the late Dennis Glover when he wrote of Arrowtown as a place where "gold pollinated the town". The domination of mining values to the exclusion of all others is readily apparent. There is a bloated definition of "Crown land" which is in turn "open for mining" and a corresponding attenuated meaning of "private land". Section 37 of the Act provides a mechanism by which private land can be declared "open for mining", against the wishes of the landowner, in favour of selected private enterprise. By s 57 a prospecting licence is able to be automatically converted to a mining licence although the Minister can impose conditions under s 69. However, he could not impose conditions so restrictive as in effect to deny the applicant the mining licence: *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554. There is a limited requirement on the applicant to publicly notify its application. There is no requirement that a cadastral map be included in the public notice, to show clearly whether land is affected or not by the application.

An objection under the Act must be received within 3 weeks of the date of publication otherwise it is invalid (subject to reg 33 of the Mining Regulations 1973, which gives the Secretary for Energy (Mines) a discretion to waive any requirement relating to the time or manner of serving, giving, posting or maintaining any notice or objection). Of course this time-horizon is shorter than that given for objections under the Town and Country Planning Act 1977. In this respect I also agree with Mr Salmon that major prospecting and all mining matters should be resolved like any other land use by running the gauntlet of our planning provisions.

Finally, under the Act the Minister for Energy retains the final decision on any application. Should a District Court Judge recommend that an application be declined the Minister may disregard that. I submit that the final decision should be a judicial one not a political one, just as in any other land use decision. The Link Report merely assumed that it is necessary "to ensure that Ministerial discretion to alter or reverse a local Council's planning decision is assured".

As an historical aside, sixteenth century Italian mining legislation prohibited metal mining in vineyards, olive groves or fertile fields. Our law disallows mining in or within 100 feet of land used for an orchard or vineyard and that prohibition extends to land under crop. (Is grass grown for grass-seed, hay or lucerne a crop?) The Act does not protect fertile fields.

A recent decision

In *Environmental Defence Society v J K Patterson & Goldmines of New Zealand* (unreported A130/81, High Court Auckland, 10 July 1981) Speight J made several important decisions in respect of the Mining Act 1971. The applicant wished, in the course of its objection to a prospecting licence, to call evidence relating to mining. Judge Patterson ruled that such evidence was inadmissible. The applicant obtained an interim injunction before Holland J (19 February 1981) who also ordered a compulsory conference of the parties. In the conference it was ruled that EDS should represent all 17 objectors in the application for review. Three main issues arose:

(1) As a prospecting licence was automatically exchangeable for a mining licence was mining evidence available at the prospecting stage? As there is no public

notice of a s 57(1) application for a mining licence, there can be no right of objection.

(2) In an objection to a prospecting licence referred for investigation by a District Court Judge (s 129), which party begins — the objector or the applicant?

(3) What is the nature of the burden of proof in the hearing of an objection referred to a District Court Judge on a matter other than a point of law?

The Court's replies to those questions were as follows:

(1) For the mining company it was said that the automatic exchange provision provided a "carrot" for a mining company. Speight J noted that counsel "did not designate this client as a prospecting donkey". In the result it was held that mining evidence is relevant but may be excluded if it is too remote or speculative, and the evidence offered must have some real relationship to recongnisable possibilities.

(2) The District Court Judge has power under r 203 of the District Courts Rules 1948 to decide which party shall begin.

(3) As there is no legal burden of proof in a s 129 investigation, and it is not a case where a party fails to establish his case if he has not tipped the scales in favour of the proposition for which he is contending, the Judge may write a neutral report synthesising the arguments or he may make a recommendation. In the result His Honour awarded $1,000 costs to EDS.

The need for early proposals on ultimate land use

If the mining industry provided more information willingly at an early stage there would be far fewer objections to mining privilege applications. Because mining is the removal of minerals from the earth's crust, it is axiomatic that all mining activity effects some change in the natural environment and may be said to have an environmental impact ranging from the imperceptible to the highly obtrusive.

As an expression of sincerity and as a guide to the ultimate land rehabilitation, a company should have to prepare, under an amendment to the Act, an Environmental Impact Report (EIR). This would be made public at a reasonable charge and subject to auditing (EIA). The information would assist in several ways. It would first of all establish the integrity of the company by showing that it really does have a plan for the ultimate land use. Secondly it would answer many of the questions currently being asked in the form of objections under the Act (the information gap), and thirdly it would allow the company to get constructive feedback to assist in its planning.

Until the industry as a whole is prepared to be a mine of information, it can only expect labyrinthine proceedings, a landslide of bureaucratic tailings, and increased public relations subsidence.

For many New Zealanders mining is a process which eats good land, digests it thoroughly and regurgitates worthless tailings. This is because there is no proven history of land rehabilitation in our country.

In the world's first mining textbook "De Re Metallica" written in 1556 there is a poignant description of the destruction caused by the mining in Germany: ". . . the fields are devastated by mining operations . . . the woods and groves are cut down . . . when the ores are washed, the water which has been used poisons the broads and streams".

While this overstates the present case generally it highlights a major concern — that the land may not be restored. The United States of America is pockmarked with abandoned mines, graphically described as "orphan land". It is essential that in New Zealand the ultimate land use be mutually decided before mining commences. The ultimate land use should be one of the first decisions to make. Too often rehabilitation conditions do not require more than cosmetic work — giving the mine a quick facelift. Spasmodic attempts at rehabilitation have not engendered enthusiasm; post-mine planning must be co-extensive with the planning for the mine itself.

Revegetation on disturbed ground is vital: it achieves rapid visual reintegration and surface stabilisation, and offers a smorgasbord of land use possibilities.

An early example of a land rehabilitation condition is to be found in a Somerset colliery lease of 1791 which required that when the colliery closed the shaft was to be filled up and "sown with Rye Grass seeds". This precise specification is more stringent than our present legal requirement. To ensure compliance with any condition that may be attached to a licence I believe there should be a bond, realistically large, to act as a deterrent. It should be

inflation-proof and remain in force for fifteen years as a protection against latent leachate or insolvency.

Conclusion

In his recent article G A Howley claimed (1981 NZLJ 193, 195) that "many local authorities (and regrettably their advisers) together with such groups as Federated Farmers, appear to be ignorant of the provisions of the Mining Act. . .". It is with some indignation that I brand this comment as a Bremworth exhortation — it sweeps all reasoning under the carpet. The farming community has had to adopt an adversarial role because of the lack of information provided by the mining industry. To rectify this an order by objectors for discovery of documents is becoming increasingly common, and in *Environmental Defence Society Inc v Goldmines of New Zealand Ltd* (unreported, District Court Lower Hutt, 14 February 1981) Judge Patterson ordered discovery against the applicant under the Mining Act 1971. However, in *NZ Cement Co Ltd v Trebilcock et ux* (unreported, District Court Westport, 13 July 1981) Judge Frampton ruled he had no jurisdiction to order discovery, on the ground that the District Courts Act 1947 and its Rules do not apply to the Coal Mines Act 1979. In view of this conflict of authority, an appeal will be needed to settle this legislative demarcation dispute.

Because of the potential damage that mining can cause it is essential that statutory penalties and fines truly reflect the possibilities. Significant penalties must exist as an active deterrent for irresponsibility. As a corollary, and even the Link Report identified this, it is demonstrably obvious that the policing and enforcement efforts of the Mines Division have been less than enthusiastic, perhaps because of misguided ideas of self-interest or self-preservation. While the Division ought to retain responsibility for policing the safety aspects of mining, it is imperative that some organisation with a little more professional detachment be entrusted with the task of policing the activities of the mining companies. After all, you do not ask a barber whether you need a haircut. Some respected and proficient body like the Commission for the Environment, would be an admirable substitute for the Mines Division enforcement role.

Mr Howley is incorrect twice (at 195) when he lists the "Department of the Environment" as being enabled "by the (Mining) Act", to seek conditions on any licence, in respect of anything likely to be dangerous or deleterious to the environment. The Commission for the Environment is not a Government Department, its precarious existence is due to a Cabinet Minute, and further it has no statutory role under any Act except the National Development Act 1979. Might I now suggest with copious quantities of respect, that as Mr Howley is ignorant (to use his own term) of the provisions of the Mining Act, relating to the protection of the environment, he reconsider his reasoning and conclusion?

Mr G A Howley comments as follows:

Mr McCoy has not finished the quotation from the sentence appearing in the article: I said that groups such as Federated Farmers appear to be ignorant of the provisions of the Mining Act regarding protection of land, public works, the environment, parks, reserves, forests and natural water. I am sorry if Mr McCoy takes this criticism personally, it certainly wasn't aimed at him, but arose from certain comments at two seminars on mining which I attended, where it was very clear from both the criticisms made of the Mining Act and the suggested legislation that was being asked for as a result of these seminars that people there just did not realise that the Mining Act did, in fact, provide remedies in respect of these specific things.

Mr McCoy is certainly typical of advocates for the Federated Farmers in that he continually talks about damage which mining can cause. It is all too common a myth in this country that the farmers are the guardians of our heritage, especially in relation to land, and can see nothing else but guarding it for the future, whereas miners are vandals who, left alone, would cause untold ruin to the land and our environment generally. This shows an abysmal ignorance of history. It is farmers not miners who have completely ruined tens of thousands of hectares of New Zealand land by their wanton destruction of forest and bush, and their ploughing methods. This did not happen only in the dim and distant past but is still happening. There is not the slighest doubt that the farmers in the early days did this through ignorance, but exactly the same applies to miners. I don't see that the farmers' motivation was any more pure than that of the miners as they were obviously both motivated by greed.

I certainly stand corrected about calling the Commission for the Environment the Department of the Environment.

I also concede my error in suggesting that the Commission for the Environment could be doing anything pursuant to the Mining Act. What I meant to convey was that the Commission now may have a say in mining works which appear to be deleterious to the environment.

WORD PROCESSING — THE SAVIOUR OF THE NZ LEGAL PRACTICE: PART II

By D B THOMAS, an Auckland Practitioner

Background

In a previous article (1980 NZLJ 301), intended to be the first of two articles describing respectively word-processing systems and word-processing equipment, I referred to the distinction that exists between the system for effecting the transfer of an author's thoughts into writing and the equipment available for producing written words on paper. I tried to describe word-processing systems so as to make clear, even to "disillusioned human Auckland Practitioners" (1980 NZLJ 118 and cf 1980 NZLJ 232), what a word-processing "system" entails. This present article was intended to appear immediately after the first, to continue the theme, and to try and clarify what word-processing equipment is and what its place might be in an office or system, and my failure to ensure the article reached the publishers is to be regretted. Those who are interested may care to refer back to the previous articles to refresh their memories on the subject.

Having detailed something of the procedures and effects involved in introducing a centralised word-processing system I suggested that in the present climate of public opinion the legal profession as a body must curb increases in legal fees while at the same time ensuring the service given to individual clients improves. If these results are not achieved and the present trend continues there will be increasing pressure for the surrender of our monopoly in legal matters. Management of the legal practice in general can and must be improved if we as a profession are to avoid such a fate and if we are to increase our market for our product. In the adoption of word-processing systems in individual legal offices lies a large part of the answer to that problem. The reorganisation of this one facet of office procedure will have a greater effect on the firm's production and its overhead structure than any other one change or new system within the office. Therefore if the profession as a whole, and if practitioners as individuals, are to survive, the adoption of word-processing systems is essential.

I have no doubt that any firm, or work-group within a larger firm, that properly plans and implements a trial period of such a system would within three months begin to appreciate that the benefits referred to in the previous and this article are real.

The equipment

Turning then to the equipment or "nuts and bolts" that can be used in connection with a word-processing system we find that modern screen-based equipment generally consists of three parts, either separate units or combined in one or two units:

(i) a Visual Display Unit (VDU or CRT workstation) where the work is keyed into the equipment via a traditional-type keyboard and the work entered is displayed on the screen in front of the operator

(ii) a processor (disc drive unit) which contains the circuitry and chips that make up the thinking, working, part of the equipment; and

(iii) a high speed character printer capable of continuous printing at a speed of 40 characters per second (one page per minute).

In truth the term "word-processing equipment" can also include the quill pen, the ordinary typewriter, the simpler "mag card" type memory typewriters, as well as full computer or computer software options now available in conjunction with computer accounting equipment hardware or com-

puter hardware dedicated to "word-processing". Whatever level of equipment an office introduces the equipment can be used either as a secretary's typing equipment, in a printing and revision capacity only, for production of the longer document, or as the productive equipment in a word-processing centre as described in the previous article. In this article I do not propose detailing the memory typewriter and its developments in the single line visual display diskette type typewriter, as their capabilities I believe to be reasonably well known and little different from the ordinary typewriter in their operation. Sufficient to say their main, perhaps sole, advantage over the conventional typewriter is in their capacity to store information (standard documents or unique documents needing revision) and (laboriously) to reorder and edit those documents. The computer software program is the same in operation as the screen-based equipment to be described herein except for the larger data base (memory capacity) available in a full computer and the additional functions that can be performed using that resource and the computer's ability to process data and to make decisions, a capacity even the most powerful word processors either do not have or have in a very limited form.

Scale of equipment

The equipment employed in the law office can be as a stand-alone system, where one operator/workstation is linked to its own processor and printer independent of other systems. Most makers start with such a system at the cheaper end of their range and develop up to the alternative "shared" system where a number of workstations use the same central processor and printer(s). Which system suits a particular office will depend on the work type and volume directed to the equipment, the systems used in the office, and the physical layout of the office. A number of stand-alone units or smaller shared systems may offer a flexibility or independence necessary in one office, while the cost considerations and greater power, and therefore speed, of a single shared processor will be more attractive to others. Two independent smaller systems would cost perhaps slightly less than a "hard" disc-based system necessary for and capable of operating two or more workstations. Those workstations can of course be distributed over an office and so the single processor does not of itself then mean that a centralised system is necessary.

Capability of equipment

The power of this type of equipment lies in its ability to simplify a typist's job by, at the same time, removing the drudgery or repetitious work and increasing production in terms of the number of pages typed. This is achieved by the equipment's capability in:

(a) *Utilising electronic technology to replace the mechanical functions of the typewriter.*

Even in the most modern of electric typewriters a number of mechanical and therefore time-consuming (in comparable electronic terms) operations occur in depressing a key causing the imprint of a letter on paper or in altering the relative positions of typeface to paper. When those same functions are performed electronically on a screen via electrical impulses they take considerably less time. Also as the characters are only electrical impulses the correction or alteration of an incorrect impulse is similarly quicker than the manual or mechanical erasure or removal of an incorrect character on paper and its replacement with another. There is then an increased speed in operation, and reduced error correction time, leading to an increase in operator capability arising from ability to type at draft speed, and not at the slower speed necessary to ensure error-free first strike work. Good typists are capable of 60-100 words per minute at least, but that reduces to as low as 20-30 wpm as they reach the end of a document and reduce speed to avoid errors that will require correction or the retyping of the whole page. This capability gives a demonstrable overall increase in a typist's output on unique work amounting to a constant 20-30 percent over that capable of being achieved on an electric "golf-ball" typewriter. When combined with standard correspondence, words, phrases and parts stored in the equipment's memory and accessible with only two key strokes, an operator can complete even unique letters and documents in less than half the time previously taken on the same electric golf-ball typewriter.

(b) *Storing large numbers of standard precedents in a readily accessible form.*

Storage comprises "floppy discs" the size of a 45rpm record, each holding approximately 140 A4 pages of typewritten work (or on some smaller equipment 5 discs capable of storing 30-80 pages). Retrieval of any particular precedent from a library of such discs is a simple matter involving at most one minute's work. With library storage space, and volume of paper, no longer a consideration, 100 separate precedents tailored to suit any one of each of 100 different circumstances can be readily at hand for both author and typist. This means a considera-

ble saving in the time taken to locate and complete a task using the equipment and precedents, compared to that taken in locating the traditional "precedent" in the "forms drawer", a previous client file, an author precedent folder (usually unindexed), text book or statute, and then revising and adapting that single compromise or previous form to fit the particular one in the 100 cases being dealt with at the time.

(c) *Alteration of stored or standard work.*

The format (layout) and content of work stored in memory is readily altered utilising the correction capability as mentioned in (a) above along with additional facilities for reordering, replacing, adding or deleting words, paragraphs or pages. Any change for whatever reason required in a previously prepared document, whether unique or standard, can be effected without the operator having to retype the correct (unaltered) parts of the document, thereby avoiding the ever-present chance that a new error may occur in the previously correct portion. Only the alteration needs operator attention and author proofing in order to reproduce a corrected copy as many times as required. This saves substantial author and typist time in typing and checking one or two words only and not having to retype and proof a full page of an affidavit or will because of a typing error, or change of mind by client or author, with the typist operating only at half pace in the retyping to avoid those inevitable new errors. That capability can be utilised as many times as is necessary to get a word-perfect document, without any worry of secretaries forming a mental block or creating new errors. How many times do solicitors accept a 90 percent perfect job on the second or third retype because their typist's time is needed on other work and they have developed a "thing" about that document, so that each time it is typed it takes longer because of an increased occurrence of errors or a reduced speed to avoid them?

Using the equipment in a law office

Below are some examples of the everyday use of these capabilities, either individually or in combination, in a law office:

(a) *Letter writing:*

Half or more of the time taken for a secretary to complete even a unique one-off letter arises from her having to place the stationery (letterhead), carbon and file copy paper in her machine and to type the standard parts of the letter — its format, the author's name, firm's reference, the date, address parts and the salutations in closing. Using the memory capacity of the equipment, each of those standard parts can be completed automatically or at most with only two key strokes each. The non-standard parts, name of addressee, addressee's reference and the text can then be typed 30 percent quicker than the same work on the typewriter. Any further copies of the original letter required for the file or forwarding to other addresses can then be obtained from the machine memory as many times as necessary, each an error-free original, without any additional operator time being required, and as an original and not an obvious carbon or photocopied copy.

(b) *Unique document preparation:*

As with correspondence work, the standard parts of documents — their formats, Court names, party descriptions, standard words and phrases, attestation clauses, addresses for service — can be automatically completed or require only two key strokes each. Then with the addition of the unique text typed at draft speed the document is completed and ready for the automatic production of as many error-free completely original documents as any Court of Appeal case or multi-party transaction is likely to require, and then as many extra copies as you have paper for.

(c) *Standard documents:*

Precedent documents are stored either individually or preferably in groups representing a transaction. Variable information to complete that document or group of documents is then entered as it occurs in the document(s). Having entered only once any single variable that re-occurs through the document the equipment can then enter it every time the variable re-occurs, without further operator action, giving operator respite and avoiding chances of an operator error in the subsequent repeats. In this way a company incorporation, probate application including probate and copy probate, divorce proceedings through to decree absolute, and the like, can be completed in less than 10 minutes each of author and operator time with only the dates of hearings or making of orders etc to be inserted in the "later" documents forming part of the precedent.

A further benefit flows from the fact that specialised precedents can be stored in memory, together with the instruction or work sheets that should be established with each precedent. This enables delegation of that work to be effected in the confidence that the chance of error in selection, amendment and completion of a precedent has been reduced to almost nil.

(d) *Drafting work:*

Probably the most powerful combination of equipment functions is that which allows revision of draft work. In preparation the author can dictate his thoughts as they come to mind without worrying about their logical order or what has been said earlier or overlooked altogether. At draft speed the operator can enter that unique one-off document. Once the printed draft or "hard copy" is received the author can then reorder his thoughts, add the new or delete the superfluous or incorrect, using the capabilities referred to above. Similarly, relevant information subsequently recollected by a client reading the first draft can be easily added and the remainder reordered. All this without any additional time other than that necessary to prepare and type the new information.

This leads to a further obvious "author's peace of mind" benefit which arises when no file is any longer "too hard", and therefore left like a potential time bomb in the filing cabinet, because it needs time spent in handwriting or planning the content in the first draft in order to try and produce a perfect or nearly perfect copy first time. Instead an author, knowing that redrafts can be produced without monopolising the typist's time to the exclusion of other work, can dictate "off the cuff" a draft document and finalise the document from the hard copy draft returned.

Cost

Needless to say equipment with the type of capability described is comparatively expensive in terms of the number of dollars needed to purchase the equipment, from $12,000 for the smallest equipment to computers with, inter alia, the necessary software programming at $60,000 plus. Screen-based equipment based on cheaper VDU-based "micro" systems is subject to the caveat that care needs to be taken in considering the equipment or program. As with any technology or systems, intending users should check the equipment in operation in other user situations to ensure that the equipment will do what is expected of it. Insist on seeing and talking to a working user of the equipment being considered and of comparative equipment of other makes. Usually those users, particularly if in the same field of work, will have no hesitation in allowing you time for this purpose. The increases in productivity and the quality of product possible with the level of equipment under consideration then need to be assessed against the cost of that level of equipment in the context of the individual office and its requirements and expectations.

There are many and varied ways of assessing the cost justification for installing such expensive equipment. The most simple and effective assessment of the value of the equipment lies in its cost comparative to salaries. An operator and workstation can produce at least as much written work as two or more typists using conventional typewriters, depending on the work-mix provided, so that the next time any office is hiring replacement or new staff it should be considering as an alternative word-processing equipment, in view of that equality in cost. Then take account of the additional benefits to authors referred to above that can accrue to a firm from having any one or more of the equipment's capabilities available and the improvement in the "image" of your firm conveyed by the quality of the original work produced. Once it is installed the emphasis must be then on maximum utilisation in the areas taken into account in the costing exercise, to obtain the best return for the investment. In a larger office, or in a smaller office with an emphasis on a particular kind of work, where the equipment can be used for only one of its capabilities in a particular work area, this may be done without disruption to existing or traditional work systems or staffing relationships. *Any* size firm, or work group within a firm, that is willing to reorganise its work systems along the lines mentioned in the 1980 article, and then combines that with the power of the described equipment, will be more than able to justify the cost.

The experience of one law office

Regrettably the practice of law is no longer a leisurely pursuit for gentlemen. It is a business with the need to acquire and make the best use of available equipment and experience to maintain profitability — by increasing a firm's capability to produce more fee earning work without increasing the cost of production.

Word-processing systems and equipment are just such equipment and experience. The use individually of a word-processing system, or any one of the three capabilities of word-processing equipment is a proven method of increasing productivity and may be implemented for that individual capability only and be suitable or acceptable to a firm or its partners in that form. The combination of all three equipment capabilities with a word-processing system's productivity gains gives increases best illustrated by reference to the writer's own office situation, where two typists working 11 hours total, 5½ hours each, were capable of producing, on Monday 62 letters, 2 company incorporations, a 4-page brief of evidence, 2 transfers and related notices

of sale, 3 caveats, 3 wills and a renewal of lease; on Tuesday 64 letters, 1 company incorporation, 1 probate application, affidavit and probate, 1 transmission, 5 caveats and 2 moneylenders contracts (including the contract, mortgage, particulars of mortgage, bank order and account), and so on through each and every week. They were keeping up with the written work of four solicitors and two legal executives without being more than 24 hours in arrears — at worst. Such productivity was attained within 12 months of the introduction of the new system and equipment in our office. Eighteen months later (2½ years since introduction) we have added the equivalent of 2 more authors and upgraded our equipment, so that now our same two operators will produce on each day all the work we can give them, resulting in a daily average of 80 letters and 40 plus pages of documents, and then have time to spare. Our original "floppy disc" equipment cost us $160.00 per week (total all-in cost) on a five-year no residual value lease, while the installation of the full "hard disc" equipment we upgraded to would be $250.00 per week all-in. At the time of our original installation our cost was the same as the salary of a good secretary and less than the real cost of a secretary when you add to salary the incidental costs of floor space, typewriter, dictaphone, furniture and benefits. The cost of the "hard disc" equipment is less than the real cost currently of a single good secretary/typist, yet enables two operators to produce typed work that would require at least seven secretaries in a traditional establishment.

When that productivity is compared with the previous output that was being achieved through only slightly fewer employees, in the previous traditional configuration, then for this author there can be no argument about the advantages of introducing a word-processing system and equipment in an office. In the 12 months prior to February 1979 when we installed our system and equipment we handled 1026 matters. In the following 12 months the same staff handled 1140 matters, with the author and operators having spent 3-4 months of that time engaged in establishing and trying new precedents and systems and the office and staff adapting to those. In the last 12 months to date we handled 1304 matters. A 27 percent increase in productivity in 2½ years in the number of matters handled, but more importantly in the same period a 245 percent increase in the average fee per matter, reflecting a slightly different accounting procedure and the increasing capabilities and experience of our legal executives, who were previously secretaries, while our overall support staff has shown only a 20 percent increase. In actual numbers the staffing increases are represented by our original complement of 4 authors and 5¼ support staff as compared to our current establishment of 8 authors and 6¼ support staff. Practitioners familiar with their own balance sheet details will be able to work out for themselves what effect such altered ratios have had on our, and can have on their own, profitability.

It is only then by utilising such modern systems and equipment that the modern practitioner is going to be able to maintain (or retain) his sanity, his clients and his profitability. The ever-increasing cost of practising law leaves no alternative but to continue along the path of increased author productivity that started with the typewriter and progressed through shorthand, dictaphones and preprinted forms. Word-processing systems and equipment are the next major step along that path, and an increasing number of firms of *all sizes* are proving that point at the present time.

INFORMATION AND THE "RIGHT" TO INCOME MAINTENANCE

By ROYDEN HINDLE

The following article is an abridgement of an essay submitted by the author in partial compliance with the requirements of the degree of LLB (Hons) University of Canterbury. In it Mr Hindle takes a critical look at some aspects of the practice of the Benefits and Pensions division of the Social Welfare Department, and explains the necessity for greater openness in its administration and in particular for more information to be made available to applicants for benefits, particularly when the benefit has been refused.

1. Introduction

The purpose of this article is to investigate the administration of cash benefits under Part I of the Social Security Act 1964.[1] In particular, it is concerned with what information flows from the relevant institutions of social welfare (the Department of Social Welfare; the Social Security Commission; the Social Security Appeal Authority)[2] to individual applicants and beneficiaries, and to the public in general. It will be seen that so little is disclosed about the way the system is operated that many of the legal duties incumbent upon other statutory bodies vested with wide discretions cannot be enforced.

The first task is to outline the institutions which administer benefits in New Zealand. The next step will be a critical examination of the actual administration of benefits. The general theme is to be found under the sub-heading *The "Right" to a Benefit?* It is argued that to speak of the "right" to a benefit is little more than rhetoric when a number of legal and practical difficulties are considered. Principal amongst these is the lack of specific information given to individuals, and of general information given to the public. The problem of how such difficulties might be remedied is then considered with some comments on the administrator's viewpoint. Possible legislation and developments are noted.

The article concludes that if a person indeed has a right to a benefit then he should have a right to know how his application is handled, and upon what criteria a decision is reached. A detailed understanding of the working of New Zealand's income maintenance schemes is becoming increasingly urgent in view of the profound social and economic changes facing the country.

2. The Administrative Bodies

(a) The Commission

The principal body is the Social Security Commission. This comprises the Director-General of Social Welfare (who is the Chairman) and two Assistant Directors-General of Social Welfare.[3] A quorum is two members.[4] The Act provides for the appointment of a Deputy Chairman and for the appointment of Acting Commissioners to fill possible vacancies.[5]

The Commission has the powers of a Commission of Inquiry[6] which means it has the same powers as a District Court ". . . in the exercise of its civil jurisdiction, in respect of citing parties, summoning witnesses, administering oaths, hearing evidence and conducting and maintaining order" in its proceedings.[7] Apart from the powers conferred upon it by the Act, the Commission may also exercise any powers conferred upon the Minister of Social Welfare which he may delegate to it (in accordance with s 11 of the Department of Social Welfare Act 1971). The Commission must comply with directions given it by the Minister when exercising its powers under the Act, but such directions must

[1] Unless given its full title, the Social Security Act 1964 will hereafter be referred to as "the Act".

[2] Unless given their full titles, these bodies will hereafter be referred to as the Department, the Commission and the Authority respectively.

[3] Section 6(2) of the Act.

[4] Section 9.

[5] Section 6(3); Section 7.

[6] Section 11.

[7] Section 4(1), Commissions of Inquiry Act 1908.

not be repugnant to the Act (see the Authority's decision reported at 1 NZAR 70, 71)

Thus the Minister retains ultimate control over policy matters.

In fact, most of the Commission's powers are delegated to officers of the Department of Social Welfare, and the Commission's main task is to check the exercise of these by way of review.[8]

(b) The Department

The Department has three divisions: the Administrative division, the Benefits and Pensions division, and the Social Work division.[9] It is with the second that this essay is concerned. The Department is responsible for the localised administration of the Act, and in 1978 had no fewer than 58 offices throughout New Zealand.[10] These provide the point of contact with the public. The hierarchy of the Benefits Division seems to be as follows:

Applications for benefits "at first instance" are processed by subordinate staff. These people may interview applicants, although this can also be done by a Departmental Social Worker. Any applications having difficult or unusual features are referred to sectional supervisors and thence to a Divisional supervisor if necessary. The final person to consider applications locally, indeed the one who decides whether to refer them to the Commission itself, is the Divisional Controller.[11] It is always open to the Department to refer difficult cases directly to the Commission. The whole branch (that is, all three divisions of the local Department office) is controlled by a Director of Social Welfare.

Implementation of Commission policy is effected through manuals issued to departments which are supplemented by circulars and memoranda.[12] It is difficult to say what precise instructions and guides these manuals give.[13] It does seem probable, however, that they contain at least a description of the Commission's policy on each of the many discretions delegated, and specify the grade of officer in the Department entitled to exercise them. The operation of this system will be discussed below.

(c) The Appeal Authority

Since 1974 ss 12A to 12R of the Act have provided a right of appeal from decisions of the Commission to the Social Security Appeal Authority. This body is independent of both the Commission and the Department. It consists of three persons who are appointed by the Governor-General on the recommendation of the Minister of Social Welfare (in consultation with the Minister of Justice).[14] Its function is to "sit as a judicial body for the determination of appeals";[15] any decision of the Commission under Part I of the Act may be the subject matter of an appeal.[16]

The procedure of appeal is set out in s 12K of the Act. Of particular importance are ss 12K(4)-(6). Sections 12K(4) (a-d) direct the Commision to supply the Authority with a wide range of materials, including applications, documents, submissions, statements, reports, copies of notes made by the Commission, exhibits in its custody, and a copy of the decision appealed against. Paragraph (c) adds to this list "a report setting out the considerations to which regard was had in making the decisions or determination". However, by virture of s 12K(6) only those reports prepared under para (e) (and s 12K(5)) must be sent to any other party to an appeal. Two comments may be made: firstly, the information sent to the "other party" (the applicant) is far more limited than that available to the Commission and the Authority. Secondly, this is the *first point* in the processing of an application at which the Act requires any substantive reasons for a decision to be supplied to any applicant. At every other stage, it is necessary only to notify the applicant of a decision. For example, s 10(6) refers to "the communication of the decision" to an applicant or beneficiary. (I have, for the sake of brevity referred throughout to "the applicant", but readers should note that this term in the context means "the applicant or beneficiary").

Although it is under no duty to do so, the

[8] Because of this delegation, "the Department" and "the Commission" will, in the context of this essay, often be interchangeable terms.

[9] Smith, The Bureaucracy, The Citizen and the Ombudsman, in Trlin (Ed) *Social Welfare and New Zealand Society* (1977) p 168.

[10] *Social Security Cash Benefits in NZ* (Published by the Department, 1978), p 26.

[11] Much of the information here presented was derived from an interview between the writer and an administrator in the Department (who did not wish to be named).

[12] See, for example, McBride, *The New Zealand Civil Rights Handbook* (1980) at p 520.

[13] This aspect is more fully considered later in the article.

[14] Section 12A(2).

[15] Section 12I.

[16] The Authority's jurisdiction is wider than this, however; see s 12J.

Authority may decide to rehear the case.[17] There is detailed provision for the conduct of any rehearing, and the Authority has at least the same power of inquiry as the Commission.[18] Pursuant to an appeal, it may confirm, modify or reverse the decision appealed against, or it may refer any matter to the Commission for reconsideration.[19] A memorandum is sent to the Commission containing reasons for the decision, and the Commission must "forthwith take all necessary steps to carry into effect the decision of the Authority."[20]

The Act also provides for appeal from the Authority to the High Court and thence to the Court of Appeal on questions of law only.[21] This seldom happens. Of more practical significance is the potential for investigation by the Ombudsmen. A detailed explanation of their role will not be attempted here; it suffices to note that the Ombudsmen provide an avenue for individual complaints in many situations, and may even have an influence upon the formulation and execution of Departmental rules and policies.[22]

3. Problems with the Administrative Practice of Income Maintenance

The main theme of this article is the need for greater openness in the administration of cash benefits. It is now necessary to examine some of the particular problems and criticisms that may be made of the system — problems and criticisms which, it will be argued, could be remedied by greater disclosure of information.

(a) The "right" to a benefit?

Is the "Poor Law" approach to social security past? This approach prevailed around the turn of the century. Welfare was seen as charity, and there was a fear that the provision of income maintenance schemes would only encourage the dissolute and the work-shy.[23] Today benefits are provided because "the community is responsible for giving dependent people a standard of living consistent with human dignity and approaching that enjoyed by the majority, *irrespective of the cause of dependency*." (Emphasis mine).[24] The Royal Commission report emphasised, for example, that "provision of supplementary assistance where it is needed is part of the community's responsibility, and is not to be regarded as charity".[25] An examination of the primary sources of benefits in the Act reveals that the phrase "shall be entitled to receive a . . . benefit" is often repeated.[26].

Yet it is an odd sort of a "right" if it is one at all. A simple example serves to illustrate the point: consider the provisions relating to Unemployment Benefit, ss 58-60. In essence, the benefit is payable to any person who is over 16 years of age, if he or she is unemployed, yet is capable of and willing to work, has taken reasonable steps to find work, and has resided in New Zealand for at least one year. The first problem is one of interpretation — what, for instance, are "reasonable steps" to obtain work? What work is "suitable"? Secondly, note that in those three sections the phrase "if the Commission is satisfied" appears three times. In order to receive the Unemployment Benefit without delay, the applicant must not only be out of work, he or she must also satisfy the Commission that he or she has not "refused or failed, without good and sufficient reason, to accept any offer of suitable employment . . .". These are discretions by implication; the trio of sections confers another five discretions expressly. Thirdly, benefit is means-tested; the rate may be altered by the Commission even once eligibility is accepted.[27]

This sort of criticism applies equally to all the other benefits. "Means tests" deserve particular mention. Some writers have argued that means tests are logically inconsistent with and repugnant to any assertion of a right in the context of cash benefits,[28] and call for their removal.[29] It is respectfully submitted that this view is not entirely accurate, and is certainly impractical. Cash advances to those who do

[17] Section 12K(7).
[18] Section 12I(2).
[19] Section 12M(7).
[20] Section 12(P).
[21] Sections 12Q and 12 R.
[22] See Palmer, *Unbridled Power?* p 122; Reports of the Ombudsmen, *AJHR*, A3; G Ganz, "The Role of the Ombudsman in Welfare Law," in Partington and Jowell (Eds) *Welfare Law and Policy*, p 127.
[23] See Oliver, "The Origins and Growth of the Welfare State," in Trlin (Ed), *Social Welfare and New Zealand Society*, p 8.
[24] Report of the Royal Commission, para 42(a) (p 65).
[25] Ibid, p 290.
[26] Eg s 40 (Invalids Benefit), s 21 (Widows Benefit), s 58 (Unemployment Benefit).
[27] Section 59(1).
[28] *Semble* Ovendon, Social Welfare and Public Ideology, in Willmott (ed) *New Zealand and the World: Essays in Honour of Wolfgang Rosenburg*, p 97, at pp 88-89.
[29] Sutch, *The Responsible Society in New Zealand*, p 131.

not need them at all are not really "welfare" payments, and do not fall within the ideals which underpin our social security system. The real goal is to distinguish those who need from those who do not, and a means test (properly conceived) is an expression of this aim. What is essential is that the criteria by which this judgment is made should be a matter for public debate, and individual decisions should be open to scrutiny.

It is submitted that because the New Zealand system fails in this respect — that is, fails to allow public debate of policy decisions, and fails to reveal reasons for individual decisions — it is naive to speak of a "right" to a benefit.

These legalistic considerations (here only briefly surveyed) have practical counterparts. The procedure for claiming a benefit is neither simple nor conducive to the belief that what is being claimed is an entitlement. From the viewpoint of an applicant, practical obstacles present themselves.

Every application has to be made on a specific form, which requires a great deal of detailed information. There is evidence that these forms alone discourage some people from proceeding with an application. Furthermore, the form then becomes the surrogate for the applicant as far as most officers in the Department are concerned. Any errors which appear on the form cannot easily be detected (much less corrected) and can have disastrous effects on the application. Where there is an interview, the interviewer is called on to "interrogate" the applicant, yet many personal and social problems may be ignored. The processing of a normal application (that is, one where there is no unusual aspect) inside the Department seems to involve as many as eight officers and can take a number of weeks.[30]

All this presupposes that the person is aware that he or she might be entitled to some form of monetary benefit. In fact it is likely that there are some who do not even know of the existence of a relevant benefit. The Department does publish pamphlets describing the eligibility requirements for each benefit, but these are available only from Department offices and, while on display, have to be asked for. In one study on recipients of the Domestic Purposes Benefit and Supplementary Assistance, it was commented, "Beneficiaries were initially informed by different people about the benefits available . . . Departmental pamphlets or counter staff played a small part in informing respondents about either benefit."[31]

Another practical consideration is the effect lack of training and the personal prejudices of a Departmental officer can have on an application. This matter has been discussed in depth by A F von Tunzelmann.[32] High staff turnover, lack of training and the volume of work to be done are no doubt detrimental to the administrative process. She notes that the opportunity for discretion to be exercised by way of value judgment or having regard to arbitrary considerations arises at almost every step in the handling of a benefit inquiry.

The 1977 Amendment to the Act which now requires the Commission to comply with Ministerial directives is another feature inconsistent with viewing a benefit as a right. Given the lack of information on how the system within the Minister/Commission/Department structure works, I have not pursued this matter. It is reasonable to suppose, however, that such ministerial directives find their way into the manuals, and to that extent they are dealt with in the section on Departmental manuals below. This power to direct is subject to the qualification that such directions must not be repugnant to the Act,[33] but the Minister may now alter the rates at which benefits are payable and increase stringency in respect of eligibility requirements.

There is one final objection to describing entitlement to a benefit as a "right". Even an eligibility that has been clearly established can be revoked by the legislature at any time. The cases of *Social Security Commission v McFarlane*[34] and *Furmage v Social Security Commission*[35] are notorious. In both instances eligibility (for capitalisation of Family Benefit and for a Domestic Purposes Benefit respectively) was established and confirmed by no less a body than the (then) Supreme Court. In both cases the legislature intervened to negative the effect of those decisions; indeed, White J's judgment in the *McFarlane* case was a statement of law for less than two days.[36] It is, of course, true to say that under any

[30] The information here presented is taken from Allan, *Observations on the Administration of Cash Benefits* 9 VUWLR 201.

[31] Campbell, *Beneficiaries' Appraisal of Supplementary Assistance*, 115.

[32] A Von Tunzelmann, Administration of Social Welfare Benefits, in Palmer (ed), *The Welfare State Today*, pp 289-292.

[33] See above, note 8.

[34] [1979] 2 NZLR 34.

[35] [1980] 2 NZAR 75.

[36] For comment, see Palmer, *Unbridled Power?* p 120; and Black [1978] NZLJ 17.

system where legislative supremacy is accepted it will be possible for the legislature to revoke any right whatsoever. The point to be taken from the discussion thus far, however, is that benefit "rights" are so much more precarious than most that they cannot accurately be described as rights at all. If benefits are not rights, then one cannot but wonder what progress has been made since the days of the 'Poor law' and the conception of monetary assistance as charity.

(b) Information in individual cases

It is not the concern of this article to consider the sufficiency or otherwise of the information that the Department *obtains about* the applicant, but rather to emphasise the insufficiency of the information *received by* the applicant. The concern is with outputs, not inputs. In the context of this article, "information" means information about a decision, as opposed to all the information which the Department holds about the applicant.

This task will be approached in two stages. The first will be an examination of what information is given to such a person — specifically, what reasons are given for the particular decision. Secondly, some of the other factors which influence a decision will be discussed; in particular the operation of the Departmental manuals.

Final decisions on applications may be made in a Departmental office, or by the Commission, or by the Authority. The local Department can only make "first instance" decisions and the Authority can only make decisions by way of review. The Commission may perform either function.

In the case of a "first instance" decision, there is seldom any substantial information in the letter which notifies the applicant of a decision. For example, the refusal of an application may be worded something like this: "Your application for . . . assistance has been considered and yours is not considered a case for assistance."[37] In a letter to the writer, the Minister of Social Welfare maintained that ". . . when a decision is made to decline an application for social security assistance, the applicant is furnished with a full explanation of the decision together with advice as to their rights of review and appeal." Every applicant is sent the appropriate form via which review is sought, that much is clear. So we are left with two conflicting views: one that replies are brief (Sutch) and the other that they contain a "full explanation" (the Minister). It is hard to say which view is correct as a matter of fact; there is no empirical study upon which an assertion either way could be based. Nevertheless, it seems likely that there is a deal of truth in Sutch's view — a "full explanation of the decision" is, after all, not necessarily the same as full reasons for a decision.

A number of consequences flow from this. The applicant cannot tell why he has been refused if no reasons have been given. Whether the decision is wrong, whether it was outside the delegation of power given the deciding officer, whether the purported delegation of that power was ultra vires — these matters are simply closed doors to the applicant. If no further action is taken by him or her, then, unless the Commission reviews the matter of its own motion (which is unlikely), the matter will rest there.

An applicant who feels he has been treated unfairly may seek a review of the decision by the Commission. Of course, if the decision was one made by the Commission itself, then it will probably simply confirm it. Otherwise, the relevant files are sent from the local office to the Commission (in Wellington) and the matter is reconsidered.[38] Again, the applicant will be notified of the decision but is unlikely to be given reasons for it, much less substantial ones dealing with any legal points raised by the case. The situation thus far is accurately stated by von Tunzelmann:

"The Act does not require reasons to be given for decisions on benefits which prejudicially affect the applicant or beneficiary; nor is there any general rule of law to require this. Reasons for the Commission's or the Department's decisions are generally not disclosed at all, but a person may be told informally, perhaps by the officer who has been handling his application, of grounds, which merely confuse because of the incompleteness or unintelligibility of the explanation. A benefit applicant or beneficiary in such a situation, uncertain of his rights and of departmental procedures, will probably accept the

[37] Sutch, *The Responsible Society in New Zealand*, p 76, Dr Sutch was there discussing an application for supplementary assistance in particular.

[38] Von Tunzelmann (loc cit p 265) maintains that the review of a benefit claim by the Commission is "in effect an investigation by the head of the department into the decision of an officer of the department who is responsible to the head of the department." This may be true, but the statement in the text conforms with the information given to the writer by the administrator interviewed.

decision as it is given."[39]

The applicant who has again been refused may decide to appeal to the Authority. For the first time in the whole process the statute requires that a report setting out the considerations to which regard was had in making the decision be sent to every party to an appeal.[40] Apart from the criticism that this is the first time such an obligation arises, there are further points to note. In the case of *Re an Application by Simonsen*[41] the report arrived at Simonsen's solicitor's office no more than one week before the hearing.[42] The Commission had made its decision five months earlier. It seems this long delay was due to the Commission having to prepare the report.[43] But if all the relevant documents and notes of the decision were already in the hands of the Commission, and if the Commission had already made its properly considered and recorded decision, then it is difficult to see why the preparation of the report should have taken so long.

The *Simonsen* case reveals another defect. Simonsen had been injured in a motor accident and had been paid both Sickness and Invalid benefits. He later received a large sum in damages, but it was unclear whether it included a payment for loss of earnings. The Commission instructed that an amount equal to the payments he had received from the Department was payable, out of the damages, to the Department. The Appeal Authority's judgment on the matter was extremely brief, stating basically "[T]hat having regard to all the facts available to the Authority, the amount claimed by the Commission is not unreasonable."[44] Simonsen appealed to the Supreme Court on the basis that, without further reasons, he was not in a position to know whether he could exercise his right of appeal to the Court on a question of law. White J decided, "I do not agree that the Appeal Authority was required to do more than record its view that, having considered the reasons set out in the report of the Commission, it agreed with the decision and the reasons for it."[45]

Thus the *only* time reasons are required is under s 12K(6) — hardly conducive to public confidence in the administration of benefits! Yet that is the extent of the information given to individuals. What about more general "giving of reasons" to the public?

In its eighth report the Public and Administrative Law Reform Committee discussed at pp 53-54 the publication of decisions of administrative tribunals. The Appeal Authority was specifically mentioned. The Committee's view was that such decisions were ". . . in many ways as useful as decisions of the Courts. They inform the parties of the considerations accepted by the Tribunal as relevant and the weight likely to be attached to each of them. The Tribunal is likely to regard its earlier decisions as precedents, to be followed in cases of a similar kind. It is for these reasons that we wish to make these decisions more accessible to those affected and others interested, including the legal profession." (One may note in passing that these sentiments are as true of the Commission as they are of the Authority.) In its ninth report the Committee was able to announce (p 13) that some such decisions would be published in the New Zealand Administrative Reports. Again, the Authority was specifically included.

These reports began in March, 1976. Since then only thirteen decisions of the Authority have been reported.[46] Most are no longer than half a page in length; the only category of cases which seem to occupy any space at all are those relating to the Domestic Purposes Benefit. The Authority often does simply agree with the Commission — indeed, it is difficult to see the point in publishing such "decisions". Certainly, the effect of the reports has fallen far short of the ideals expressed by the committee.

There is also evidence of some lack of communication between the Authority and the Commission. Section 12P of the Act requires that a memorandum of the Authority's decision, with reasons for it, shall be sent to the parties to the appeal and to the Commission, which must "forthwith take all steps to carry into effect the decision of the Authority." Yet Mr Prebble MP recently alleged that the Department had refused to implement a ruling of the Authority.[47] The case was in the nature of a test case and was decided against the Commission, yet it

[39] Von Tunzelmann, (loc cit) p 281.
[40] Sections 12K(6) and 12K(4)(c).
[41] (1978) 2 NZAR 56.
[42] Correspondence received from H Williams, Solicitor for Simonsen.
[43] Interview with Departmental Administrator.
[44] Ibid, p 58.
[45] Ibid, p 61.
[46] And two decisions of the High Court on appeal from the Appeal Authority: *Furmage* (see note) and *Simonsen* (see note).
[47] *The Christchurch Star*, (Saturday, March 21, 1981), at p 19.

seems that the ruling was applied only to the case that went on appeal. The justification was that each case is different and that there was no precedent value in the Authority's judgment. No doubt that is a matter of opinion, but (practically speaking) one in which the Commission's attitude will prevail as it cannot easily be tested elsewhere.

To summarise: insufficient information is given by the Department, the Commission and the Authority regarding individual cases. Full reasons should be supplied to each applicant who is refused. Furthermore, the Authority's published decisions should always deal fully with the substantial issues of law or policy that the cases may raise. It should not be for the Commission alone to decide whether any case has value as a precedent.

Giving reasons in individual cases would not, however, be a sufficient step towards openness. Quite possibly it would make no difference — the applicant might well be confused by every paragraph except the one which read "Your application has been refused. . . ." Publication of reasons to form some sort of case guide would be more adequate, but as such cases would mostly be no more than an expression of policy, there is a more direct approach: publish the manuals.

(c) Departmental manuals

The manuals, circulars and memoranda have been mentioned above. The difficulty in describing them arises because no one other than authorised Departmental officers have access to them.[48] That they are used (a) to ensure uniform application of policy throughout the various Departmental offices in New Zealand and (b) to provide a guide to the exercise of discretion delegated to subordinate officers, however, is certain. These functions are not to be criticised.[49]

The difficulty is that such rules might fetter discretions given in the Act. Even the Department sees the manuals as having limited use.[50] They are used by subordinate staff and apparently it is not unknown for a decision made at that level to be reversed for too rigid an application of the manual, either by the Divisional Controller or by the Commission itself. It is understood that the administration of cash benefits is in a constant state of flux, with the result that parts of the manual (which is subject to periodic revision) may at any time be obsolete. It seems reasonable, therefore, to suppose that the senior levels of the Department treat these manuals with suspicion, and that the Commission takes no account of them when reaching a decision. This may be the reason why lawyers who have had dealings with the Commission and Appeal Authority have been unaware that the manuals existed. For example: Mr S P Williams, who appeared before the Appeal Authority and the High Court for Mrs Furmage, wrote ". . . I felt they (the Commission) relied in the *Furmage* case upon their interpretation of the law. There may be Departmental manuals, as you put it, but in cases like these the writer's experience is that the Commission in Wellington rely upon their own interpretation of the law on the facts as they see them to be." Mr J H Williams (in the *Simonsen* case likewise wrote: "Referring to your question concerning the Departmental manual, I can only say that at no stage during the *Simonsen* case was I ever made aware that there was a Departmental manual or that the Simonsen decision was reached in accordance with that manual, if in fact it was." It may well not have been. (Both these comments are from letters to the writer).

But manuals are used by the subordinate staff who make most of the decisions. Such staff may regard them as a "bureaucratic security blanket"[51] and apply what were intended to be guides as fixed rules. This is the real point of criticism. To fetter a discretion by too rigid an application of a policy is clearly ultra vires.[52] However, without any access to the manuals and without any study of individual decisions, it is not possible to give an example. (This alone is a strong indication that manuals should be public and reasons for decisions should be given).

Not only the application of the manuals but guides in the manuals themselves may be ultra vires, and there are reasonably clear indications that this nas been so in the past. In a 1969 background paper prepared by the (then) Social Security Department for the Royal Commission on Social Security, there appears an appendix describing policies and applica-

[48] McBride, *The New Zealand Civil Rights Handbook*, p 520; Von Tunzelmann, loc cit pp 284-285; Allan, *Observations on the Administration of Cash Benefits* 9 VUWLR 201, 204.

[49] Von Tunzelmann, loc cit p 284. The description of the manuals and criticisms of them given in Von Tunzelmann's article (pp 284-9) should be referred to; it would be hard to improve upon that exposition.

[50] Interview with Departmental Administrator.

[51] Allan, loc cit p 204.

[52] See for example, *Hamilton City v Electricity Distribution Commission* [1972] NZLR 605.

tions of certain discretionary provisions in the Act. Regarding s 59(1) (reduction of Unemployment Benefit where spouse has an income) there appears this note:

"Delegated to district Offices. Commission has formulated rules as to how moneys received are to be treated in assessment of Unemployment Benefit. Each case is assessed according to these rules which are rigidly applied. Decision is therefore not strictly according to the circumstances of each case." References to the 'Weekly Manual' are then given. The note on s 59(1)'s wording, however, was unambiguous: "Commission may in its discretion *having regard to the circumstances of the case* reduce Unemployment Benefit. . . ." (Emphasis mine).

Another example is provided by the Commission's treatment of redundancy payments for the purpose of deciding when to commence payment of Unemployment Benefit under s 60. The general rule adopted by the Commission was to treat the redundancy payment as "ongoing wages" and to postpone commencement of the benefit for the number of weeks covered by the quantum of redundancy moneys. (Later this rule was changed to include only one half of the redundancy payment). Such a payment, however, is in the nature of compensation for the position lost, and for incidental loss of seniority and other various privileges. On a literal interpretation of s 60, the general rule usurped the function of the *enacted* criteria upon which payment of the benefit could be postponed. It was ultra vires for introducing into the decision an irrelevant consideration.[53] The general rule was, no doubt, set out in the manual.

The possibilities for ultra vires at both the formulation and application of policy stages are wide. Included are over-rigid application of a guide,[54] taking into account irrelevant considerations or omitting relevant ones;[55] bad faith; unreasonableness (within the *Wednesbury* (formula);[56] acting for the wrong purposes;[57] and possibly even acting upon an incorrect basis of fact.[58] Without publication of policy formulae and the rendering of reasons in individual cases, it is very difficult to detect even the most blatant of such errors.

Outlined in this section is the case for requiring:

(i) The Department to provide each applicant with full reasons dealing with the substantive issues raised by any important decision affecting him or her;
(ii) The Commission to publish its manual instructions, or (at the very least) to provide some public record of its decisions; and
(iii) The Authority to record reasons which deal with the substantive issues in an appeal, and to publish them.

Such requirements are, it is submitted, consistent with establishing the right to a benefit (where an applicant is prima facie entitled to it) in practice as well as in theory.

4. Public Access to Information?

Two questions remain: are there any compelling reasons why such information should not be published? If not, how might the duties both to give and to publish full and accurate reasons be recognised in law?

The first question is dealt with under the subheading *"Two Points of View"*. While recognising a number of practical difficulties, it will be submitted that the answer is "no". The second question raises the possibility of legislative intervention.

(a) Two points of view

Strong criticisms of the Department and of the Department's exercise of delegated powers have been made. It would be unfair and inaccurate not to record an example of some Departmental attitudes, both to the general administration of benefits and to the giving of reasons specifically.[59]

The Social Security Act 1964 is an extraordinarily difficult statute to administer. Almost every section in Part I provides at least one new discretion. It is well understood by the Department that such an Act needs to be carefully administered by trained staff. While it was conceded that there were staff

[53] See Hughes, *Redundancy and the Law In New Zealand*, (1980) 9 NZULR 122, 146-7. It has since been announced that the policy has been discontinued: see the footnote which appears at p 149 of the above-mentioned article.
[54] See the note *Hamilton City* case, supra.
[55] Eg: *Re Brasted* [1979] 1 NZLR 400, *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
[56] *Associated Provincial Picture House v Wednesbury Co-operation* [1948] 1 KB 223.
[57] *Congreve v Home Office* [1976] All ER 697, *Fiordland Venison v Minister of Agriculture* [1978] 1 NZLR 341.
[58] Most recently see Cooke, J in *Dagayanasi v Minister of Immigration* [1970] 2 NZLR 130.
[59] Again, much of the information here presented derives from an interview with a local welfare administrator.

problems, principally due to high staff turnover, it was not conceded that staff were ill-trained. There is a comprehensive training programme and apparently new recruits are carefully supervised until some experience has been acquired.

One problem mentioned to the writer was that this particular Act undergoes a large number of substantial changes — far more so than Acts other Government Departments have to cope with. Examples include the complete revision of Superannuation after the National Party came to power in 1975 and, more recently, the Social Security Amendment Act 1980, by which Domestic Purposes Benefit may be payable before maintenance proceedings are commenced.[60] The Department may now take proceedings on behalf of a beneficiary, but only a nominal number of extra staff have been allocated to the Department to help implement this fundamental change.

There is an obvious concern for beneficiaries, and it is recognised that the Department deals with the livelihood of many people. Put briefly, the purpose of these comments is to reassure the reader that the Department is not some sort of bureaucratic monster. That officers of Social Welfare attempt a bona fide exercise of their powers in the overwhelming majority of cases is beyond question.

As to the specific matter of not giving reasons, there is very little information available to justify the Department's practices. Probably this is because the Department has never been called upon to do so. It appears, however, that there is a very strong fear of beneficiary fraud. In reply to my request for access to the manuals, the Minister of Social Welfare observed, "It is not proposed to relax the confidentiality rating applying to the instruction. There have, in recent times, been an increasing number of determined criminal attempts to obtain social security benefits by fraud, and the more familiar the public become with departmental systems and methods, the more we can expect the incidence of such frauds to increase."

Unfortunately, such an attitude penalises the majority of bona fide applicants for the sake of a few, who will probably attempt to mislead the Department anyway. Beneficiary fraud is handled by the Police who prosecute under the relevant provisions of the Crimes Act.[61] It is submitted that that is adequate protection, and that greater openness would probably help the police to detect such fraud.

Another attitude was that there was no *need* to give reasons. Most applications that are refused are refused for fairly straightforward reasons. So why do what is not necessary, especially in view of the huge numbers of applications received? Two comments may be made. Firstly, if reasons are straightforward, it would be a simple matter to inform the applicant. For example: "Your application for Unemployment Benefit is refused under section 59(1) as your spouse is in receipt of an income of over $..... ." Secondly, once a decision is made, how it was reached is no longer of significance to the administrator. But it may be of vital importance to the frustrated applicant who suspects his or her case was improperly handled.

Concerning more general release of information in specific cases, Mr Gair (the Minister of Social Welfare) has written that, "On the policy side, the issue is essentially a constitutional one. The Minister and the Government are entitled to have frank information and advice. Mutual confidence between a Permanent Head, his senior staff, and the Minister, is a keystone of ministerial and official relationship and it is likely that this relationship would be jeopardised by the removal of confidentiality.

"In this respect the matter of confidentiality of departmental documents has already been argued in the Courts. In the case *Corbett v the Social Security Commission* (1962) NZLR CA (sic) the Court refused the plaintiff's request for disclosure of departmental documents relating to a matter decided by the Commission in terms of Government policy and held that '. . . at any rate in civil proceedings the Courts of New Zealand are bound to treat as conclusive against production an objection by a Minister made on his own personal consideration of a document or documents of which production is sought'."

There seem to be three possible conclusions.

(i) If Mr Gair is indeed still referring to the release of information in individual cases, he has got a very long way to go to explain why publication — or rather, release of information to the individual concerned — has got anything to do with "Ministerial confidence".

(ii) Maybe Mr Gair has moved to talk of more general matters of policy — for example, Ministerial directives and maybe even the manuals? Again, however, it is difficult to see how publication of the finalised directives and/or manuals could affect "Ministerial confidence". What can be stated

[60] Social Security Amendment Act 1980.

[61] Particularly, see ss 245-247 (False Pretences).

with certainty is that the proposition taken from *Corbett v Social Security Commission* [1962] NZLR 878 (at p 898) is *incorrect*. The first part quoted in the letter is in fact taken from the dissenting judgment of Gresson P — and this was the very point of dissent. It may be compared with North J's remark (at p 911) that "I am of the opinion we should reaffirm that Courts in New Zealand still possess the power to overrule a ministerial objection to the production of documents in respect of which privilege is claimed if they think it right to do so. . . ." In the more recent case of *Tipene v Apperly* [1978] 1 NZLR 761, Richmond J said (at p 764) "It is clear from the cases that a Court is not bound by the Minister's certificate that disclosure of a class of documents, or the contents of a class of documents, would be injurious to the public interest. . . ."

(iii) The third conclusion one might reach is that the Minister has some involvement *in individual cases*. If this is the case; if the Commission refers difficult or contentious cases to the Minister for decision, then Mr Gair's statement becomes understandable (if indefensible). The possibility of ultra vires through abdication of jurisdiction arises. Obviously the Minister and Department would wish to keep that confidential, to avoid political embarrassment if nothing else.

However, given the generality of the Minister's comments, the final conclusion is not one that should quickly be drawn.

With regard to the publication of decisions, the relationship of confidence between the Department and the applicant is used to justify the present state of affairs. This argument is also unconvincing (for reasons discussed below).

Finally, the question of cost. No doubt giving of reasons, preparing of reports and decisions for publication, and actual publication would be costly exercises. Yet this objection is answered in the Danks Committee Report: "If it is accepted that the Government has a responsibility to keep the public informed of its activities, it will no doubt be recognized also that this aspect of its work must be given priority over other demands".

"Some of the positive outcomes of greater openness, such as better understanding of public policies, are not measurable in money terms. . . . If greater openness enables Government to work more smoothly and effectively in the long run, a real gain in the efficient use of resources will be achieved".[62]

(b) Legislative intervention — the Official Information Bill

We turn now to discuss how the release of more information might be required by law. The clearest alternative, of course, would be appropriate legislation, and in this respect the Official Information Bill is very encouraging. If passed in its present form, it would apply to many fields of administration, including social welfare, and would entail significant improvements in communication between applicants and the Department.

In particular, cl 20 provides that ". . . every person has a right to and shall, on request made under this section, be given access to any document (including a manual) which is held by a Department or Minister of the Crown or organisation and which contains policies, principles, rules or guidelines in accordance with which decisions are made affecting any person or body of persons in his or its personal capacity". Clause 21 further provides that any person affected by such a decision has a right to a statement setting out the findings on material issues of fact, a reference to information on which those findings were based, and the reasons for the decision. (The Department of Social Welfare and the Social Security Commission are covered by the Bill — see s 2(1) and Parts I and II of the First Schedule to the Ombudsmen Act 1975.) Both of these strong provisions are made subject to a list of reasons which could justify withholding such information from the applicant. These reasons, found in ss 6 and 7, include privacy of the individual and that the information involved was entrusted in confidence to the Department.

Privacy and confidentiality of personal information held by the Department are important. The Minister of Social Welfare has written, "Although I appreciate the arguments for more freedom of information as far as the Department of Social Welfare is concerned, the utmost care must be taken to ensure that any moves in this direction do not undermine or destroy the confidence members of the public have in the impartiality of departmental officers and the

[62] *Report of the Danks Committee on Official Information*. Paras 132, 133 appear at p 37.

confidentiality of the Department's records".[63]

It is arguable that the publication of welfare decisions could contravene the requirement of confidentiality in the Official Information Bill, but the same problem does not seem to have prevented the reporting of (for example) family law cases. Apart from this, it is difficult to see how any of the other reasons listed might justify continued refusal to disclose information relating to cash benefits.

It is not necessary here to rehearse all the details of the Bill — the Bill itself makes for interesting reading. What is worthy of note is that the Bill seems to go further than the General Report of the Danks Committee on Official Information, on which it is based. A duty on Government Departments to "improve communication with the public" was called for in the Report, but it was not made clear that this would extend to releasing reasons for decisions or explaining the contents of Departmental manuals. The Bill is to be applauded for having made these obligations clear.

The basic principle of the Report of the Danks Committee finds expression in cl 5 of the Bill: information should be available unless there is good reason to withhold it. Problems with the administrative practice of income maintenance described in this article would be greatly improved if this simple proposition were given the force of law; cls 20 and 21 are particularly encouraging.[64] But perhaps the most significant aspect of the Bill is that it evidences a general discontent with how little access there is to the sort of information held by the Department. The general problems outlined in this article with regard to monetary benefits are not isolated. In this respect, let us hope the Official Information Bill is passed in its present form.

5. Conclusion

New Zealanders cannot assert that there is, in their country, any *right* to income maintenance — certainly not in the sense that a person falling within the simple elegibility description of a benefit can rely on getting that benefit. The inaccuracy of describing benefits as being a right has been explained. We have also seen how lack of general and individual information outputs contributes to the problem. Avenues for change have been considered.

There have been a number of developments in the past decade alone that will have profound consequences for social security. Higher standards of living have led to greater expectations of income maintenance, while economic depression has placed a greater strain on resources.[65] The numbers of benefits being paid have increased sharply — and it is difficult to imagine that the unemployed will cease to rise in number. Hanson puts the problem succinctly: "From such trends questions must inevitably arise over the future of social security in New Zealand. How far social security should extend; how much this country can afford to pay for it; and what direction further developments should take, are issues that governments of either political party must deal with".[66] One may add to that list of questions — "How might income maintenance best be administered, and upon what principles?" The shortage of information from which we now suffer is itself an indication that the present system is inadequate.

[63] Letter to the writer from the Minister.
[64] Neither of these clauses gives the Minister, Department or organisation involved a discretion to refuse the request. In contrast, note cls 38 and 16 which relate to other requests for information.
[65] Hanson, *The Politics of Social Security*, p 151.
[66] Ibid, p 151.

Jury Trials — Western Style

The following tale was narrated by the US Attorney-General to the 29th Congress of the Union Internationale des Avocats, 31 August 1981:

I remember the story of a defence attorney who found himself before a western Judge in our frontier area. The Judge and jury listened patiently to the presentation by the prosecution. At last the time came for the defence. "Now, your Honour," said the attorney for the defendant, "I would like to present my client's side of the case." The old Judge just stared down at the defence attorney for a while, then cleared his throat and said, "Wouldn't be worthwhile. Your side of the case would just confuse the jury."

"THE STARTLING REALITY" AND UALESI

By DAVID G McGEE

The author, who is Clerk-Assistant of the House of Representatives, originally submitted a long article on the **Ualesi** *decision, but Mr Joseph's article, which appeared in the last month's Issue, had already been received and was accorded priority. We invited Mr McGee to comment if he so wished on Mr Joseph's article, and we now publish his response.*

The major flaw in Mr Joseph's main proposition — that the Crown gives life to our representative institutions by the summoning of the General Assembly following a General Election either pursuant to statute or to the prerogative — is that it assumes that the constitutional position in New Zealand is a mirror image of that in the United Kingdom. This it is submitted is not so. It is not the Crown but s 32 of an Act of the Imperial Parliament, the Constitution Act 1852, which has given life to the House of Representatives since 17 January 1853 (long before a House was ever summoned to meet), and only an Act of the General Assembly of New Zealand can take away the life of that House (as happened with the Legislative Council in 1950); the Crown cannot. We must be very careful in applying to our constitutional system terms like *summon, prorogue* and *dissolve*, which are recognised or mentioned in the Constitution Act. Though these were directly imported from the United Kingdom we can by no means assume that they have exactly the same meaning and effect in New Zealand as they do in the different constitutional system of the United Kingdom. We are after all interpreting the general law of New Zealand.

On those occasions when it has been thought desirable to equate the position of the House of Representatives with that of the House of Commons, this has been done by specifically importing the powers or practices of the House of Commons in the desired areas (see s 242 Legislature Act 1908 for the adoption by the House of Representatives of the House of Commons' privileges, and SO 2 of the Standing Orders of the House of Representatives for the adoption of House of Commons procedure). There is nothing inserted in the Constitution Act adopting British Parliamentary law as, for example, there was in the Supreme Court Ordinance 1841 adopting wholesale for the Supreme Court the jurisdiction of the common law and equity Courts at Westminster. While it is natural that the drafters of the Constitution Act and the Governor and parliamentarians working the colony's new constitution would look to British constitutional practice for the answer to the problems which confronted them, and many of the terms pertaining to the "Mother of Parliaments" would be automatically associated with the New Zealand Parliament, the inescapable fact is that the two systems have different bases. One, without a precise starting point but deriving from an exercise of the Royal Prerogative, the other with a clear starting date deriving from Statute.

As Mr Joseph acknowledges, in looking at these matters we are in many ways the victims of the centrality accorded in our system to the General Election. The electoral system we enjoy is our way of replenishing our main Parliamentary institution. The political completion of the House of Representatives is "new" following each election but this does not necessarily mean that the institution itself dies. Because of s 32 of the Constitution Act it is submitted that it is incorrect to refer to the House ever ceasing to exist in a legal sense, and that dissolution in New Zealand is the termination by the Crown of the Parliamentary tenure of all current members of Parliament, as opposed to the termination of that tenure by effluxion of time under s 12 of the Electoral Act.

Time and further experience (of which *Ualesi* is the latest of the remarkably few cases which explore these issues) will reveal the implications of the statutory base for the House of Representatives, but I would suggest two conclusions from Mr Joseph's articles. One is that it is futile to analyse the words used by Judges as if they were drafted with statutory precision and expect to find a coherent statement of constitutional principles. Thought is rarely given to constitutional principles in our politically stable society and they are certainly not uppermost in the minds of Courts with practical not theoretical problems to solve. The second is not to look to Parliamentary debates for guidance on what the law is. Indeed Mr Joseph's first article made as good a case as

can be found anywhere against the admission in Court of speeches made in Parliament. Parliamentary debates take place in a much different atmosphere to Court proceedings and with different objects and ground rules. The Courts in admitting *Hansard* would be assailed with a plethora of material which would serve to confuse their task rather than assist it.

While Quilliam J's judgment disposes of many of the issues raised by Mr Joseph, I would cavil at one part of his decision — his determnation (although it was not necessary to the result of the case) that membership of the House dates from the declaration of the result of the poll, rather than from the return of the writ. It is submitted that in legal terms the latter is more than the "administrative consequence" of the former. While the declaration is public notification of the result of the electoral poll it is no more than that. It is the return that follows which confers membership of the House. (On this point see *Re Poole Election Petition, Hurdle v Waring* (1874) LR9 CP 435, 442 per Lord Coleridge CJ and the submissions of both counsel in *Wairarapa Election Petition* (1898) 15 NZLR 471.) The declaration, being an act performed in public, establishes the date from which time runs for the purpose of bringing an election petition, rather than the return, which, while an official and public act, is not transacted in public so as to give potential objectors any notification of the result. Following the Supreme Court's decision in *Hunua Election Petition, Peters and Others v Douglas and Others* (No M38/79), the House of Representatives directed the Clerk of the Writs to amend the *return* pursuant to s 172(2) of the Electoral Act and substitute the petitioner's name for that of the person returned. There has not been, nor can there be, any amendment of the *declaration* of the result of the Hunua election, which presumbly still shows the supplanted member as the person elected. If the status of member of the House was conferred on him by the declaration rather than the return why does the Statute direct its attention to the latter in such a case?

Further, in at least one other electorate at the last General Election, the declaration of the result was followed by a magisterial recount which reversed the first-declared result. The declaration was consequently ordered to be amended as it may be in these circumstances under s 117(6), but Quilliam J's decision suggests that the person first declared elected was in law a member of the House for the time which elapsed between the declaration and the amendment of the declaration. Directing attention to the return as the fount from which membership of the House of Representatives springs avoids this conclusion and is, it is suggested, correct in principle.

CONFERENCE PAPERS
INDUSTRIAL LAW

LAWYERS IN THE INDUSTRIAL ARENA

By JUDITH REID

The author is an academic turned union official. She was educated at the London School of Economics and taught there before a period at the Victoria University of Wellington. Mrs Reid has since 1979 been Secretary of the Auckland and Gisborne Shop Employees Union.

Introduction

For most of my working life I have been an academic lawyer, flirting only with those dangerous but exciting inhabitants of the real world, trade unions. The transition from academic to union official was dramatic enough in itself, but in my case made more so because my education in industrial law was gained in the UK rather than in New Zealand.

The experience, though peculiar, has taught me two things, and they will be the main themes of this address. The first is that legal intervention in industrial relations, very much a feature of the New Zealand system but traditionally lacking in the UK, may fundamentally affect the development of unions but at the same time fail to bring about industrial harmony. The second is that legal skills, deployed by union officials or their advisors, are of

limited value in this field.

The law caught the unions young in New Zealand, with the passing of the first Industrial Conciliation and Arbitration Act in 1894 — the aftermath of a major defeat for the Maritime Unions and a period of what can only be described as exploitation by employers. The overt intention was to protect unions by setting up a structure which they could use, if they wanted to, to force employers to recognise and bargain with them. But though benevolence may have been the intention, our conciliation and arbitration system has in many ways measured up to Harry Holland's description of it: "labour's leg-irons".

The collective bargaining process

Consider first the collective bargaining process as it exists today. Each year, for each award, the union meets employers in conciliation. The play begins: a conciliator paid by the Government opens the Conciliation Council in rooms provided by the Government. The union advocate, backed by his team of assessors, reads the claims for the year. The employer's team, though it must legally receive the claims six weeks before Council convenes, expresses surprise and in some cases shock and withdraws to consider its response. The employers will have already filed their own counter-proposals but in many cases these are not to be taken seriously, since they are of the "no change in the present award, two-year term" variety. Admittedly, employers have of late adopted the more cunning strategy of filing a number of counter-proposals, often based on union activities or Court decisions which have occurred in the preceding year.

The process which follows is one of barter rather than bargaining, and this is where a large number of counter-proposals can be useful, since each one can be traded off for a concession on the union's side. It may take two or three days for each side to get down to rock bottom, and in many cases the reaching of an agreement thereafter will depend on stamina and the time of the last flight home. Before the assessors depart, however, each one must fill in a claim form for their expenses to be paid by the Government. In the case of disagreement, there are only a limited number of ways to go. The Government will pay the parties to return to conciliation at a later date if this seems justified to the conciliator; or one or both sides may decide to go to the Arbitration Court; or the union may "go back to its members". The latter step is normally taken to see whether the members will support industrial action and this is not really playing the game according to the rules.

Two more factors must be added to the game: the conciliator himself, and the Government. The conciliator's role is often a very limited one. If the two sides stop talking to each other altogether, he will carry messages. If on the other hand they talk too much too loudly to each other in unsuitable language, he will try to restore order. He may talk informally with the two advocates, who will in turn bear messages back to their assessors, and who themselves often assume a mediator's role. (It would often be true to say that the advocate gets a harder time from his own side than he does from the opposition.) A conciliator of course also listens and records, but he does not often produce a settlement where the parties are not willing to arrive at it themselves. Then there is the Government, which may through the law or more informally determine the level of permissible wage increases for the award round in question, thus reducing bargaining about wages to a minimum. Even without Government intervention there are internal constraints on bargaining about wages. In every award round, a "going rate" will be fixed early on by a "trend setting" agreement. Though in the last award round the going rate was fixed by the Prime Minister at 13.5 percent on top of a 4 percent cost of living increase granted to all, in the previous year it was fixed by the Drivers' Union at a somewhat lower rate. As each wage round progresses, the going rate becomes a minimum rate which some unions will simply accept without further negotiations, though some may try to improve upon it marginally.

Other award terms are becoming increasingly standard, and changes in them are both slow and, when they come, achieved across the board.

I have, perhaps disrespectfully, described the rules of the game as they are laid down by the law. In my rather limited experience, these rules demand conduct which can be extremely artificial. The formal proceedings in Conciliation Council can often scarcely be called bargaining at all, since they seem to by-pass exchanges between employers and unions altogether. This is more particularly the case when the employers have as their advocate a representative of the Employers' Federation (a service which is not provided by the Federation of Labour to its affiliates).

Are the legal constraints effective?

What are the consequences of the game as it is played in New Zealand, for unions and industrial relations generally?

Over the years since 1894, unions have come to rely on the statutory structure, to the extent that its removal would in the medium term be extremely damaging. National awards are common, but the assembling together of unions from all over the country in conciliation would be beyond the resources of many unions without State subsidy. However, national awards in industries such as my own, retailing, can only hope to strike a lowest common denominator for employers as disparate as Nathans and the corner store. Awards are strictly minimum documents and it is not easy to negotiate upwards from them. Yet their removal (which might well result from the removal of Government subsidies) would cast unions back on the task of plant bargaining, something that many unions would not presently be able to undertake, though in the longer term it may well prove to be a more effective tactic.

Union recognition is in New Zealand a corollary of the conciliation system. Voluntary non-conciliated agreements are of course perfectly legal, but if an employer refuses to recognise the union for the purpose of negotiation, the only legal recourse the union has is to use its rights to force the employer into Conciliation Council.

Unions are themselves licensed to operate by the Government, and may be delicensed. Their finances are also subject to legal control. There is first a statutory upper limit for subscriptions; and secondly union membership is compulsory under virtually every award. Though the latter may seem to be a blessing, it is one which can (and has been) withdrawn by legislature. It is also one which does not require unions to develop the organisational muscle which would be necessary if membership were voluntary.

The system as a whole funnels union activity into a highly centralised pattern, and has produced a relatively immature system of shop floor bargaining. Whereas in the UK the shop steward plays a central role in determining rates of pay and conditions in his workplace, this is not true in New Zealand.

I have stressed some ways in which in my view legal intervention moderates union activity. The question remains whether it produces harmony, and this seems doubtful. Very few strikes in New Zealand are legal, though most in the UK would fall within that "golden formula" which gives them legitimacy if they are called "in contemplation or furtherance of a trade dispute". The strike figures for the two countries are nevertheless comparable. Statutory control may have made unions weaker on the job in this country, but it has not stopped them from using those tactics which produce results. Thus those unions which have the ability to "go back to their members" will do so whether the rules of the game permit it or not, rather than ask the Arbitration Court to arrive at a settlement. Anyone who has spent time at conciliation Council, on either side of the table, would I think accept that beneath the legal rules there is an underlying reality which determines the responses of both parties, and that this reality is about bargaining strength, not fair play in accordance with the law.

The legal constraints may well also have produced another characteristic feature of New Zealand industrial relations: those major disruptions of 1911-13 and 1951 which were also specifically rebellions against the Conciliation and Arbitration system. In any event it does not appear that direct legal intervention in the bargaining process is counter-productive: witness the actions taken against meat workers and drivers in 1978 and during the Kinleith dispute in 1980.

In award negotiations the lawyer has no role to play, not just because the legal rules may, as I contend, be somewhat irrelevant, but also because practising lawyers are expressely excluded from the game. Are their skills used, and useful, in other areas of industrial relations?

Lawyers are most commonly found representing employers and to a lesser extent in matters involving individual worker's rights, particularly on dismissal. The law relating to dismissal underwent a major change in 1970, when the concept of unjustifiable dismissal was introduced. Because of this change, unions have gradually shifted their resources away from fee collection (which is increasingly a clerical function) and towards the actioning of members' complaints and grievances — and since these matters may end up in the Arbitration Court, legal representation has also become increasingly common.

Drawbacks of the present system

The question I would like to ask here too is whether the law serves us well, since if it does not the skills of practising lawyers may be of little use to us either. Perhaps the point can best be illustrated by more tales from the front. My union shares a building with other unions, more noted for their militancy. It also shares a radio-telephone system, and in these ways it has been possible for me to compare rather different approaches to similar problems.

Take a dismissal: an everyday affair in my business which might result from a number of different

causes ranging from an assault committed on the boss to the colour of the worker's eyes. My own union, on receiving a complaint, will, if the dismissal appears to be unjustified, approach the boss in an attempt to resolve the matter. If this fails, we will set up a personal grievance committee under the chairmanship of a Government mediator, prepare written submissions for that committee, and spend maybe a day at the committee hearing. The committee will usually sit within a few weeks of the dismissal, but for varying reasons the process may take longer. If agreement is reached in the committee, the worker may get his job back, but compensation is a more usual outcome. When no agreement can be reached, and where one side or the other is not prepared to leave the matter to the chairman to decide, the next step is the Arbitration Court. It may take up to six months to get a fixture with the Court, and by that time reinstatement is likely to be out of the question, more particularly because the worker is under a duty to mitigate his loss by seeking another job. In addition many unions will feel obliged to hire lawyers for Court appearances, even though the Court habitually extends every courtesy to laymen.

On the other hand, union X (the militant one) which receives a similar complaint will first establish the extent of support on the job for the dismissed worker. If sufficient support exists, it is likely that the dismissed worker will be reinstated very quickly for obvious reasons. The question whether the dismissal was really justifiable or not may not arise at all, particularly, for instance, where it is said to be for redundancy. This may not seem to be fair, but it is extremely efficient both in terms of cost to the union and benefit to the dismissed worker, more especially where jobs are at a premium. The union which takes the "legal" path, probably because it lacks strength on the job, is thus in reality penalised.

I could give many other examples but perhaps one more will suffice. A union is legally entitled to enforce Unqualified Preference clauses in its award against non-members, and indeed the getting of such clauses is hung around with checks and balances to ensure "union democracy". But Court action on this matter can easily be abortive, because by the time the action gets to Court, the defendant is likely (especially in industries with a high turnover) to have moved on. The law requires the union to prove that the defendant is still employed, and delay in getting to the Court often means that the threat of legal action is an idle one. But again union X can ensure that the requirement for membership is observed in much faster and more direct ways.

A further consideration is that Court decisions are public matters. Because of this, we can be sure that any decision on award interpretation in a union's favour is likely to surface as an employer counter-proposal in the next award negotiations, and that a decision against the union may have wide repercussions for other employees. This is no doubt as it should be in the legal world, but it would often make the legal alternative very much less attractive if the same result could be attained for an individual worker without becoming a matter for public record. That worker is after all the person who pays us.

And can unions afford to pay lawyers? It is not just a question of lawyers' fees, though these are in fact prohibitive for many unions. Delay in the resolution of disputes is also expensive, in terms of both officials' time and workers' jobs and incomes.

Suggested reforms

It is not of course the fault of the Arbitration Court that it cannot promptly deal with all the cases brought to it, but I do suggest that if the legal alternative is to be made an attractive one for individual disputes, a quite different system must be produced. What is required in my view is the setting up of an equivalent to the Small Claims Tribunal in the industrial arena, based permanently in different parts of the country, able to deal quickly and informally with such disputes, and so conducted that the services of practising lawyers are not seen as necessary.

I do not suggest that these tribunals should dispense discretionary justice: rules are necessary both for consistency and for the guidance of those who wish to conform with the law. But such rules should perhaps be translated into codes of practice, rather than highly technical legal provisions, so that they could more readily be observed. Such codes, if they are to be acceptable to both sides, should of course themselves be the product of discussions between the national organisations representing employers and employees.

In such a system, I would also suggest that there is a role for professional legal skills, but that they should be dispensed in a somewhat different way. Many unions, particularly the smaller and newer ones, have a real need for legal advice and representation, even sometimes in conciliation. Professional practising lawyers are not to my mind the best people to meet this need, but a "para-legal" service could well be. Such a service could provide unions with advisors and advocates experienced in industrial relations whose legal knowledge would not necessarily need to be as comprehensive as that of a

practising lawyer. There would be of course no bar to people qualified in this way appearing as advocates in Conciliation Council, where negotiating expertise may be more necessary than legal knowledge. One would also hope, of course, that services of this kind would come cheaper than the services of a practising lawyer.

Some tentative steps have already been taken in the direction of para-legal services of the kind I have described, and I would expect this trend to continue. Though I have suggested throughout this paper that what might loosely be called "market forces" are paramount determining factors for industrial relations, at least in the collective sphere, no union can avoid contact with the law from time to time. If those who make the law wish unions to use it more often, then perhaps an effort should be made to render it more accessible to us.

TAX IN PRACTICE

USING TAX LOSS SUBVENTIONS TO ADVANTAGE

By JOHN C WAUGH CA (SA), ACA

Where two or more companies are members of the same group of companies for income tax purposes,[1] if any one of them has a current or prior year tax loss, it is only natural that consideration be given to the use of that loss by other group companies with assessable income. In the case of specified group companies,[2] this may involve a tax loss offset election[3] by the loss company or transfer by way of subvention payment.[4] Where group companies do not form a specified group, only the subvention method is available for effecting the loss transfer.

In practice, more often than not, specified group companies transfer losses by way of elected offset, rather than follow the comparatively clumsy procedure of effecting subvention payments under agreement. However there are at least two situations where subvention payments need to be considered. The first of these involves the determination of provisional income for the payment of provisional tax. The other concerns the liability to New Zealand income tax of a non-resident company receiving non-resident withholding income subject to tax by direct assessment, ie taxed at company tax rates on the net amount of such non-resident withholding income, after taking into account allowable expenditure incurred in deriving that income. In terms of prevailing Inland Revenue Department practice, the taxpayer may claim a standard allowance, representing "deemed" expenditure, in lieu of a claim for actual costs so incurred. Examples of such withholding income are industrial royalties and interest derived from associated persons (as that term is defined in s 8 of the Act).

The provisional tax situation: specified group companies

Subvention procedures can carry an advantage over offset procedures where, in relation to the income year in respect of which provisional tax is payable:

— group companies derived assessable income in the immediately preceding year; and

[1] Companies whose shares are at least $66^2/_3$ percent commonly held on a lowest common multiple principle. Such commonality may be in relation to either allotted capital, paid up capital, profit participation or voting power. Save for the last test, fixed dividend only shares are disregarded when testing for commonality.

[2] Section 191(4) of Income Tax Act, 1976 (the Act): group companies (see note 4) with 100 percent commonly held paid up share capital.

[3] Tax loss offset elections: s 191(5) of the Act. In addition to being a tax loss available for use by the loss company, it must also be one which is available for offset purposes. Not all tax losses will be so available.

[4] Tax loss subventions: s 191(7) of the Act. In addition to being a tax loss available for use by the loss company, it must also be a loss which is available for subvention purposes. Not all tax losses will be so available.

— there are subventible tax losses to be brought forward to that preceding year; and
— but for subvention techniques, there would be a group provisional tax liability to be met.

Consider the situation of three specified group companies in the following situation

Year 1	Company A	Company B	Company C
Assessable income for the year	Nil		
Tax loss available for carry forward		-500	-100
Year 2			
Assessable income derived in the year	350	300	150

(All losses to be brought forward are available for subvention or offset)[5]

Assuming that the group are not estimating provisional income for year 3, let us determine the aggregate level of provisional income upon which provisional tax is to be based.

If in relation to year 2, a tax loss offset election is made by Company B, requiring the $200 residual loss to be transferred to Company A, provisional tax liabilities would be based on provisional incomes of:

Company A:	$350[6]
Company B:	$300 (the assessable income derived in year 2)
Company C:	$150 (the assessable income derived in year 2)
Group	$800

However, if Company A subvented $350 of Company B's tax loss from year 1, and the remaining $150 of that loss was subvented by Company C, the following pattern of provisional incomes would result:

Company A:	nil
Company B:	$300
Company C:	nil
Group	$300

In each case, the provisional income is the assessable income derived by the company in year 2. As will be noted, the total provisional income for the group is substantially less than what it would have been had tax loss elections been effected. The total tax liability for year 3 will not be affected, but a significant cash flow advantage can be achieved.

The reason for the disparity between the two determinations lies in the differing tax treatment of subvention payments and tax loss offsets. The former give rise to deductions *in* determining assessable income, and the latter to deductions *from* assessable income.

Of course, where companies propose to effect subventions, regard must be had to the consequences of such an action. Subvention payments are made of a sum equal to the amount of the loss to be subvented, ie for $1 of tax loss worth 45c, one has to pay $1. Where there are minority shareholders in the loss company, they stand to benefit from the 55c[7] gain to that company for every $1 of loss subvented. In many cases, this gain may be more theoretical than real because the shares in the loss company may still have little or no value even after the subvention is effected. More to the point, perhaps, is that the subvention payment to any group company places additional funds in the loss company. Such funds would be available to pay creditors.[8] In some cases, the subventing company may be the principal (secured) creditor, and thus the principal beneficiary of the loss company's newfound liquidity — a happy situation indeed! Other

[5] Ie: The tax losses are available for subvention in accordance with the provisions of s 191 of the Act, read with s 188 of the Act and s 41(5) of the Income Tax Amendment Act, 1980.

[6] Being the $350 assessable income derived in the income year: s 378(a) of the Act. The group has no residual tax loss at the end of year 2 for carry forward to year 3 and use in reduction of Company A's provisional income for year 3, as contemplated by s 383 of the Act. The amount by which Company A's assessable income for year 2 is reduced through any tax loss offset by Company B may not be taken into account in determining Company A's provisional income. This is because the loss offset is a deduction *from* the assessable income derived in year 2 (s 191(5)). Provisional income is based *on the assessable income* derived in the preceding year, viz: year 2.

[7] In fact, if the tax loss would not otherwise have been used, it is in reality a $1 gain!

[8] Effecting a loan back in favour of the subventor does not alter the situation as the funds represented by the loan are still available for the benefit of creditors.

consequences may attach to subvention payments in particular situations, and the prospective subventor should be alert to these.

The non-resident withholding income situation

In some circumstances, non-resident companies deriving non-resident withholding income from New Zealand are subject to tax thereon by way of direct assessment, credit being given for non-resident withholding tax withheld at source. It frequently happens that such a non-resident company has a New Zealand resident[9] fellow group company[10] which is in a tax loss situation. Even if the companies are part of a specified group, no tax loss offset election is possible because s 191(5) of the Act precludes the use of this technique in relation to non-resident withholding income. However, if the tax loss is available for subvention by the non-resident company, consideration could be given to the non-resident company subventing an appropriate part of the loss. Section 191(7) of the Act does not preclude the use of subvention techniques in relation to non-resident withholding income.

From a New Zealand viewpoint, the 15 percent non-resident withholding tax is a minimum tax,[11] so one would seek to subvent no more[12] of the subventible loss than is necessary to reduce the tax[13] on the net assessable income[14] to an amount equal to 15 percent of the gross non-resident withholding income being taxed by direct assessment.[15]

Mention was made earlier of the need not to be that blinded by the New Zealand tax advantages of tax loss subventions as not to notice the other consequences thereof. In this particular situation, there is one all-important consideration. The non-resident corporation needs to consider whether the making of such a payment has tax implications in its country of residence and/or in other jurisdictions where its actions can affect its or its group's[16] tax liability.

Conclusion

In recent years, subvention payments have played an important role in salvaging tax losses for the benefit of domestic group companies, particularly where major changes of shareholding were likely to occur in a tax loss company. The legislative amendments introduced by ss 40 and 41 of the Income Tax Amendment Act, 1980 effectively closed many of the avenues where tax loss subvention payments could be used to advantage. However, those amendments did not seek to deprive ongoing groups of companies from using tax losses incurred within the group for the benefit of other ongoing group companies. With a little imagination, the selective use of tax loss subvention techniques can achieve useful tax savings and or cash flow advantages. The tax planner should be alert to the possibilities.

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[9] For income tax purposes.

[10] Ie: A holding, subsidiary or fellow subsidiary company with which the non-resident company has group status for income tax purposes, (see note 1).

[11] Article VII. The present USA-New Zealand tax treaty includes an elective option which, as presently interpreted, enables USA resident persons to achieve a New Zealand tax liability of less than 15 percent of the gross royalty on qualifying royalties.

[12] Subventions are restricted by the level of the subventible loss and of the assessable income derived by the subventor in the income year to which the subvention relates.

[13] Calculated at 50 percent non-resident rate. It should be noted that quite apart from the cash flow advantage arising from the earlier use of the loss, there is a 5 percent tax advantage in that the loss subvented, if and when it would otherwise have been used by the loss company, would only have saved tax at the rate for resident companies, currently 45 percent. However, as a result of the subvention payment, additional revenue reserves accrue to the payee loss company. This will advance the day when the company will have retained earnings available for distribution as a dividend attracting non-resident withholding tax.

[14] See note 1. Income (other than non-cultural royalties and interest derived by associated persons) which is taxable by direct assessment does not attract non-resident withholding tax, and there is no minimum tax liability in respect of such income.

[15] See note 1.

[16] In its widest sense.

SUSPENSION OF NON-STRIKING WORKERS

By ALEXANDER SZAKATS

In this article the author, Emeritus Professor of Law, University of Otago, Barrister and Solicitor examines the implications of a recent Court of Appeal judgment in the case of an appeal under s 128 of the Industrial Relations Act 1973.

The Court of Appeal has added a definitive note and clarified the problems surrounding the legality of suspending workers under s 128 of the Industrial Relations Act 1973, in its recent judgment in *NZ Forest Products Limited v The Northern (Except Kawerau and Caxton Paper Mills Limited) Wellington and Otago and Southland Industrial Districts Woodpulp and Paper and Related Products IUW* (unreported CA181/80, 27/5/1981).

The decision of the High Court in *Elston v State Services Commission (No 3)* [1979] 1 NZLR 218, (known as the New Plymouth Electricity Workers' case), concerned suspensions in the state services, and the relevant statutes and regulations were considered. In the present writer's view certain principles can be deduced from the judgment, and may be set out in the form of the following criteria for the lawful exercise of the right of suspension:

(a) The relevant legislation or contract must define the precise nature and limits of the right.

(b) All the facts establishing the preconditions to suspend must be present; thus, depending on the particular preconditions in the relevant legislation or contract,
  (i) the worker must have committed a default by refusing to carry out the contractual duties; or
  (ii) there must be no work available normally performed by him.

(c) The facts establishing the preconditions must directly and individually relate to or arise from the worker's person, whether or not jointly with other workers, but not as merely a member of a group.

(d) The employer must exercise the right exactly in the manner prescribed by the legislation or contract, that is:
  (i) any requisite warning should be given before suspension;
  (ii) the notices should not be served before all preconditions are established;
  (iii) the notices must be served individually, not on a mass basis;
  (iv) the form of notices and the method of service must strictly comply with the requirements of the relevant legislation or contract.[1]

In the *Forest Products* case the issue was whether the employer's suspension of the worker had been lawful in terms of s 128(1). That subsection now reads:

> 128(1) Where there is a strike, and as a result of the strike any employer is unable to provide for any workers who are in his employment and not on strike work that is normally performed by them, the employer may suspend their employment until the strike is ended.

As a result of a strike by maintenance workers two workmen belonging to the Paperworkers' Union (whose members were not on strike) were suspended. The Union appealed under s 128(3) against the suspension of the two workers. The Arbitration Court in *Northern etc Woodpulp etc IUW v NZ Forest Products Ltd* (1980) Arb U 379, held that the suspension of one of the workers, Mr Harniss, was not justified. Chief Judge Horn delivering the decision found that:

(a) The worker (Mr Harniss) was an oil compound attendant and not a shiftworker;

(b) The strike commenced on 7 January 1980, but he was not suspended until 18 February at 10.45 am, when he received the suspension notice;

(c) At that time there still was some work available for him during the day and he continued to perform his functions until 2

[1] See Szakats, *Law of Employment*, 2 ed Butterworths, Wellington 1981, paras 202-205; also Szakats "Unlawful Suspension after Unilateral Variation of Terms and Conditions; the New Plymouth Electricity Workers' Case", (1979) NZLJ 292.

pm when, there being no work, with the consent of his supervisor he went home;

(d) As the oil compound could be entered by certain other personnel who had keys at any time, including outside normal working hours, for the purpose of drawing supplies, this necessitated recording of the withdrawals, which normally would be the function of Mr Harniss;

(e) During the suspension some operations occurred in the oil compound which normally had to be done by Mr Harniss;

(f) Though such functions would be less than full time employment for him the employer has not sufficiently shown that normal work was not available for Mr Harniss;

The Court consequently held that Mr Harniss' suspension was premature.

Against the Arbitration Court's decision the employer appealed to the Court of Appeal under s 62A of the Industrial Relations Act on six points of law relating to the interpretation and application of s 128. The first question was whether the statutory preconditions of suspension set forth in s 128 of the Industrial Relations Act fall to be determined only at the time of suspension.

Cooke J, delivering the judgment of the Court, answered, "Yes", but added that the lawfulness of the suspension must be judged at the time when the employer invokes the section. The written notice of suspension given on 18 February to Mr Harniss was to be effective from the end of that day. His Honour continued:

> "Accordingly the question was whether when the notice was given to him on 18 February it could properly be said for the purposes of the section that from 8 am on 19 February the employer would be unable to provide for Mr Harniss work normally performed by him. A reasonable degree of foresight and advance consideration must be called for on the part of an employer to enable the section to be operated as Parliament must have intended."

The Court expressed the view that the section should be applied in a practical way and it must be a question of fact and degree whether enough work would be available on the following day. It rejected the extreme interpretations that unavailability of work automatically justifies suspension or that availability of a small amunt of work automatically rules out suspension, and emphasised that the decision of the Arbitration Court was "consistent with what we regard as the correct approach — namely that the matter is one of fact and degree and reasonable foresight".

The second question was whether the suspension on 18 February "was justified at the time of such suspension". The Court of Appeal regarded this point as partly a question of fact which, if the Arbitration Court had applied the wrong test, could be referred back to that Court. As, however, the terms of its decision did not show the wrong test, the necessity did not arise.

The third and fourth questions were considered together; they asked (a) whether the suspension, if valid at the time of suspension, continued only until such time as work became available for Mr Harniss, and (b) whether, there being some work available during his suspension, the suspension should have been lifted when work became available. The Court of Appeal observed that these situations did not arise, as the Arbitration Court had held the suspension invalid and its decision should stand, but "it is better not to leave doubt in this sphere". For this reason, the ambit of the expression "until the strike is ended" was examined. Cooke J said:

> "If Parliament had meant the employer to be free to select a lesser period of suspension or had meant that either party should have the right to insist in certain circumstances on the suspension ending before the strike, one would have expected the section to say so and to make incidental provisions about such matters as notices to resume work".

The next question related to the onus of proof and asked whether, in the absence of any evidence being called by the respondent union, the onus of justifying Mr Harniss' suspension at the hearing before the Arbitration Court rested on the employer.

Comments made by the learned Judge on this point not only reiterate the ordinary principles of evidence in appeal cases and generally before a Court of law but focus attention on the different procedural rules which are available only to the Arbitration Court by virtue of s 57(1) of the Industrial Relations Act 1973. His Honour answered this part as follows:

> "The union was the appellant and there is nothing in [s 128] to displace the ordinary principle that an appellant has to show that the decision under appeal was wrong. The onus of justifying the suspension did not rest on the employer, but as (for reasons for fairness) the employer elected to call evidence, the union was entitled to rely on that evidence and cross-examination to discharge the onus . . . The Arbitration Court could have admitted [document-

ary] evidence under s 57(1). That subsection also enables the Arbitration Court to call for evidence itself. These comparatively unusual powers underline that often questions of onus may not be of much importance under the Act."

Returning to the facts of the case, the Court of Appeal considered that the Arbitration Court could look to the employer for evidence that the available work was not likely to be enough to justify retaining Mr Harniss as a paid worker. "[I]n more legalistic terms, the [Arbitration] Court was free to take the view that the evidential onus shifted to the employer". This view can be supported by the circumstances that facts relating to the employer's operations would be mainly within the knowledge of the employer.

The Court held that the Arbitration Court's decision did not contain any error of law, and noted that "the Arbitration Court's jurisdiction is one with special problems".

Two important issues emerge from the *New Zealand Forest Products* case. First, the Court of Appeal reinforced and further clarified the principles enunciated in the *New Plymouth Electricity Workers'* case specifically relating to the application of s 128 of the Industrial Relations Act. The propositions can be restated in a few points:

1. All the statutory preconditions of suspension must be present and their presence be determined as at the time of the suspension to make it lawful. The preconditions are that —
   (a) there is a strike in existence, and
   (b) as a result of the strike the employer is unable to provide to the non-striking workers work normally performed by them.
2. Notice of suspension cannot be given earlier than the time when non-availability of normal work has been ascertained by the employer; if notice is given earlier, it will be premature and make the suspension unlawful.
3. Availability or non-availability of normal work is a question of fact to be decided by the employer, using a reasonable degree of foresight and advance consideration. The onus of proof lies on the employer, who alone has access to the relevant information.
4. The correct approach for the Court is to determine on the facts whether the availability of less than the normal amount of work in the circumstances would justify suspension, and whether the employer acted with a degree of reasonable foresight.
5. When all the preconditions are present and the suspension is valid in accordance with s 128(1), it continues until the strike ends; neither party may unilaterally demand the resumption of work earlier, but together they may agree that the suspension be lifted. It follows that, if work becomes available during the suspension, unless the parties otherwise agree the suspension continues.
6. It is also clear that if non-availability of normal work results from causes other than the strike, a worker cannot be lawfully suspended under s 128.[2]

The other significant observation relates to the Arbitration Court's "comparatively unusual powers" to call for evidence itself, and to the diminished importance in its proceedings of evidential rules on the burden of proof. In other words, the Court of Appeal took judicial notice of the Arbitration Court's special jurisdiction and recognised that its procedure does not necessarily follow the usual adversary system observed by Courts of law in common law countries, but incorporates certain elements of the inquisitorial process which empowers the Court to seek any further evidence necessary. Though the word "inquisitorial" may sound frightening, it simply means the inquiry power of the Court to go beyond the evidence offered by the parties. This method, developed in countries belonging to civil law systems, has been utilised in New Zealand by many judicial and quasi-judicial tribunals. Parliament, in giving by the Industrial Relations Act 1973 (and earlier by the Industrial Conciliation and Arbitration Acts) a statutory jurisdiction to the Arbitration Court, obviously had in mind its special problems and devised a procedure most suited to solve them.

[2] See *Mazengarb*, 4th ed, para 128.

PRACTICE AND PROCEDURE

DISCOVERY BY THE CROWN IN APPLICATIONS FOR REVIEW

By JOHN HANNAN*

Where judicial review is sought of decisions of central government officials, discovery of documents may be of prime importance. Such discovery is frequently not available. In an interlocutory judgment in **Environmental Defence Society v South Pacific Aluminium Ltd, Minister of National Development and Others,**[1] *the Court of Appeal took a small step towards clarifying when such discovery will be available.*

1. Introduction

The limited availability of discovery in judicial review proceedings arises from the well-established common law principle that discovery is not available against the Crown.[2] The Crown Proceedings Act 1950 (s 27(1)) rendered the Crown liable to discover in "civil proceedings". But "civil proceedings" as defined in s 2 of that Act do not include proceedings in relation to habeas corpus, mandamus, prohibition, certiorari, or proceedings by way of an application for review under the Judicature Amendment Act 1972, to the extent that any relief sought in the application is in the nature of mandamus, certiorari or prohibition. In *Fiordland Venison Ltd v MacIntyre*,[3] and in *Arataki Honey Ltd v Minister of Agriculture and Fisheries*,[4] it was made clear that discovery would not be available in applications for review which sought orders in the nature of mandamus, prohibition and certiorari. The common law position stated (obiter) in *Duncan v Cammell, Laird & Co Ltd*[5] was maintained. Subsequently, a submission that s 10(2)(i) of the Judicature Amendment Act 1972[6] renders the Crown liable to make discovery was rejected in *Mohammed v Minister of Immigration*.[7]

What of the declaration? This remedy is, significantly, not among those excluded from the definition of "civil proceedings" in s 2 of the Crown Proceedings Act. Consequently, discovery should be available pursuant to s 27(1). A recent flurry of cases dealt somewhat inconclusively with the question. In the *Arataki Honey Ltd* case Jeffries J indicated (obiter) that such is the law, terming it an "extraordinary result".[8] In *Fowler & Roderique Ltd v Attorney-General*,[9] Casey J was squarely confronted with the issue; the applicant in this case sought only a declaration. His Honour was unequivocal in holding discovery to be available against the Crown. However, in *Ng v Minister of Immigration (Nos 1 and 2)*,[10] Holland J took a view which severely cut down the ambit of the decision in *Fowler & Roderique Ltd*. He noted that "civil proceedings" as defined in the Crown Proceedings Act do not include applications for review "to the extent that any relief sought is in the nature of certiorari, mandamus or prohibition". He therefore concluded that, if the granting of a declaration would for all practical purposes have the effect of mandamus, prohibition, or certiorari, it would be excluded from the definition of "civil proceedings". Discovery would not be available. Moreover, "an applicant for review who establishes that he or she is entitled to a declaration independently of the Judicature Amendment Act 1972 then becomes entitled to relief under the provisions of the

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[1] Court of Appeal, 12 June 1981 (CA59/81) unreported.

[2] It will, however, be suggested later in this piece that at least in the early portion of the 19th century discovery by the Crown was occasionally ordered. See fn 27.

[3] [1979] 2 NZLR 318n.

[4] [1979] 2 NZLR 311.

[5] [1942] AC 624, per Viscount Simon LC, at p 632.

[6] Section 10(2): "At any such Conference the Judge presiding may — (i) require any party to make discovery of documents or permit any party to administer interrogatories".

[7] [1979] 2 NZLR 321.

[8] Supra, at p 317.

[9] [1980] 2 NZLR 216.

[10] [1980] 2 NZLR 219 and 289.

. . . Act by way of or in the nature of mandamus, prohibition, or certiorari" (*Ng* at p 224). When this statement is read together with s 7 of the Judicature Amendment Act (proceedings for declaration to be disposed of as if application for review), it becomes apparent that Holland J contemplated that in most cases where declarations are sought against government officials discovery will not be available, at least where the declaration would have the effect of certiorari, mandamus or prohibition.

This decision seems squarely in conflict with *Fowler & Roderique Ltd.* Holland J certainly thought so,[11] although *Ng* might arguably be distinguished on the basis that the declaration there sought would clearly have had the effect of certiorari. [Now note however the final section of this article].

2. Environmental Defence Society v South Pacific Aluminium Ltd

The confusing position outlined above has now been partially clarified in the Court of Appeal. The *EDS* case was an application for review of the decision of the Governor-General in Council to apply the provisions of the National Development Act 1979 to the first respondent's proposed aluminium smelter. Discovery was sought and was resisted on the ground that there was no power to make such an order against the Crown. The Court of Appeal ordered that discovery be made. The judgment contains, alas, no reference to any of the cases thus far discussed. The Court discussed the definition of "civil proceedings" in the Crown Proceedings Act and moved directly to the conclusion that "to the extent that any relief sought in the application is in the nature of mandamus, prohibition or certiorari, discovery and interrogatories should not be ordered". The "plain purpose" of the special definition of "civil proceedings" would be undermined by any other ruling. However the applicants here sought not only certiorari and an order setting aside the Governor-General in Council's decision,[12] but also a declaration that the order was invalid. A declaration was, in fact, the primary relief sought in the view of the Court. Discovery was consequently available. The Court was reinforced in this view by *Barnard v National Dock Labour Board*[13] and by the power given in s 10(2)(i) of the Judicature Amendment Act.[14]

The jurisdiction to order discovery is discretionary; the Court here ordered discovery principally on the basis that otherwise it might well be virtually impossible to challenge Orders in Council made under the National Development Act. Cases under the Act, it thought, were of such major public importance that the Court should not so shackle itself.

3. Unresolved Problems

(a) Can discovery be made when a declaration will have the effect of, eg, certiorari?

It seems clear that in *Ng* Holland J considered that asking for *any* remedy other than declaration would be fatal to any prospect of discovery. By implication, the Court of Appeal do not agree; an order in the nature of certiorari was sought against the Governor-General in Council in the present case. The Court said nothing as to what the position would be if the declaration would have the *effect* of, eg, certiorari. For all practical purposes, that was the position in the *EDS* case. The Court of Appeal placed emphasis on the fact that the applicants' claim for certiorari was probably misconceived; it is unlikely that a prerogative remedy of this kind will issue against a Governor-General, who stands in place of the Sovereign. The applicants could not (arguably) obtain certiorari, so the declaration they sought (that the Order in Council was invalid) would have had precisely the effect, for all practical purposes, of quashing the decision of the relevant "tribunal".

The declaration sought was that the Order in Council was invalid — a nullity. On one view (in recent years probably the better view) certiorari, which issues to rectify a breach of natural justice,[15] involves quashing an error going to jurisdiction and thus necessitates the finding that the decision was a nullity. It may perhaps be assumed that the Court has tacitly overruled *Ng*.

(b) When are proceedings "against the Crown"?

While in the *EDS* case there was no doubt (for the Governor-General in Council was a respondent)

[11] *Ng (No 1)*, supra, at p 223.

[12] Section 4(2) Judicature Amendment Act 1972.

[13] [1953] 2 QB 18, per Denning LJ at p 42.

[14] See n 6, supra.

[15] The applicants' statement of claim alleged breach of natural justice in that the Governor-General in Council failed to give the applicants a hearing after being requested to do so.

that these were proceedings "against the Crown", the question of precisely when it will be said that proceedings *are* against the Crown continues to give difficulty. "The Crown" is a chameleon-like concept (and, from the point of state officials, a highly useful one). The special vestment of privilege in litigation possessed by the Crown has been — and is being — most reluctantly put off. Prior to the enactment of the Judicature Amendment Act 1972, none of the "prerogative writs" would issue against an official or agency who could be said to be "the Crown".[16] In general, no remedy could be obtained against the Crown unless authorised by the Crown Proceedings Act or other specialist statutes. It was therefore necessary to sue (eg) a Minister in his own name, a practice which still continues. But, where this is done, the immunity of the Crown against discovery in many cases inures to the benefit of the official concerned. Arguments that discovery is available where the (eg) Minister is being sued not as an officer of the Crown but as persona designata, or in a personal capacity, have been rejected.[17] In *Bird v Auckland District Land Registrar*,[18] an injunction was sought to restrain the Minister of Lands from proceeding with a compulsory acquisition. The Crown Proceedings Act did not apply; the case had to be treated as an action against the Minister personally. Notwithstanding this, "it is the rights or interests of the Crown, and not of the Minister, that are really at stake" (per F B Adams J, at p 467). The test formulated is whether, as a matter of substance, the proceedings are against the Crown, regardless of how the proceedings are inituled. If the "rights or interests" of the Crown can be said to be at stake, discovery may be successfully resisted.

(c) Is discovery available for other remedies?

The Judicature Amendment Act 1972 provided a new remedy for litigants. Section 4(5) empowers the Court to direct decision-makers to reconsider and redetermine. Is this remedy included in the definition of civil proceedings in s 2 of the Crown Proceedings Act and is discovery consequently available? In *Mohammed's* case Barker J thought not, categorising what appears to have been an application for a s 4(5) direction as being an application for an order in the nature of mandamus. This may be doubted. The s 4(5) direction was seen by the Public and Administrative Law Reform Committee[19] as a new remedy. It is also clear that the essential nature of mandamus is that it will compel performance of a public duty, and de Smith observes that, in general, mandamus will not lie "for the purpose of undoing that which has already been done in contravention of statute".[20]

A distinction might therefore be drawn between the s 4(5) direction and mandamus. The applicants' statement of claim in the *EDS* case did not seek a s 4(5) direction and, consequently, the Court of Appeal did not consider the matter.

4. A Need for Change

(a) Directors and Playwrights

The rather curious situation outlined above has attracted critical judicial comment:

> "Finally, Mr Barton drew to my attention the extraordinary result if it is held in these proceedings discovery is not available against the Crown. If the applicant had chosen to proceed by way of a . . . declaration, it would have been entitled to discovery. Extraordinary, indeed. However, I am the director, not the playwright, and do not move out of my province."

Thus Jeffries J in *Arataki Honey Ltd*, at p 317. It is, however, well-known that directors as well as playwrights have power to change the spirit of a drama, and it will be argued in what follows that this should be done. It seems nonsensical to say to a litigant that, if he seeks one remedy (for all purposes quite as efficacious as others he might seek) he may obtain discovery, yet if he seeks those other remedies he may not.

The rationale for the position adopted by the Courts appears, in the first instance, to be the incipient constitutional conflict involved in ordering the Crown to make discovery. What if the Crown refused? In *Fowler & Roderique Ltd v Attorney-General*, Casey J noted (at p 217) that ". . . the distinction becomes more credible when one contrasts the peremptory effect of the prerogative remedies, and their historical development as Crown writs, with the milder persuasive effect of a declaration."

The contrast referred to by Casey J, while real

[16] See *Ng (No 2)* at pp 292, 293.

[17] Eg *Arataki Honey Ltd*, supra, n 4. *Fiordland Venison Ltd v MacIntyre*, supra, n 3.

[18] [1952] NZLR 463.

[19] 4th Report, *Administrative Tribunals, Constitution, Procedure and Appeal* (1971) p 16. 5th Report, *Administrative Tribunals, Constitution, Procedure and Appeal* (1972) p 7.

[20] *Judicial Review of Administrative Action* (4th ed), p 542.

enough, is not a ground for the distinction as to discovery. If the Courts are so chary of the possibility of a stand-up fight with the Executive on this matter, the position taken by Holland J in *Ng* (that discovery will not be available in almost every case where a declaration is sought) should be adopted, for while a declaration may be merely mildly persuasive, an order that discovery be made is entirely peremptory. It does not become any the less peremptory because it arises out of proceedings for a declaration. There is, however, another reason for the immunity.

(b) A prerogative immunity

The reluctance of the Courts to grant discovery against the Crown rests, in fact, primarily on the view that the immunity of the Crown from discovery is part of the prerogative, which can consequently only be displaced by statute, either expressly or by necessary and clear implication. The implication of displacement can *not* be made, it is thought, because of the legislative intent revealed by the exclusion of certiorari, mandamus, prohibition, or applications for review having the effect thereof, from the definition of "civil proceedings" in the Crown Proceedings Act. A number of observations may be made.

First, while recent cases have spoken of the Crown's immunity from discovery as a prerogative,[21] that immunity is spoken of as a prerogative in only one earlier case, so far as the writer has been able to discover. In that case, *Attorney-General v Newcastle-upon-Tyne Corporation*,[22] the observation was *obiter*. The observation made therein has nevertheless been extensively quoted with approval.

In *Duncan v Cammell, Laird & Co*, Viscount Simon LC noted that "the common law principle is well-established".[23] In earlier cases, the Courts have appeared less sure of the basis for the immunity. In *Tomline v R*,[24] it "seems to have been regarded as resting rather on technical difficulties than on a distinct prerogative".[25] Chitty, in his discussion in 1820 of the prerogatives of the Crown,[26] does not mention the immunity from discovery. This may be explained by the fact that at that time discovery was not generally available at common law. It originated in the Court of Chancery, although it was also known in the Court of Exchequer on its equity side.[27]

Despite the paucity of clear judicial statement as to the status of the immunity, it is probably appropriate to term it a "prerogative immunity". Although "in principle the Courts will not recognise the existence of new prerogative powers"[28] (and the immunity was certainly not known prior to 1800), it can be said to fall within the Crown's general prerogative of immunity from suit. That prerogative rested on the rule that the King could do no wrong.

What then of the statutory position?

(c) Statutory displacement

Counsel in several of the recent New Zealand cases made valiant (but fruitless) attempts to show that statutory changes had removed the immunity of the Crown from discovery. It will be submitted in what follows that indeed it could be held that statutory changes have destroyed the immunity. The prime candidate for such a statutory provision is s 10 of the Judicature Amendment Act.[29] The section is quite clear that a Judge may require *any* party to make discovery. Section 13 states that the Act is to bind the Crown, subject to s 14. In the *Mohammed* case an argument based on s 10 was rejected, partly for the reason that s 14(2) requires the relevant part of the Judicature Amendment Act to be read subject to the Crown Proceedings Act. Barker J felt that this was a clear indication that s 10 cannot be read as inserting a power to order discovery by the Crown. This, it is respectfully submitted, is analytically untenable, for it is not the Crown Proceedings Act which creates the immunity. Rather, that Act diminishes the immunity. The requirement of s 14(2), that Part I of the Judicature Amendment Act (which includes s 10) be read subject to the Crown Proceedings Act, does not, therefore, derogate from the width of application of s 10. What then are the purposes of ss 14 and 10?

It must first be noted that s 10 was inserted by the 1977 Amendment to the Act. Section 14 was enacted in the original 1972 legislation. The purpose

[21] Eg *Fiordland Venison Ltd*, supra, n 3, at p 319.
[22] [1897] 2 QB 384 at p 395.
[23] Supra, n 5.
[24] (1879) LR 4 Ex D 252.
[25] G S Robertson, *The Law and Practice of Civil Proceedings by and against the Crown* (1908) p 598.
[26] Chitty, *Prerogatives of the Crown* (1820).

[27] It was in this jurisdiction of the Court of Exchequer that discovery was, in a few early cases, ordered against the Crown. See *Attorney-General v Brooksbank* (1827) 148 ER 743; *Deare v Attorney-General* (1835) 160 ER 80.
[28] E C S Wade and G G Phillips, *Constitutional and Administrative Law*, 9th ed, p 240.
[29] See n 6.

of s 10 should perhaps be considered separately from that of s 14. As to s 14, the only useful comment this writer has been able to discover is that of the Public and Administrative Law Reform Committee in its explanatory notes to the draft 1972 bill. The Committee stated that the purpose is "to preserve the status quo in relation to the Crown under the new procedure. At present, under s 2 of the Crown Proceedings Act 1950, the term 'civil proceedings' does not include proceedings in relation to mandamus, prohibition, or certiorari".[30] The Committee went on to note that s 27 of the Crown Proceedings Act allows a Court to order discovery by the Crown. It is clear that the Committee intended to preserve the immunity. It may, however, be inferred that its intention was also to prevent the new application for review procedure from being governed by the Crown Proceedings Act in the same way that care was taken when that Act was originally drafted to prevent the prerogative writs from being so governed. It thus becomes necessary to consider why that was done.

There is no comment in the available literature on the 1950 Act or its 1947 UK equivalent which gives guidance as to why the prerogative writs were excluded. But the reason is obvious. It was that of ensuring that these writs would not issue directly against the Crown; that would have seemed a constitutional nonsense, the writs being the King's writs. Such writs would only issue against an official in either his/her personal capacity or as *persona designata*. The exclusion of discovery in 1950 was incidental to this larger purpose. In 1972, the larger purpose was given truncated consideration. The focus was on the procedural aspects. Nevertheless, the original purpose of the special definition in s 2 of the Crown Proceedings Act remains, and s 14 must be read as serving that purpose as much as maintaining the immunity.

The intention of Parliament in its 1977 enactment of s 10 is unknown. The Public and Administrative Law Reform Committee commented in their 1975 Report that the general purpose of s 10 was that of minimising delay and ensuring that "all matters in dispute may be effectively and completely determined".[31] But the section is very clear in its insistence that *any* party may be required to make discovery. It is consequently submitted that it is open to the Courts to rule that s 10 does indeed displace the immunity. This argument is strengthened by the use of s 10 by the Court of Appeal in the *EDS* case. The Court observed that the view that discovery is available in the case of a declaration "is reinforced by the power expressly conferred by the Judicature Amendment Act 1972, s 10(2)(i)". If the section reinforces the argument in respect of the declaration, it can surely also be taken to give power in respect of the other remedies.

A further argument as to the statutory position was advanced in the *Arataki Honey Ltd* case and in the *EDS* case. It was submitted that, since s 5(2) of the Crown Proceedings Act makes the Code of Civil Procedure binding on the Crown, R161 of the Code (which provides for discovery) is binding on the Crown. The Court of Appeal dealt shortly with this submission by stating that "it would undermine the plain purpose of the special definition (of civil proceedings) in s 2(1)". For Jeffries J, in *Arataki Honey Ltd* that purpose was to keep "those prerogative writs. . . in a special category . . . to retain for that jurisdiction the privilege of the Crown of immunity from discovery".[32] As has been previously noted, however, the primary purpose of the s 2(1) definition of "civil proceedings" may have been to prevent the prerogative writs being available against the Crown, for the constitutional reasons stated.

5. Conclusion

Judges in common law jurisdictions are both directors and playwrights. Examination of the origins of the Crown's immunity from discovery discloses that, in this particular drama, it is the Judges who have been the playwrights. Perhaps they might now engage in some (dare one say?) judicious re-writing. In what has been said previously, a number of ways in which this might be done have been suggested. There is good reason to say that the established scenario no longer appeals to the modern audience. It seems absurd that discovery by the Crown should be available when a declaration is sought (and even where other remedies are sought together with a declaration), but not in the case of the other remedies. The incipient constitutional conflict can no longer afford a rationale for refusing discovery in the latter class of cases, if it did not afford such a rationale in the former. And why should discovery be available in actions in tort and contract under the Crown Proceedings Act, but not

[30] 5th Report, Appendix, p 10.

[31] 8th Report, *Administrative Tribunals, Constitution, Procedure and Appeal* (1975) Appendix, p 3.

[32] Supra, n 4, at p 316.

for (eg) certiorari? It must also be remembered that the Crown may fall back upon the shield of public interest privilege, as indeed it did in *EDS v South Pacific Aluminium*. Discovery will not automatically undermine the interest the Crown has in keeping its ruminations secret. The modern formulations of public interest privilege afford a more or less satisfactory balance between the public interest in some degree of secrecy in some areas of governmental activity and the public interest in governmental accountability and access to justice. Nevertheless, until the directors/playwrights determine that the time has come to correct the anomalous position outlined above, counsel will be wise to include the remedy of declaration in their pleadings if they wish to obtain an order for discovery against the Crown in applications for review.

Addendum

Since the completion of this piece, a judgment of the Court of Appeal reversing the decision in *Ng v Minister of Immigration* has become available; see CA 100/81, 10 August 1981, Cooke, Richardson, McMullin JJ.

This judgment puts it beyond question that the Crown may be ordered to make discovery where a declaration is sought, even if the declaration would have the effect of (eg) certiorari. The question posed in para **3(a)** of this article is answered in the affirmative. As the Court observed, declaration is in this respect "a superior form of remedy". Moreover, the fact that a remedy such as certiorari is sought in addition to a declaration will not preclude discovery.

Despite these positive developments, and contrary to the view adumbrated in para **4** of this article, the Court was of the opinion that s 14(1) of the Judicature Amendment Act preserves "the Crown's ancient freedom from discovery" in respect of relief in the nature of mandamus, certiorari or prohibition. The fact that s 4(1) of that Act speaks of declaration and injunction, whereas s 14(1) does not, indicated to the Court that Parliament did not intend s 14(1) to exclude the declaration from the jurisdiction to order discovery. The anomalous position continues.

FAMILY LAW

MEDIATION AS A REQUIREMENT OF CONCILIATION UNDER THE FAMILY PROCEEDINGS ACT 1980

By ALLENBY STANTON

The author is an Auckland practitioner who has long been interested in the relationship between the skills of the lawyer and of the social worker. He was one of the founders of the Marriage Guidance Movement in New Zealand. The new Family Proceedings Act not only reiterates the pious hope that lawyers will effect reconciliation, but imposes the more practical requirement of conciliation. The article looks at this in terms of mediation and draws attention to some of the different roles and skills mediation requires.

A New Requirement

Section 13 of the Domestic Proceedings Act 1968 imposed an obligation upon solicitors or counsel acting for a husband or wife to give consideration, in all proceedings under that Act, to the possibility of reconciliation, and to take all proper steps that might assist in effecting a reconciliation.

Section 8 of the new Family Proceedings Act reimposes such a duty, but goes further and requires not only the giving of information concerning facilities existing for the promotion of reconciliation, but also the taking of such further steps as, in the opinion of the barrister or solicitor, may assist in the promotion of *conciliation* where reconcilation is not possible.

Subsection 2 of that section attempts to reinforce this, by imposing a requirement that, before any matter at issue between the husband and wife under

that Act, or the Guardianship Act 1968, can be set down for hearing, the barrister or solicitor shall certify on the application that he has carried out his responsibilities.

The requirements under s 8 are distinct from, and in addition to, the provisions for a mediation conference conducted by a Judge under s 13. It remains to be seen how seriously the Court takes the requirements imposed under s 8. If the Court insists upon giving effect to what appears to be the intention of the Act concerning conciliation, at least a change of emphasis may be required in the way the profession handles matrimonial disputes.

Although the Law Society has given some support to the concept that an aggressive adversary approach is inappropriate in family matters, the degree to which the profession must have regard to the requirements for conciliation will depend upon whether the new Family Court insists upon more than merely a formal compliance.

At the seminar on Family Law conducted by the Legal Research Foundation at Auckland on 28 May last, Principal Family Court Judge Trapski made it clear that he understood the legislature intended, in formulating the new Act, to circumvent what it believed were the unsatisfactory results produced by the "adversary methods" which were the cause of complaint by people who claimed that they had suffered detriment at the hands of the profession.

Mediation and Arbitration

Achieving conciliation calls for mediation. This is a skill commonly used by the profession, particularly solicitors, but the term is not often heard. It is significant that in the video tape shown on TV1 on 26 July last under the heading "Conflict of Interest" the panel did not mention mediation, and talked about a conveyancer *arbitrating* a dispute between vendor and purchaser. On the basis that a person is likely to do something better if he knows what he is doing, it is worth establishing what mediation is, and how it differs from arbitration.

An arbitrator is appointed by agreement, or pursuant to a provision which has previously been agreed to, between the parties, to give an answer to a question which is in dispute between the parties. Although the arbitrator must have regard to the concerns and interests of all parties in dispute, the ultimate decision is his. It is accepted by the parties as a consequence of their prior agreement. Mediation on the other hand is a procedure whereby the parties are assisted to find a solution to a problem, or series of problems, which the parties themselves are prepared, albeit reluctantly, to accept and go along with. In an arbitration the parties are obliged to accept an imposed decision, whereas mediation is a means of exploring the possibility of finding a decision which both parties are prepared to accept.

The television presentation of the "Conflict of Interest" panel highlighted the fact that litigation and arbitration are the bread-and-butter of the barrister, but mediation is the daily task of the solicitor. This is not surprising: a matter seldom moves on to the sphere of litigation unless mediation has failed. Moreover, the solicitor's knowledge and experience, and his familiarity with the area in which the dispute lies, are likely to equip him the better to mediate; but the forceful approach, and training in negotiation, of the barrister, are likely to be counterproductive in an attempt at mediation, unless he is conscious of the need to accept different role prescriptions.

The Affective or Emotive Aspect

The Continuing Legal Education Committee of the Auckland District Law Society took advantage of the presence in Auckland of Mr Richard Evarts, a professional mediator from Denver, Colorado, to invite him to talk to some 40 practitioners there on 19 May last. Having drawn attention to the distinction between litigation, negotiation, arbitration, mediation and reconciliation, Mr Evarts went on to discuss the motivation behind many disputes. He pointed out that people are often not seeking justice so much as retribution. There is an emotional or psychological element which prevents the parties from dealing in an objective way with the cognitive aspect of the dispute. A lawyer involved at this level is drawn into an adversarial process in which he is required to carry the burden of persuasion, but not necessarily the burden of proof. If conciliation is to be effected, this emotive or affective involvement of the parties must first be dealt with.

This requires a special type of interviewing skill, which will be familiar to those who have been associated with counselling agencies such as Youthline or Lifeline, or who have worked in a Citizens Advice Bureau. The interviewer avoids reacting emotionally to what the client is saying. Instead, he first tries to understand the feelings that underlie the client's words, and then "reflects" those feelings in a way that is both meaningful and acceptable to the client, without expressing either approved or disapproval. The interviewer may, for example, say "You felt put down"; "When your husband behaves like this you feel angry and frustrated"; or, "That was really good". When the client's feelings are understood and accepted by the interviewer, the client is

better able to step aside from the compulsive aspect of his emotions and to deal with the practical side of the problem.It is not sufficient for the interviewer merely to be aware of the client's emotions and make allowance for them; he must confirm his understanding and acceptance. A client caught in strong emotions will go round and round without going forward; the mediator must be able to facilitate the client breaking free.

The mediator must concern himself not only with transitory feelings of anger and anxiety. If agreement is to be acceptable now and in the future, the mediator must ensure that the actions of the parties are not dominated by underlying feelings of guilt or fear arising out of the immediate problem situation.

If the affective or emotive elements can be effectively dealt with as and when they arise, the would-be mediator can move the parties towards looking objectively at what the practical problem is, with a view eventually to finding a solution which both parties can accept.

Mr Evarts was at pains to point out that the mediated settlement is not just a compromise, but arises from a rearrangement of the elements in the problem, an exploration of the possibilities and an acceptance of the difficulties.

It is often necessary first to clarify what the parties really want, or what they feel to be correct; and then to consider what each party is willing to accept. It may take a little time and patience before the real answers to these questions can be worked out. Even then there are often "private agenda". If these emerge later, the parties may have to rethink their answers.

The Congnitive Element

Dealing with the cognitive part of the problem requires the mediator to take a different role from that which will enable him effectively to deal with the emotive element. We hear a good deal today about the counselling interview, although we may not always recognise the significance of the terms used. The attitudes, knowledge and techniques of the counsellor may well make him effective in handling emotions, but family disputes generally involve practical problems, such as deciding questions of custody and access, or who will occupy the matrimonial home. To deal with this part of the problem the mediator has to be able to take control of the situation: he must be able to exercise authority, and must be seen by the parties as a person having integrity, objectivity, and accurate knowledge. In a matrimonial property dispute it may be necessary for the mediator to say that, from a legal point of view, the savings made by the husband out of his earnigns during the marriage are matrimonial property, but the shares left to the wife by her aunt are not. At the same time he must be able to avoid getting caught up in arguments as to what *ought* to be the situation.

The importance of bringing the parties back to reality is sometimes exemplified in custody and access discussion. I recall one incident in which a father was unfortunate enough to be left with a provision where he had access to a primary school child from 4 pm to 6 pm on a weekday. Similarly, it is unrealistic to try and determine, without reference to the child, what a 13-year-old boy will do every second Sunday, particularly if it is assumed that the arrangement will carry on for two or three years. Indeed, a not uncommon cause of friction in access matters arises out of the custodial parent's fear the other parent will demand arrangements which will not work, and that the custodial parent will be blamed for it.

Although the mediator must be careful not to be seen as making decisions for the parties, he must often point out alternatives which are available, and must help the parties to explore them. The solution may arise out of a lateral thinking exercise. It will be seen that all this can tax the skill and patience of a person both dedicated and acute.

The mediator must be able to listen in a manner that can best be described as active, or even creative. He must be aware not only of what is said, but of what is not said. He must understand the implications both affectively and congitively, and be able to encourage the speaker to explore and develop feelings and understanding. He hopes to arrive, point by point, at an agreement which the parties will ultimately enter into, and which will be binding according to its tenor — a document of performance well articulated between the parties. This may be achieved by a draft of the relevant points leaving the final agreement for the respective lawyers to put into an effective form.

Mediation in Marriage Breakdown

A practitioner experienced in the family law field will be aware of the high level of emotion involved at the time of a marriage breakdown. In addition to the practical problems, both will have suffered injury to their self-esteem, and, if the marriage has existed for more than two or three years, they are likely, however much they may have hated the relationship, both to feel some grief. Most people react to stress at this level by a deterioration in

behaviour which further exacerbates the situation.

The cognitive aspects of the problem on the other hand are often those in which the parties have a good deal of common interest. They both want what is best for the children; they both want to preserve the matrimonial property or to sell it at the best price. Indeed, if the parties are able to accept the marriage breakdown, and to rebuild their lives and shattered egos, they are often able later to deal with these problems in an objective and businesslike way: perhaps even to co-operate. For this reason it is tempting to see the problems which create such difficulty at the time of the marriage breakdown as emotional rather than practical ones. This has encouraged some people, including those in the psychological and medical professions, to question whether lawyers are the best people to deal with such problems. The gist of their argument is that the problems that beset the parties at the time of the marriage breakdown are not judiciable. Attractive as this may seem in theory, in practice professional people who have not had the opportunity of legal training are often unable to deal effectively with the feeling of uncertainty and the strong antagonism of the parties at this time. If they can, the dispute will not reach the lawyer's office. The detailed and accurate knowledge the lawyer has concerning the rules applicable and facilities available, the back-up of the Court and its associated services, and his training in identifying the objective issues are themselves important in reducing the emotional stress. Lawyers commonly deal with clients in crisis situations, and can cope with high levels of emotions, including ambivalence (the tendency of the client to express conflicting emotions, and to demand conflicting lines of action).

Mediation and Advocacy

Mediation is not a watered-down form of advocacy; nor is it a hotted-up method of counselling. Mediation calls for a specific role with its own aims and skills. The situation will dictate whether mediation is appropriate, or whether an adversary approach is called for. We are more likely to seek an adversary approach in a *sum zero* dispute. If your client can only get a larger share by my client getting a smaller one, I must fight to keep your client's share down to prevent my client's share being diminished. Determining the price which one party must pay to buy out the other party's interest in a matrimonial asset could be such a situation.

On the other hand, arranging appropriate provisions to enable the children to maintain a good relationship with their father does not involve reducing the benefit the mother obtains by the order giving her custody. Indeed, if good arrangements can be made for father to take the children, or some of them, for a period, it could give a welcome respite to mother. In another case, if mother is concerned whether the 12-year-old boy will be able to live amicably with his father, it may be wiser for her to take a relaxed attitude towards custody, so that if a change does prove to be necessary the boy can feel free to come and live with his mother, without the feelings of guilt and failure which would be almost inevitable if the mother had fought against it in the first instance.

We have been used to dealing with similar situations in the commercial field, where successful co-operation by parties, notwithstanding an element of competition, is sometimes more profitable to both of them than an adversary type of attack against each other. What is important, of course, is that the parties are enabled to take positive steps towards a workable arrangement.

Conclusion

There are lawyers working in the family law field who have gained sufficient knowledge and skills to help those clients involved in marriage breakdown to deal in a mature way with the many problems that arise from a separation. But sufficient clients have suffered from what they believe were inappropriate adversary methods to have caused Parliament to include in the new Act a requirement for conciliation.

If the attempt by Parliament is to be effective, a degree of specialisation will be required. Lawyers who handle family disputes will have to learn to listen energetically and understandingly to the client, to discriminate between what is affective and what is cognitive, and to be able to deal with each in a way that helps the client to move through the uncertainty and emotional stress of the marriage breakdown, with a minimum of hurt to the parties and the children. The lawyer will need to know when a mediation procedure is appropriate, and when an adversary one, and to fulfil each of these roles appropriately and competently.

CORRESPONDENCE

Dear Sir,

Legally Aided Litigants — The New Privileged Class

I was fortunate enough to be able to attend the May 1981 conference of members of the Victorian Law Institute. I was there involved as a commentator at the workshop session on legal aid. That session reinforced for me, from my experiences as a member of the Auckland District Legal Aid Committee, the feeling that our system of "legal aid" effectively places litigants with minimal resources of their own on the same level as those with unlimited personal means, or the major companies. The system strengthens the position of those aided litigants by simply moving them into a position where they have virtually unlimited resources. These newly enfranchised are then able to prosecute proceedings to sometimes inordinate lengths, to the general disadvantage by overloading further our Court calendars and increasing the cost of the scheme to those who provide the funds for the general pool, and to the specific disadvantage of any other party to the proceedings who is unfortunate enough not to qualify for aid.

The idea of "legal aid" is surely to equalise the disadvantaged in their position in our legal system. At present aid is virtually unrestricted and unlimited with the result that those eligible have a virtually unfettered capacity for litigation. I would suggest it is contrary to the public interest that these litigants can bring and pursue cases that they would not bring or pursue if they had to fund the proceedings themselves, or that two parties can pursue highly technical arguments through Appeal Courts that they would not contemplate if they had to meet the cost of those appeals personally. In the former situation the public purse, the Court system and the other parties involved all bear an extra and unwarranted burden, while in the latter case the public purse and Court system alone bear the burden. Might I suggest that such a situation can only cause a lowering of the image and standard of our judicial system in the long term.

If parties to a Court action are possessed of equal resources then there will be a point where they both "accept" a conclusion to their dispute, whether by a decision of a Court or by a settlement. That I would suggest is as things should be. Such an imposed or "ad idem" settlement of a claim will often give a more expeditious and equitable result than would have been obtained had the claim been pursued fully through the Courts on strictly legal criteria.

I would then suggest to the profession that the proliferation of unnecessary cases arising from grants of aid must be prevented. Is the answer to restrict the eligibility for aid to certain areas of the law and/or to limit the amount of aid made available? By doing this perhaps we will restore the market forces that have previously supported the acceptance of our judicial system and its conclusions by the participants in it.

D B Thomas
Auckland

Dear Sir,

I recently had occasion to research a hitherto unplumbed (by me) area of the law, relating to the role of signatories in commercial contracts. An area of the law which, I can assure you, is marginally less enthralling than an evening with the Rubik Cube.

In the course of my customary wide-ranging and diligent work, I came across the decision of *Bowen v Morris* (1810) 2 Taunt 374.

The report of the case in the late Mr Taunton's excellent little opus extends to some twelve printed pages, of which only the last fourteen lines are devoted to the judgment of the Court. Those 14 lines, however, contain a priceless and slender thread of authority upon which my entire argument was to be based. They are prefaced by the letter "a" in parenthesis indicating to my trained eye that there was a footnote on the concluding page of the report, relevant to the matter which had drawn the late Mr Taunton on that particular day to the enclaves of the Court of Exchequer Chamber.

Now I obviously have never made the acquaintance of the late Mr Taunton, he having kicked the jurisprudential bucket approximately one century before I started from the womb, and nor do I have any reason to cast doubt upon the man's integrity and devotion to his adopted profession as a law reporter. However, I feel it incumbent upon me to draw to your readers' attention the fact that, at p 386 of Vol 2 of his otherwise meritorious series, the following footnote is indelibly printed and upon which, therefore, posterity can reflect along with the subscribers to the New Zealand Law Journal:

> "(a) The Reporter was not present at the time this judgment was delivered, but he was favoured with the substance of it by a gentleman at the bar of known accuracy and knowledge."

Could I respectfully ask present members of the New Zealand Bar who feel that they deserve the accolade of such generous epithets to make their identities known to the Council of New Zealand Law Reporting in order that they can earn a few bob on the side?

I have sent a copy of this letter to Miss Frances Wilson and am anxiously awaiting my first assignment.

Yours faithfully
C A McVeigh
Christchurch