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EDITORIAL

JUDGES AND LAWYERS AT RISK

In New Zealand, as in most developed countries, the legal profession enjoys a relatively high level of remuneration, job satisfaction and social status, in return for hard work and considerable responsibilities. So far as it goes this may be true also of most so-called Third World countries. But in a number of those countries there is a further and sinister dimension. This can be seen in the two reports dated 30 October 1980 of the Centre for Independence of Judges and Lawyers — an offshoot of the International Commission of Jurists.

The first report describes the fate which overtook the elected members of the Egyptian Council of Advocates on account of certain criticisms they had voiced of government policy while abroad. On publication of the report of a commission set up by the government, the Egyptian parliament dissolved the Council of Advocates on 22 July 1981 and subsequently appointed a fresh Council. There have followed a number of arrests of former members of the Bar in Egypt, under a recent law which establishes a separate system of Courts to try such crimes as "propagation of whatever implies denial of heavenly religion" and "publishing or broadcasting abroad . . . if this is bound to harm any of the country's national interests". This last provision has a familiar ring, being not dissimilar to cl 52 in our Public Information Bill, on which Philip Joseph comments in his article at p 534 of this issue.

The second report describes the continuing wave of assassinations of Judges and lawyers in Guatemala. From January 1980 to July 1981 forty-seven Judges, lawyers and law professors were assassinated there. The report states, "There is considerable circumstantial evidence that these killings are related to the professional activities of the victims, and that the security forces at least tolerate them. In many cases the assassinated attorneys have been representatives of trade unions, peasant groups or a national university and its legal aid service. In one previously reported instance the assassins attributed the murder of a lawyer to his defence of a political prisoner; in another the assassination of a Judge hearing a sensitive case was followed, a few days later, by that of the Judge assigned to replace him. The method of killing is identical in an overwhelming majority of cases. The killings normally occur in daylight, often in heavily populated areas. No case has been reported in which the responsible parties have been brought to justice, or where an attempted murder has been frustrated by police, even where death threats have been reported to them, or where the assassination was preceded by an unsuccessful attempt."

The Egyptian experience represents an early stage, and the horrors in Guatemala an advanced stage, of the illness which afflicts a state when the professional independence of Judges and lawyers begins to be curtailed in order to conform to the "national interest" as interpreted by the government of the day. Some consider a very early symptom to be discernible when Cabinet ministers are seen (as they have been lately in New Zealand) to criticise decisions of the Courts in cases arising from unsuccessful prosecutions of individuals whose actions have challenged some aspect of government policy.

The happenings in Egypt and Guatemala are but two examples of the way in which, in authoritarian states of all political complexions, courageous lawyers are at a serious risk. The latest report of the In-

ternational Commission of Jurists lists a total of twenty-two different countries from which the Commission received, between 1977 and 1980, reports of harassment or persecution of lawyers. It is easy from our safe, remote and prosperous vantage point to dismiss these phenomena as no concern of ours. But curbs on professional and judicial independence anywhere not only provide us with cautionary lessons for our own society but tend to weaken one of the great bulwarks against tyranny, and thus in a real sense affect all of us.

Some may say there is nothing effectual we can do. The reply is that we can write to the authorities concerned and/or urge our local Law Societies to do so. The experience of Amnesty International in respect of prisoners of conscience has been that, while positive responses to individual letters are rare, the cumulative effect of pleas from many countries, in particular letters from persons or bodies representing the same profession as the prisoner, does from time to time bring about the release of victims.

The International Commission of Jurists has a New Zealand section which, while publicising overseas developments, devotes most of its energies to local issues. Anyone seeking further information, either about the cases mentioned above or about the section's general work, should write to its secretary Mr T J Broadmore, PO Box 993, Wellington.

Mortgagee's Sales — A Caveat in the Works

The upsurge in mortgagee's sales in the past few years has caused a latent problem to assume the proportions of a major worry for practitioners who act for such mortgagees. In many cases the title is found to be encumbered with a caveat. The caveat generally protects no more than a subsequent unregistered mortgage. The trouble arises from the fact that, while a subsequent registered mortgage is simply overreached, under s 105 of the Land Transfer Act 1952, on the sale by the prior mortgagee, and hence no impediment arises when the transfer is lodged for registration, the High Court has held in more than one case recently that s 141 prevents the District Land Registrar from registering a transfer even by a prior mortgagee exercising his power of sale, so long as there is a caveat on the title.

A very recent High Court case shows the extent to which a registered mortgagee can be penalised. The mortgagee bought in at the morgagee's sale, but could not register the transfer because of a caveat. The interest which the caveat purported to protect was a simple loan, claimed by the caveator's counsel to be an equitable interest in land. Though the Court had little difficulty in finding against the caveator, the whole exercise cost the mortgagee dear in both time and money.

This obvious anomaly has been the subject of consideration by the Property Law and Equity Reform Committee, whose report entitled "Report upon the Effect of a Caveat on a Mortgagee's Power of Sale" has recently been published.

After considering the position in certain other jurisdictions where the Torrens system applies, the Committee has recommended a short Bill which would amend s 141 by enlarging subs (3) to provide that a transfer registered pursuant to a mortgagee's power of sale may be registered despite the existence on the title of a caveat, so long as the caveat was lodged after registration of the mortgage, unless the Registrar is satisfied from the particulars in the caveat that the estate or interest claimed by the caveator would, if registered under the Act, have priority over the mortgage or otherwise affect the estate or interest of the mortgagee under the mortgage.

The Commitee was at pains to preserve the rights of those whose caveats protected interest other than unregistered puisne mortgages. It also considered whether notices pursuant to the Matrimonial Property Act 1977, which under s 42(3) of that Act are deemed to have the effect of caveats, should similarly be overreached under the proposed legislation. Not without hesitation they came down on the side of preserving, even against a selling mortgagee, the effectiveness of the Matrimonial Property Act notices. This is an aspect which will no doubt be fully canvassed when the draft Bill reaches Parliament.

Simpler Drafting

At the Triennial Conference last Easter one of the most noteworthy papers was that presented by Mr I L McKay entitled "Intelligible Drafting". It was one of the four papers selected by the Conference Committee for inclusion in the booklet sent to all members of the profession and was the subject of one of the video-taped panel discussions screened on TV1 last July. It is for that reason only that it has not been re-published in this Journal.

More recently publicity has been given to an article in the Consumer's Institute monthly periodical which strongly criticised the prolixity and obscurity of many legal documents in common use today.

While the reaction of layman to this criticism has been predictably supportive, it is clear that a great many lawyers are also troubled by the poor

public relations which the present situation engenders.

If reform comes in this field it can come only from within the profession. An opportunity to take a first step in this direction seems to have been missed when the Auckland District Law Society's revised draft form of Agreement for Sale and Purchase was prepared. Whatever its substantive merits, no one could claim that it is readily understandable by even an intelligent and literate layman.

In order to try and provide a forum for those laywers who have a positive concern for reform in this area, space will be provided in the Journal from next year onwards in which we shall be happy to publish any useable examples that readers may care to send us of what they regard as effective simplified drafting which they have either prepared themselves or encountered. In case this produces few entries, space will also be given to examples of particularly clumsy and obscure drafting, so long as these are accompanied by the sender's suggestion for reform.

PETER HAIG

THE LAW SOCIETY'S COAT OF ARMS

The New Zealand Law Society has provided the following note on the Coat of Arms which is featured on our front cover. It is reported that the choice of the succinct English motto owed much to the advocacy of the late Sir Richard Wild, who was a noted opponent of archaic forms.

On 19 September 1963, at the request of the Council of the New Zealand Law Society, the Earl Marshal authorised and directed Windsor Herald, of the College of Arms, London, to grant and assign a Coat of Arms, cross and supporters to the Society. The Letters Patent, now displayed in the Society's Council room, were signed on 4 August 1965 by three Kings of Arms — Anthony B Wagner, Garter; J D Heaton-Armstrong, Clarenceux; and Aubrey J Toppin, Norroy Ulster.

The Arms are described as follows:

> "Azure four Mullets in cross Gules fimbriated Argent in base two Barrulets wavy and on a Chief Argent an open Book proper bound Gules edged and clasped Or between two Quill Pens erect proper. And for the Crest on a Wreath of the Colours Perched on two Books bound Gules edged and garnished Or an Owl proper holding with the dexter claw an Antique Lamp Or enflamed Gules. Supporters: On either side a representation of a Maori Carving of a Manaia Murrey eyed Azure upon a Compartment of a Maori Carved Panel proper."

The stars represent the Constellation of the Southern Cross as in the first quarter of the Arms of New Zealand. The open book and quill pens are symbolic of the Society as a learned one; the twin wavy bars represent the ocean. The crest depicts the Owl of Wisdom holding the Lamp of Truth and the books on which it is perched Statute Law and Common Law. The Manaia symbolises the spirit; represented as a pair, each is slightly different from and the opposite of the other signifying, for example, right and wrong, justice and injustice.

THE LEGAL POSITION OF ASSESSORS AND LOSS ADJUSTERS

BY JK MAXTON and AA TARR

2: PRIVILEGE FOR THEIR REPORTS

This concludes the article of which the first part appeared in the November issue

3. Privilege in relation to Assessors' Reports

The report of the Law Reform Committee on "Professional Privilege in the Law of Evidence", in March 1977, stated on p 1:

> "Privilege in the law of evidence is the right to refuse to disclose in Court, or to allow another person to disclose in Court, evidence otherwise admissible that is relevant to the matter in issue. It arises out of the conflict between the need to preserve confidence on the one hand, and the need to ascertain the truth on the other."

Privilege from disclosure creates an exceptional position in the law since the general evidential rule demands that "all relevant evidence should be adduced to the Court".[28] As such, privilege is an area closely controlled by the Courts and abounding with policy considerations. A discussion, therefore, of not only relevant cases but also pertinent policy deliberations is required.

Of the several heads of privilege recognised by common law and statute[29] there are three which, it is submitted, might provide some protection to the reports of insurance assessors. These are: legal professional privilege, "without prejudice" negotiations, and privilege based on "public interest" grounds.

Legal professional privilege

The Rule

The ambit of legal professional privilege, in so far as it obtains in both civil and criminal cases, may be outlined thus:

(a) Communications passing between a client and his legal adviser will be privileged if made either to obtain legal advice or with reference to litigation, actual, pending or contemplated; however,

(b) Communications passing between a legal adviser or client and third parties will be privileged only if made for the purpose of obtaining information to enable the legal adviser to advise about actual, pending or contemplated litigation.[30]

As Lord Edmund-Davies put it in *Waugh v British Railways Board* (supra) at 1181:

> It is for the party refusing disclosure to establish his right to refuse. It may well be that in some cases where that right has in the past been upheld the courts have failed to keep clear the distinction between (a) communications between client and legal adviser, and (b) communications between the client and third parties, made (as the Law Reform Committee put it) "for the purpose of obtaining information to be submitted to the client's professional legal advisers for the purpose of obtaining advice upon pending or contemplated litigation". In cases falling within (a), privilege from disclosure attaches to communications for the purpose of obtaining legal advice and it is immaterial whether or not the possibility of litigation were even contemplated. . . . But in cases falling within (b) the position is quite otherwise. Litigation, apprehended or actual, is its hallmark.

In the usual course of a loss assessor's work, a report will be submitted with his investigations to

[28] Per Lord Simon of Glaisdale, *Waugh v British Railways Board* [1979] 2 All ER 1169 at p 1175.

[29] See for example *Cross on Evidence* (3rd ed, 1979) pp 255-283; Cross and Wilkins *Outline of the Law of Evidence* (5th ed (1980) pp 97-108, and Evidence Amendment Act (No 2) 1980, ss 29-35.

[30] See *Cross* pp 265-273; *Cross and Wilkins* pp 103-107.

his employing insurance company. That company will then normally, if it appears warranted, seek legal advice.

The communication of the assessor's report to his insurance company, if it attracts legal professional privilege, will attract it under head (b) (above) — the insurance company constituting the client and the assessor the third party.

That established, the question which now falls to be discussed, from the latter part of head (b), is this: If a report comes into existence for any purpose *other than* with a view to litigation, actual, pending or contemplated, can privilege be claimed in respect of it?

The Law 1913-33

The development of the law in this field divides into three distinct phases: first, 1913-1933; secondly, 1959; thirdly, 1976-1979.

Three English Court of Appeal decisions handed down in the 20 years between 1913 and 1933 established the general principle that a report (such as an assessor's report) would be privileged if *one* of its purposes (*even though subsidiary*) was to inform the solicitor with a view to litigation contemplated as possible or probable.

The first decision, *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co*[31] involved a negligence action. The plaintiffs sued the defendant in negligence for hay destroyed by fire at the defendant's station. The defendant objected to the production of certain documents on the ground that they came into existence in order to facilitate its solicitor's task in respect of the contemplated litigation. The Court of Appeal upheld the claim for privilege. Vaughan Williams and Buckley LJJ took the view that it was not necessary that

> ". . . the affidavit should state that the information was obtained 'solely' or 'merely' or 'primarily' for the solicitor, if it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending or threatened, or anticipated."[32]

Hamilton LJ agreed with his brothers on the Bench in not inclining toward the view that to attract privilege the documents must have come into existence for the *sole* purpose of submission to legal advisers. He, however, considered that to accord privilege to documents coming into existence for a multitude of purposes *only one of which* was submission to a legal adviser was "unsound in principle and disastrous in practice".[33]

It is notable that Hamilton LJ's views were preferred, although not as a matter of decision, 60 years later by the House of Lords in *Alfred Crompton Amusement Machines Ltd v Commissioner of Customs and Excise (No 2)* [1973] 2 All ER 1169.

The second relevant Court of Appeal case is *Ankin v London and North Eastern Railway Co.*[34] A passenger, claiming damages for personal injury against the defendant railway company, argued that he was entitled to inspect, inter alia, communications prepared after the accident between officials of the defendant company and third parties. The defendant company claimed legal professional privilege in respect of the relevant documents on the ground that they were prepared in anticipation of litigation and at the request of their solicitor.

The claim for legal professional privilege was upheld. Scrutton LJ (p 69) approved the defendants' argument that

> ". . . it was not necessary to claim privilege on the ground that the document was prepared solely for the information and use of the legal advisers of the defendants, which is quite right on the authorities."

It appeared that, as in the *Birmingham* case (which was quoted with approval), as long as *one* reason for the preparation of the report was submission to a legal adviser for advice about litigation, then the privilege adhered.

The final case of this trio is *Ogden v London Electric Railway Co.*[35] A passenger was injured on the defendant's railway. After the accident, as was the company custom reports were compiled on a form headed "For the information of the company's solicitors only". The company used such reports to instruct its solicitors, if and when necessary, and also to help the company to avoid future accidents. In an action for discovery of the reports it was held that, following the *Birmingham* case, such reports were privileged.

It was deemed to be immaterial, first, that the in-

[31] (1913) 109 LT Rep 64.
[32] Per Buckley LJ at p 67.
[33] Per Hamilton LJ at p 68.
[34] [1929] All ER Rep 65.
[35] [1933] All ER Rep 896.

formation was not obtained solely, merely or primarily for solicitors, and, secondly, that the company intended to settle the matter if possible. Such a decision was foreseeable in view of Scrutton LJ's statement that

> "[T]his case comes exactly within the principles stated by Buckley LJ in *Birmingham and Midland Motor Omnibus Co v London and North Western Railway Co.*"

By the mid 1930s it was, therefore, accepted that the second head of legal professional privilege (ie head (b) above) embraced reports coming into existence for any number of reasons only one of which needed to be submission to a legal adviser — although it was often reiterated that that rule was not to prejudice any party's attempts to settle a claim without recourse to litigation, if settlement seemed a possibility.

The 1959 cases

For more than 20 years the vexed question of privilege in respect of reports submitted by third parties to clients or legal advisers rested — until 1959. That year marks the second distinct stage of development of the law in this field.

In 1959 two cases on this issue came up before single Judges in the Queen's Bench Division. The first, *Seabrook v British Transport Commission*[36] involved a claim for damages arising out of a fatal accident involving a British Transport Commission employee. The Commission claimed privilege for routine reports made by the Commission's officers and agents into the accident, and for correspondence between them. Havers J held that privilege attached to such routine documents: they had been prepared for the purpose of taking professional advice from the Commission's solicitors with a view to anticipated proceedings. The fact that the documents also served other purposes did not put them outside the scope of the privilege.

The decision in this case was clearly in line with the three Court of Appeal cases discussed above, by the authority of which Havers J felt himself much constrained. In *Longthorn v British Transport Commission*,[37] decided in the same year, on similar facts, Diplock J escaped from the thraldom of the precedents with which Havers J had contended, by holding (p 37) that

> "[T]he inquiry [into the accident] was not to any appreciable extent for the purpose of obtaining for or furnishing to the solicitor to the Commission evidence and information as to the evidence which will be obtained."

In his judgment, Diplock J intimated his disquiet with the prevailing accepted principles in this branch of the law of evidence. This disquiet has been echoed recently by eminent Judges in separate jurisdictions.[38]

The present position — (i) in Australia

We come then to the third stage of development in this field. In 1976 the High Court of Australia considered the case of *Grant v Downs*.[39] The question at issue was whether the staff of a psychiatric centre had been negligent in the care of a patient who had died from exposure after escaping from his room.

The nominal defendant claimed legal professional privilege (under head (b) above) for some reports which were prepared concerning the patient's injuries. These reports were required to be prepared in respect of all injuries suffered by patients in mental hospitals. One of the material purposes of their preparation was submission to the legal advisers of the Health Commission in case disciplinary action was taken against any staff member. Other purposes included the necessity to detect any faults in the security of the premises, and the investigation of other inadequacies in the general running operation of the centre.

On the basis of the foregoing English authorities (some of which were referred to in the judgments) a claim for legal professional privilege would seem secure: one purpose for which the reports had been prepared was their projected submissions to legal advisers. All members of the Court agreed, however, that the reports were not privileged. Where they failed to agree was on which test to apply in such cases.

Barwick CJ stated his view thus (p 579)

> "[A] document which was produced or brought into existence either with the dominant purpose of its author or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable

[36] [1959] 2 All ER 15.
[37] [1959] 2 All ER 32.
[38] Notably England and Australia (infra).
[39] (1976) 11 ALR 577.

> prospect, should be privileged and excluded from inspection."

He went on (pp 579-80) to reiterate that the presence of the requisite "dominant purpose" would not preclude privilege attaching even although the document had been produced with other uses in mind.

The Chief Justice's view was not shared by the majority of the Court (Stephen, Mason and Murphy JJ), who agreed (p 588) that "the sole purpose test should now be adopted as the criterion of legal professional privilege". Thus, for legal professional privilege of the head (b) type (above) to attach, the *sole* purpose for the existence of documents prepared by third parties for clients or legal advisers must be their projected use in litigation.

Jacobs J formulated yet another test in these words at p 591: "does the purpose of supplying the material to the legal adviser account for the existence of the material?"

On the authority of *Grant v Downs*, if a report of an insurance assessor, for example, were produced *for any reason other than* submission to legal advisers it would not attract privilege. Since most of such reports are compiled primarily to assess loss after an accident it would appear that, in Australia at least, any claims for privilege in this sphere will fail.

That conclusion was verified in 1978 when the High Court of Australia considered the case of *National Employers Mutual General Insurance Association Ltd v Waind*.[40] In that case the appellant insurance company claimed legal professional privilege for certain reports, including reports by loss assessors, relating to injuries sustained by the plaintiff in the course of his employment. The primary raison d'etre of these reports was to enable the insurance company to assess its liability to pay workers' compensation. Evidence was heard that the submission of such reports to legal advisers was of minor significance since in 90 percent of the cases which the appellant investigated no litigation ensued.

It was held, following *Grant v Downs*, that the reports were not privileged. The relative lack of importance of potential submission to legal advisers caused the reports to fail each of the three tests of legal professional privilege in *Grant v Downs*.[41] Which test was most favoured by the Court is difficult to ascertain,[42] but it would appear that the "sole purpose" test in Australia is gaining a firm foothold.

In England

In England the situation is otherwise. In *Waugh v British Railways Board*[43] the House of Lords had to consider a claim for legal professional privilege in respect of an accident report. The facts of the case were these: the plaintiff's husband, a British Railways Board employee, was killed in an accident whilst working on the railways. A report on the accident was prepared by two of the Board's officers two days after the accident. This was in accordance with the Board's usual practice. Despite the fact that the report was headed "For the information of the Board's solicitor", it appeared from the Board's affidavit that the report had been prepared for two equally important purposes, viz —

(i) to establish the cause of the accident so that appropriate safety measures could be taken, and

(ii) to enable the Board's solicitor to advise in the litigation which was almost certain to ensue.

The Board claimed legal professional privilege in respect of the report. The Court of Appeal on the basis of its three earlier decisions already discussed held that privilege attached. The House of Lords, however, held that the Board's claim to privilege failed because the "dominant purpose" for the preparation of the report was not its submission to a legal adviser for advice and use in litigation.

> "[H]ow close must the connection be between the preparation of the document and the anticipation of litigation? On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it; to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation. At the lowest such desirability of protection as might exist in such cases is not strong enough to outweigh the need for all relevant documents to be made available."[44]

In reaching their conclusion the House of Lords overruled the cases of *Birmingham and Midland*

[40] (1978) 24 ALR 86.

[41] Ie the tests of Barwick CJ; of the majority; and of Jacobs J (supra).

[42] See p 91 of the report.

[43] [1979] 2 All ER 1169.

[44] Page 1173 (per Lord Wilberforce).

Omnibus, Ankin and *Ogden* (supra) thereby laying to rest the principle that privilege would attach if *one* purpose accounting for such a report's existence was submission to a legal adviser.

By adopting in *Waugh* the "dominant purpose" test, the House of Lords followed Barwick CJ's view in *Grant v Downs*, (supra). The decision in *Waind's* case (supra, n 40) was handed down a mere 4 months before the decision in *Waugh*, which explains the lack of reference to the former in the latter.

By virtue of these cases, in Australia and in England, the problem of privilege in respect of reports has been resolved. In Australia the test is the stringent "sole purpose" test; in England it is the more flexible "dominant purpose" test. What is the situation in New Zealand?

In New Zealand

The Court of Appeal decision in *Konia v Morley*[45] is the leading New Zealand case in this area. The relevant facts are these: the appellant brought a civil action against a police officer based on an abuse of police power. The appellant sought discovery of certain documents relating to a police inquiry which had resulted in the officer in question being fired. The Crown contended (p 459) that the documents had come into existence

(i) in connection with the disciplinary inquiry, and
(ii) also for the use of the Crown's legal advisers in the future.

Discovery was sought, but was refused by both the Attorney-General and the High Court on the basis, inter alia, of legal professional privilege. On appeal to the Court of Appeal the appeal was allowed and discovery ordered in respect of the documents claimed to be protected by legal professional privilege.

> "[E]ven if the document's submission to a solicitor was not a dominant or substantial purpose for its existence; it must be . . . an appreciable purpose"[46]

for privilege to attach. It was held not to be such an "appreciable purpose" in this case. This conclusion was arrived at with the support of the two 1959 decisions of *Seabrook v British Transport Commission* and *Longthorn v British Transport Commission* discussed earlier in this paper. Since the three cases which constrained Havers J to reach his decision in *Seabrook* were expressly overruled by the House of Lords in *Waugh v British Railways Board*, the attitude of the New Zealand Court of Appeal to claims for legal professional privileges for assessors' reports must be a matter for speculation. Will that Court follow the Australian "sole purpose" test, the English "dominant purpose" test, or will it remain with the "appreciable purpose" test of *Konia v Morley?*

Although the answer to that question has yet to be given by the Court of Appeal, the High Court has recently pledged itself to the "appreciable purpose test". In *Anglo Caravans Sales Ltd v QEB Insurance Ltd*[47] Greig J adopted a similar view to that expressed by Barker J in *Chandris Lines Ltd v Wilson & Horton Ltd*[48] in following the *Konia v Morley* test of "appreciable purpose". In ordering, inter alia, disclosure of assessors' reports which had come into existence prior to the decision of the defendant insurers to dishonour a fire damage claim, His Honour said:

> "The assessors provided their reports to inform the defendant as to the cause of the fire and as to the quantum of the claim so that it, the defendant, could make its decision whether or not to accept or decline the claim. No doubt such reports might ultimately be submitted to legal advisers if a claim was issued, but that could never be an appreciable reason for their creation."

Conclusion

Legal professional privilege in respect of reports, such as insurance assessors' reports, has undergone a marked change since 1913. From the position when such a report was privileged as long as one of its purposes was submission to legal advisers for advice and use in litigation, to the present position when that purpose must be either "sole", "dominant" or "appreciable", the law has changed radically. The policy consideration that "Justice is better served by candour than by suppression"[49] has been, in part at least, responsible for this change.

[45] [1976] 1 NZLR 455.
[46] Per McCarthy P at p 459.
[47] (Unreported) High Court, Hamilton, 8 May 1981 (A143/80) Greig J, and [1981] NZ Recent Law 255.
[48] (Unreported) High Court, Auckland, May 1981 (A1449/77).
[49] *Waugh v BRB* (supra) at p 1182 (per Lord Edmund-Davies).

Whether the three different formulae for the test of legal professional privilege will continue to be applied in the three several jurisdictions remains a matter for conjecture.

"Without Prejudice" negotiations

Privilege under this heading, often invoked by insurance companies, may also be of some limited use to a loss assessor in the course of his work.

The general rule is that the contents of a statement made "without prejudice" in an attempt to compromise litigation cannot be put in evidence in a civil case without the consent of both parties to the litigation. Such statements are often made as part of an endeavour to settle a dispute, without allowing one party to construe the offer to settle as an admission of the unsoundness of the opponent's case. Insurance companies may often find themselves involved in such attempts at settlement with their insured. Assessors will usually be third parties in such situations, but it is to be noted that the "without prejudice" cloak has been extended to reports obtained by one of the parties from a third party.

In *Robin v Mendoza*[50] the plaintiff claimed damages from the defendant surveyors for a negligent survey of a house which the plaintiff bought. Before the action began the parties met to try to reach a settlement. The meeting was agreed to be "without prejudice" to either side. As a result of the meeting it was agreed that the defendants would procure another surveyor's report. This they did. In an action for discovery of the second report by the plaintiffs it was held that the report was privileged: it had been obtained as the result of "without prejudice" negotiations and the privilege was to be upheld despite the fact that, contrary to the usual rule, it involved a third party.

Any assessor's report, therefore, obtained as a result of a "without prejudice" meeting between, for example, his insurance company and an insured, ought to be privileged from use in civil litigation.

Privilege based on the "public interest"

If an assessor obtains information in confidence which he then includes in his report, can he claim privilege for the report on the basis of confidentiality?

To answer this question both common law and statute law must be looked to.

In three House of Lords decisions (*Rogers v Home Secretary*,[51] *Alfred Crompton Amusement Machines Ltd v Commissioner of Customs and Excise (No 2)*[52] and *D v NSPCC*[53] privilege has been successfully claimed on the basis of confidentiality. The successful argument in each case was that, unless privilege was granted, a source of information which enabled Crown bodies (or analogous institutions) to do their work, would "dry up".[54] Thus confidentiality alone was insufficient to ground a claim of privilege. Some overriding public interest had also to be served (eg sources of information which would otherwise "dry up"). Documents where the latter consideration has not been present have not been granted privilege.[55]

It is submitted that assessors' sources of information, although possibly given in confidence, will not enable their subsequent reports to be privileged under this head, for two reasons. First, assessors are not a Crown body (or anything analogous thereto) and, secondly, such sources of information are not likely to "dry up" in the way, for example, police informers might if faced with a constant threat of police prosecution.

As regards statute law, the Evidence Amendment Act (No 2) 1980 contains a provision of relevance. By s 35(1) of that Act the Court, in its discretion, can excuse a witness from giving evidence if to supply that evidence would involve a breach by the witness

> "of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach."

Subsection (2) requires the Court to exercise its discretion in favour of the "public interest", having balanced the case for disclosure against the case for retention of confidence, and having had regard to the

[50] [1954] 1 All ER 247.

[51] [1973] AC 388.

[52] [1974] AC 405.

[53] [1977] 1 All ER 589.

[54] *Rogers* (the Gaming Board's letter to Sussex Police) *Alfred Crompton* (customers of the appellants who had supplied information to the Customs and Excise Department) *D v NSPCC* (complaints from the public about the maltreatment of a child) and see *Greenfield v Ritchie* (unreported) High Court, Rotorua, 7 April 1981 Greig J M175/80 (privilege, on the grounds of confidentiality and to promote candour, granted to a social worker).

[55] See, for example, *Norwich Pharmacal Co Ltd v Customs & Excise Commissioners* [1973] 2 All ER 943.

following matters:

"(a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding:

(b) The nature of the confidence and of the special relationship between the confidant and the witness:

(c) The likely effect of the disclosure on the confidant or any other person."

Whether this section will cause privilege on the basis of confidentiality to develop along a different course from that of the common law remains to be seen.

CLAUSE 52 OF THE PUBLIC INFORMATION BILL 1981

INDICTING LIBEL OR SLANDER AGAINST THE STATE

*By PHILIP A JOSEPH**

1. Introduction

The Public Information Bill 1981 is preambled "An Act to make official information more freely available, to give individuals proper access to official information relating to them, to protect official information to the extent required by the public interest . . ., and to establish procedures for the achievement of those purposes, and to repeal the Official Secrets Act 1951". There is now in New Zealand overwhelming agreement on the need for this legislation. However, although the broad principles of the Bill promise to fulfil that need there is one disturbing clause which threatens to compromise the entire legislative package. This is cl 52 which creates the offence of "Wrongful communication of information", and is to be inserted in the Crimes Act 1961 in substitution for the present s 78.[1] Clause 52 reads:

> "52. New sections substituted — (1) The principal Act is hereby amended by repealing section 78, and substituting the following sections:
>
> "78. Wrongful communication of information — (1) Every one is liable to imprisonment for a term not exceeding 14 years who, being a person who owes allegiance to the Queen in right of New Zealand, within or outside New Zealand, for a purpose prejudicial to the security, defence, or international relations of New Zealand, —
>
> "(a) Communicates information or delivers any object to a country or organisation outside New Zealand or to a person acting on behalf of any such country or organisation; or
>
> "(b) With the intention of communicating information or delivering any object to a country or organisation outside New Zealand or to a person acting on behalf of any such country or organisation:
>
> "(i) Collects or records any information; or
>
> "(ii) Copies any document; or
>
> "(iii) Obtains any object; or
>
> "(iv) Makes any sketch, plan, model, or note; or
>
> "(v) Takes any photograph; or
>
> "(vi) Records any sound or image; or
>
> "(vii) Delivers any object to any person, —
>
> if the communication or delivery or intended communication or intended delivery under paragraph (a) or paragraph (b) of this subsection is likely to prejudice the security, defence, or international relations of New Zealand."

The Minister of Justice has announced that a special parliamentary Select Committee will study the Bill during the period between the dissolution of this Parliament and the meeting of the next,[2] and doubtless submissions on cl 52 will be made. With reference to the objectives of the Danks Committee which drafted the Bill, the writer lists what he considers are the principal objections to this clause.

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[1] Entitled "Communicating secrets". Cf, s 6 of the Official Secrets Act 1951 presently entitled "Wrongful communication of information".

[2] Christchurch Press, 21 October 1981.

2. The Ingredients of the Proposed Offence

(a) "Information"

The Danks Committee (established in May 1978 to review the whole question of freedom of information)[3] emphasised (p 94) that the proposed s 78(1) offence is "limited to national security information". It "relates only to communicating secrets and (in para (b)) to certain acts that are preparatory thereto": "In short, the provision is concerned with espionage".

With respect, the provision is not so limited. It embraces "Every one . . . who . . . (a) communicates information or delivers any object . . .; or (b) with the intention of communicating information or delivering any object . . . collects, obtains or records any information or delivers any object". As these words read, the information that may be the subject of an indictable communication need not be of a sensitive nature; indeed, there being included no words of limitation as to the species of information to which the offence relates, even information that is freely, publicly available in New Zealand could conceivably form the substance of an indictment. The essence of the proposed offence lies not in the information communicated but simply in the circumstances of the communication. Provided the communication can be said to be "for a purpose prejudicial to the security, defence, or international relations of New Zealand" (effectively, for a purpose prejudicial to the Government's stated policy in any of these areas),[4] and that it "is likely" to effect that purpose, the offence is complete. In addition to the examples below illustrating the unacceptable scope this gives to the offence, consider the Danks Committee's concession (para 5.49) as to the extent to which the criminal law may legitimately be used to protect information:

> "The two principal offences of espionage and wrongful communication (leakage) — which are proposed for inclusion in the Crimes Act to emphasise their serious character — are limited to information in that national security area. [Sic] But, of course, not all information in that area should be protected by the criminal law. Indeed much of it is already made public. It should be protected only if damage to important interests is likely to result."

Yet cl 52 does not honour this concession. Indeed, the entire thrust of the Bill is to grant a legal right of access to "official information",[5] which is defined in cl 2 as information held by a Minister, a government department or a central organisation listed in the First Schedules of (respectively) the Bill or the Ombudsmen Act 1975. Surely any information sufficiently sensitive to justify an allegation of espionage — as that term is properly understood — will be information in the hands of these persons, departments or organisations? For this reason it is perplexing why the Committee, in this one part of the Bill, should abandon the reference to "official information", particularly as all the lesser offences proposed (s 78(2) included) are confined in scope to the cl 2 definition.[6]

However, even confining the offence to the communication of "official information" would not solve the problem. Given that the proposed legislation seeks to redress the balance between the individual and the state, a citizen ought to be able to reap the benefit at least confident in the knowledge that he is not committing the offence of espionage. Yet, since the offence as drafted is concerned principally with the purpose and effect of communication, an individual properly obtaining information under the legislation would always be at risk of criminal prosecution depending on the uses to which the information was put. Nor would the risk envisaged necessarily be remote. As mentioned below, to act "for a purpose prejudicial to the security, defence, or international relations of New Zealand" need not require proof of *mala fides*: indeed, the Danks Committee cited House of Lords authority for the proposition that an individual may act for a purpose prejudicial to the interests of the State even though he may believe his action to be, in the broadest sense, beneficial to those interests.[7]

Finally, contrast the present s 78 of the Crimes Act 1961 (entitled "Communicating secrets"), confined in scope to communicating or making available "any military or scientific information, or any sketch, photograph, map, plan, model, design, pattern, specimen, article, note, or document of a military or scientific character". The Committee com-

[3] For its recommendations, see *Towards Open Government*, General Report (19 December 1980), Supplementary Report (20 July 1981). Unless otherwise indicated, references to the Danks Committee are references to the Supplementary Report.

[4] See *Chandler v DPP* [1964] AC 763 (HL), discussed infra.

[5] See particularly, cls 4 and 5.

[6] See generally cls 50 to 57, to be inserted severally in the Crimes Act 1961 and the Police Offences Act 1927.

[7] *Chandler v DPP*, supra, note 4.

mented (p 94) that the new espionage section is wider in scope than the present s 78 in one respect only, resulting from the proposal to replace the present requirement of "intent to prejudice" the State with the formula "for a purpose prejudicial to". However, the scope of the offence appears to have been more significantly widened by the proposed omission of the epithets "military or scientific".

(b) "for a purpose prejudicial to"

The writer nonetheless agrees with the Danks Committee that the replacement of the existing mens rea requirement will indeed expand the offence considerably. In *Chandler v DPP*, an appeal against conviction for conspiring to breach the Official Secrets Act 1911 (UK), the House of Lords gave an authoritative ruling on the meaning of the words "for a purpose prejudicial to". But first consider the defence resulting from the interpretation a Court would likely give to the present words "with intent to prejudice".

R v Steane [1947] KB 997 was an appeal against conviction for doing an act likely to assist the enemy with intent to assist the enemy (Steane having made several propaganda broadcasts for the Germans in consequence of alleged violence to himself and his family). Allowing the appeal, Lord Goddard CJ seemed to suggest that for offences of this nature (ie requiring proof of what Lord Simon in *DPP v Lynch* [1975] 2 WLR 641, 673 termed a "specific intent") the prosecution must establish that the sole or predominant purpose of the accused was to prejudice the State, as distinct from perceiving prejudice to the State as an unwanted consequence of an act performed for some other purpose.[8] However, although this interpretation of the specific intent would narrow the offence considerably, the House of Lords has since held that even "[A]n intention to perform an act with foreseen consequences can co-exist with a *wish* not to perform the act or that its consequences should not ensue", (*DPP v Lynch*, at 664 per Lord Simon). Thus on the present wording of s 78, provided the accused recognises the virtual certainty of prejudice to the State resulting, he cannot deny the requisite mens rea.

Yet, that a person may do so on other grounds under the existing legislation was confirmed recently by the New Zealand Court of Appeal. In *R v Simpson* [1978] 2 NZLR 221 S had been convicted under s 192(2) of the Crimes Act 1961 for assaulting a constable "with intent to obstruct the person so assaulted in the execution of his duty". In allowing the appeal their Honours made it clear that, in addition to the ordinary intent required to establish an assault, the prosecution must establish that the object of the assault was in fact to obstruct the constable whilst in the execution of his duty. This, the Court explained, required the prosecution to prove a positive state of mind on the part of the accused with reference to two matters:

> "[T]he intent of which the subsection speaks is an intention to obstruct the person assaulted from carrying out *his duty*, . . . And, in order to form a view as to what that duty was, the person charged must obviously reach a conclusion as to the status of the person assaulted. In short, the intent is necessarily founded on a positive assumption as to the status of the person assaulted and the duty on which he is engaged."[9]

A fortiori a mistaken belief as to either of those matters, whether a mistake involving law or fact the Court affirmed (at p 226), will be a defence.

Consider this reasoning, then, with regard to the present s 78. The accused must communicate or make available the information in question with the object of prejudicing "the safety, security, or defence of New Zealand", which would require at least a "positive assumption" on his part as to what are New Zealand's interests in matters of "safety, security, or defence": in short, only by reaching a conclusion as to these matters of State could he form the necessary intent to act prejudicially to New Zealand's interests. Thus if he believed, as did the appellants in *Chandler v DPP* (albeit to no avail on the mens rea wording in question), that his act was, in the broadest sense, not prejudicial to New Zealand's interests, or indeed was beneficial to them, he would be entitled to an acquittal. According to *Simpson* this would be so notwithstanding the Government's stated position in these matters: where, in other words, his motive was to protect New Zealand from the "folly" of the defence and foreign policies which the Government had adopted.

Now contrast the Bill's proposal. The Danks Committee explained (para 5.51(a)):

> "The phrase suggested for inclusion in the introductory words to the proposed section 78

[8] See also *R v Ahlers* [1915] 1 KB 616; *Thorne v Motor Trade Association* [1937] AC 797; *Sinnasamy v Selvanayagm* [1951] AC 83 (obiter per the PC).

[9] Ibid, at 225 per Richardson J for the CA.

> . . . is 'for a purpose prejudicial to the security, defence, or international relations of New Zealand'. The House of Lords has authoritatively interpreted essentially the same form of words in *Chandler v DPP* [1964] AC 763. . . . It distinguished between the defendants' direct or immediate purpose and their indirect or long-term purposes or motives. The legislation was concerned only with the former. It was not possible for the defendants to argue, and to introduce evidence to the effect, that their actions would not in the broadest sense prejudice the interests of the State and were indeed beneficial. It was for the Crown alone, through its Ministers, to determine (in the circumstances of that case) the defence policy of the State and in particular its adherence to the NATO alliance. Such matters were not matters of fact nor even matters of opinion . . . for the jury. The disposition of Britain's armed forces was a political question. . . . Such an issue was not for the Court or the jury. . . ."

This is an accurate summation of *Chandler* which, on the wording in question, excludes any defence on grounds that the accused sincerely believed that his act was not prejudicial to the State, or that he acted laudably in protest against government policy that he believed was not in the State's best interests. As the Danks Committee explained (para 5.51(b)), "the 'purpose' is not one that extends to broader questions of motive; it relates to the specific action being taken and to the direct purpose of the defendant". Thus the proposed mens rea requirement would be satisfied simply on showing the accused to have acted for *any* purpose which he believes or knows to be prejudicial to any policy or measure adopted by the Government in matters of security, defence or international relations. What is in truth advocated — without justification in the writer's opinion — is to reduce the mens rea for espionage to the intention to dissent in matters that, in a liberal democracy, will naturally engender dissent.

(c) Whether the communication "is likely to prejudice"

The proposed s 78(4) will render it a question of law "whether the communication or intended communication . . . was, at the time of the alleged offence, likely to have prejudiced the security, defence, or international relations of New Zealand". The Danks Committee was confident (para 5.51) that this proposal would provide the necessary balance between the interests of the State on the one hand ("the State must be able to protect what it sees as its vital interests in the face of a broad assertion of beneficial motive by the defendant") and the interests of the individual on the other ("basic principles of the criminal process require that in general the prosecution must prove its case"). The balance the Committee proposes (para 5.51(c)) is this:

> ". . . that the law is and should remain that the executive must in general determine the foreign, defence and security policy of the State. If it could also determine that the particular release did the requisite damage, then the executive could by its own assertions and nothing else provide the necessary evidence of the major components of the offence. (All that would remain would be the proof of purpose — in the narrow sense indicated — and of communication.) That is contrary to principle. It is for the Courts and not for the executive to find the facts on which defendants are convicted of criminal offences."

Obviously Courts should exercise this function. But this effects little more than a procedural — as distinct from a substantive — balance between the individual and the State. In effect it is concerned only with who should have the power to make the determination on which conviction is to be entered, rather than with the critical elements of the offence which themselves determine the likelihood of conviction. In view of the considerable broadening of these elements proposed by the Bill (namely, the deletion of the specific categories of information that may be the subject of an unlawful communication, and the relaxation of the mens rea requirement), the balance ultimately struck achieves exactly the opposite of what the Committee proposes: that "the scope of the criminal sanction be drastically narrowed".[10]

Not even with respect to s 6 of the Official Secrets Act 1951 which the new law is to repeal (cl 48), can it be assumed that the Committee achieves its object. In fact it is difficult to agree with the Committee's opening statement (para 5.51(c)) on this question of likelihood of prejudice, that "[t]he Official Secrets Act 1951 in effect allows the Government to make this determination: in general it is only if release is authorised by the Government that information can lawfully be communicated in terms of section 6". Of the several forms of offence under s 6, in respect of only two is it ever relevant

[10] Para 5.36. See also the General Report, paras 79 to 91.

to consider whether information is used "in any manner . . . prejudicial to the safety or interests of the State". And even then, it is sufficient if it be used "for any purpose", rather than "in any manner", prejudicial to the State's interests. On the other hand, in contrast to the proposed s 78 offence, s 6 is concerned only with secret official information, *inter alia* relating to or used in a prohibited place or otherwise obtained in confidence by or from a person holding government office.

Consider further the effect of the proposed subs (4) with reference to the present s 78. As proof of the likelihood of prejudice to the State has always been a prerequisite of conviction under this section, all that subs (4) will achieve is to give this question — of the likely impact of release in a particular case — to the Judge in preference to the jury. Erroneously, it is submitted, the Danks Committee assumed that in the absence of subs (4) this question would effectively fall within the province of executive discretion and so be for the Government to determine: hence the Committee's repeated concern "that the executive should not itself have the power, in effect, to convict a defendant of a very serious offence punishable by up to fourteen years imprisonment". Contrary to what the Committee inferred, *Chandler* did not establish that the Crown, as well as being the sole judge of the relevant interests of the State, was entitled also to determine whether a particular release was in fact likely to do the requisite damage to those interests. Although this latter element was not an ingredient of the particular offence charged in *Chandler*, the Committee's inclination to draw this inference is perhaps understandable in view of the admitted facts in this case. For once it was accepted that the disposition of the armed forces fell within the Crown's exclusive prerogative to maintain the defence and security of the realm, there was no room for argument that the appellants' avowed purpose — to immobilise the Air Force nuclear installation — was not a purpose prejudicial to the safety and security of the State. But this is not to confuse the principle, to quote Lord Devlin:

> "What . . . is the question which the jury has to decide? . . . They were inquiring whether a fact, constituted by statute as an ingredient of a criminal offence, has been proved. The fact to be proved is the existence of a purpose prejudicial to the state . . . . Consequently, the Crown's opinion as to what is or is not prejudicial in this case is just as inadmissible as the appellants'. The Crown's evidence about what its interests are is an entirely different matter. They can be proved by an officer of the Crown whenever it may be necessary to do so."[11]

Consequently for s 78 to designate the likely effect of the communication to be a question of law will simply transfer the matter from the jury (as is presently the case) to the Judge. How this will redefine the balance between the interests of which the Danks Committee spoke is difficult to see, for the determination will still remain an essentially factual one given the Government's statement as to what the State's interests are. Why should a Judge's approach to this question be any different from that of a jury? Even supposing juries to be less circumspect than Judges, how exacting indeed is this burden on the prosecution to prove potential prejudice to the State? In introducing the proposed offences the Committee explained "the appropriate role" of the criminal law, and observed "only if disclosure would *seriously* prejudice [the State's] interests" would its sanction be warranted.[12] Yet, as drafted, all the proposed espionage offence requires is the likelihood of prejudice *simpliciter;* this, in the face of informed criticism of the Government's policy touching our security, defence or international relations, may mean that the prosecution need do no more than simply point to that criticism in order to establish prima facie proof of potential prejudice. Certainly, if that possibility is envisaged by the Prime Minister's criticism recently of one economist (discussed below) whose comments "would have an adverse effect on our international credit" and, to quote another Minister, "would not be helpful for New Zealand", the burden which the re-enactment of this requirement will impose on the prosecution will be less than exacting.

(d) International relations and the criminal sanction

Whereas prejudice to New Zealand's international relations resulting from disclosure may be a justifiable ground for withholding information (see cl 6) its deletion as an independent ground for applying the criminal sanction is strongly urged.

Given that its inclusion in cl 52 creates a novel potential to indict for all manner of communications abroad, it is surprising that only once throughout its General and Supplementary Reports did the Committee proffer any explanation for extending the of-

[11] [1962] 3 All ER 142, at 158-59.

[12] Para 5.46 (emphasis added).

fence thus — and that was only by way of an aside to New Zealand's economic interests, which the Committee rightly believed did not justify protection under s 78.[13] It is surprising for this reason also: espionage might be seen as the modern form of treason, the Committee explained, and should be restricted to protecting the most important interests of the State, "those going to its very existence" it was said.[14] But international relations per se are not matters affecting the "very existence" of the State: indeed it is only upon having secured its existence that the State can claim international standing so as to conduct relations abroad.

While the Official Secrets Act 1951 may be draconian for establishing legal presumptions heavily favouring the prosecution,[15] it is, like security-type legislation elsewhere, concerned solely with protecting national security interests; not interests so broad and diverse as to embrace matters affecting New Zealand's image abroad, for instance, or its continuing membership of some "good-will" international organisation. Recall the statements communicated abroad by HART spokesmen leading up to and during the Springbok tour. Whilst some considered these to have prejudiced New Zealand's standing in the Commonwealth, only those prone to delusion would contend that this in any way threatened the State's existence.

Among the conclusive reasons specified in cl 6 for withholding information are "(d) The substantial economic interests of New Zealand". Why, in contrast to New Zealand's international relations, did the Danks Committee not also include this as a ground for applying the criminal sanction under the new s 78? On the one hand these are vital interests, the Committee believed, and should not be separated from the other matters of vital concern listed in cl 6;[16] yet the Committee declined to include the para (d) interests as meriting the s 78 protection. (In fact, according to the Committee's own criterion above, economic interests can quite properly be separated from the State's more urgent interests in defence and security).

First, the Committee pointed (para 5.57) to the difficulty of definition: ". . . the very expression — 'substantial economic interests' — is a vague one, not appropriate, some would say, as part of the definition of a criminal offence". But is not the expression "international relations" as vague as, if not more vague than, the expression "substantial economic interests"? Is the former intended to include every facet of New Zealand's international relations, as critically unimportant to New Zealand as many of its international affairs may be, or is it intended to include only certain facets? If the latter, what facets?

Secondly, the Committee observed that "really serious cases" involving damage to our economic interests might already fall within the provisions of the proposed offence, thus obviating the need to specifically include "substantial economic interests". The reference intended was probably to New Zealand's international relations (international trade alliances falling within those relations), but the point can similarly be made that the most critical matters of foreign policy undoubtedly concern security and defence, which likewise obviates the need to specifically include New Zealand's international relations as an independent interest warranting protection.

3. The Proposed Catch-all

The following examples illustrate the unacceptable scope of an offence that, (1) is intended to deal with espionage and, (2) carries a maximum penalty of 14 years imprisonment upon conviction.

(a) HART

It is not surprising that this organisation should object to the new s 78 offence — whatever its spokesmen might be accused of it is certainly not espionage. Yet the expanded s 78 reads as though it were drafted as a blueprint to cover HART's activities since the signing of the Gleneagles agreement in June 1977. For example, in July 1978 spokesman Mr Trevor Richards confirms that HART regularly sends to African organisations details of New Zealand sporting contacts with South Africa.[17] In the same week Nigeria announces its withdrawal from the Edmonton Commonwealth Games in protest over New Zealand's continuing sporting contacts. For the application of the proposed s 78 to these events, consider the Prime Minister's comments:

> ". . . Richards was employed by the United Nations Anti-Apartheid Committee and the chairman of it, Harriman, is a Nigerian, and it now has become clear in messages that we have had that the information has passed from

[13] General Report, para 37.

[14] Para 5.50(1).

[15] See ss 4(2)(a), and 7, and also s 4(1) for establishing an evidential presumption favouring the Crown.

[16] Para 5.57. See also the General Report, paras 35 to 37.

[17] Christchurch Press, 27 July 1978.

him to the Nigerian Government.
I've got adequate proof . . . Richards of course admitted yesterday that he's sent material to the Supreme Council for Sport in Africa and also to Harriman."[18]
"Mr Richards was spreading propaganda which was 'masquerading as truth'.
What more evidence do you want that Richards is creating a false impression of this country? He is a dissident. He doesn't agree with me, he doesn't agree with the Government . . . ."[19]

Of the Government members preferring the term "traitor", one lamented indeed: "It was a pity there was not a law to control people like the HART chairman, who were damaging not only New Zealand but also the Commonwealth".[20]

(b) The 1981 ILO conference

The President of the Federation of Labour, Mr Knox, addressed the 1981 Conference at its plenary session on 8 June. A number of Government members objected to the speech. The Prime Minister: "Mr Knox broke an unwritten law that New Zealanders abroad do not disparage their own country. He has slandered his own country and harmed the international image of New Zealand".[21] The member for New Plymouth tabled a motion in Parliament condemning Mr Knox's contention that "the hard-won democractic rights of the working people of our country are being deliberately smashed", and accused him of "falsely and maliciously" setting out to damage New Zealand's diplomatic and trading relations.[22] Other notices of motion tabled contained such accusations as "disloyal", "inflammatory", "unpatriotic", "traitorous" and "treasonable".[23] While these are emotional responses to which politicians are prone, yet they raise the question whether Mr Knox, having communicated information to an organisation outside New Zealand, acted for a purpose prejudicial to New Zealand's international relations and in such a way as to be likely to prejudice our international relations.

(c) The political journalist

The journalist sending copy abroad has obvious reason for concern — albeit it suffices to simply mention the application of the proposed offence to the political journalist in view of the following example.

(d) The economist, lawyer or political scientist

If cl 52 is enacted in its present form, its scope will be such that not even the specialist commenting within the confines of his own discipline will be immune. Consider this example which arose recently. On 25 August the Prime Minister wrote to the Chairman of the Bank of New Zealand objecting to the prediction by the Bank's economist, Mr L C Bayliss, of a 20 percent inflation rate by September 1982, a forecast which Mr Bayliss made on the basis of present movements in the economy. To quote the Prime Minister, "Mr Bayliss's comments were not only misleading and not factually based but would also have an adverse effect on our international credit".[24]

It is not clear to whom Mr Bayliss conveyed his forecast (*quaere* whether communicated to any journalist commissioned by an international news agency) but in the House Mr Bolger speaking on behalf of the Prime Minister narrowed the issue to the question whether the matter was "being debated in a manner which was not harmful to New Zealand". At least according to this Minister there was little doubt: "The Bank of New Zealand is a substantial financial institution and any one speaking with that attached to their name speaks with some authority or could be presumed overseas to be speaking with some authority." To which the Minister added, "that would not be helpful for New Zealand".[25] If this suggests the requisite prejudice to (in this instance) New Zealand's international credit rating, then the only question remaining would be whether Mr Bayliss's purpose was to achieve that result. Instinctively, one knows that this was not Mr Bayliss's object. But if in publicising his forecast Mr Bayliss anticipated New Zealand's credit rating being adversely affected, could not this result be identified as his immediate purpose — as that term was explained in *Chandler* — as distinct from some ultimate purpose common to professional economists?

[18] Christchurch Press, 28 July 1978.
[19] Christchurch Press and the Christchurch Star, 4 August 1978.
[20] Christchurch Star, 3 August 1978.
[21] (1981) 6 NZJIR 117, reported by H O Roth.
[22] NZPD (1981) No 7, at 827-30 (24 June 1981).
[23] Supra, note 22.
[24] Christchurch Press, 20 October 1981.
[25] Ibid.

4. Conclusion

Why does an otherwise carefully drafted Bill, which is commendable for the substantial benefit it promises to confer, contain a provision so unacceptable as cl 52? No doubt, those supporting the enactment of the clause will point to the condition carried over from the Official Secrets Act 1951 stipulating that no prosecution may commence without the consent of the Attorney-General.[26] The Danks Committee concluded that this would be an important safeguard, given the competing interests and the impossibility of drawing precise lines in the definitions; advocating that "the balancing of interest is better placed in the first instance in the hands of the prosecutor and the Attorney-General".[27] With respect, this is to delegate the task required of the criminal law reformer, which is the very reason *why* the need for consent becomes "an important safeguard". Indeed, given the Committee's admission of the lack of drafting precision, to what extent is this a safeguard? The public interest, not party political considerations, is what the Attorney-General must weigh in performing such functions. But to state this in the present context pinpoints the problem, for the proposed offence is in essential respects a political offence, concerned pre-eminently with the purpose with the purpose of acting prejudicially to Government policy.

If the next Parliament is intent on enacting an offence of wrongful communication of information carrying anything like the maximum penalty presently proposed, then at the very least it is urged that New Zealand's international relations be deleted from the listed State interests; that the present mens rea requirement "with intent to prejudice" be retained; and that the information to which the offence refers be confined to national security information.

[26] Subs (3) of the proposed s 78.
[27] Paras 5.56 and 5.59.

CORRESPONDENCE

Dear Sir,

Bad Language and the Law (pp 424-427 ante)

Those of your readers who read neither *Private Eye* nor *The Canberra Times* may be interested to know that according to the former (issue 520, 20.11.81) the latter published the following item in its issue of 31.5.81:

> Denying Mrs Erika Bayliss and Mrs Kati Ugrica, both of Hindmarsh, Southern Australia, permission to re-name their "Europa" restaurant the "Get Stuffed" restuarant, Judge R Grubb said: "Because there are restaurants bearing the name 'Get Stuffed' in Dublin and in Edinburgh establishes no precedent. I have had a long concern, indeed a love, for the English language. But I will not have the honest bawdiness of Chaucer and Shakespeare turned into the slyly salacious.
>
> "When these ladies say they are referring only to the legitimate and innocent culinary concept of stuffing food, I say 'Rot!' If that was the case, they would call their restuarant the 'Come in and Stuff Yourself'. The fact that their families, their friends and their customers have found the new name 'hilarious', 'brilliant' 'and terrific' cuts no ice with me. However, provided others agree, I will allow them to re-name their establishment 'The Get Fucked Restaurant'."
>
> Judge Grubb has the reputation of being South Australia's wittiest dispenser of justice.
>
> Mrs Bayliss said: "We are disappointed. We have decided to re-name our restuarant 'Fatty's'."

Yours faithfully
A F GRANT
Auckland

ECONOMIC STABILITY AND CARLESS DAYS

By J F CALDWELL*

The author discusses the outcome of the latest Court action to question the scope of the notorious regulation-making provisions in the Economic Stabilisation Act 1948.

With so much of daily life controlled by government regulations it is perhaps surprising there have been so few challenges launched in the Courts against their validity. Thus the latest Court of Appeal judgment of *Brader v Ministry of Transport* [1981] 1 NZLR 73 is a welcome reminder of the possibilities (and limits) of judicial review of delegated legislation.

In this case the applicant had been convicted under the carless days regulations ie the Economic Stabilisation (Conservation of Petroleum) Regulations (No 3) 1979. These Regulations had been made under s 11, the empowering section, of the Economic Stabilisation Act 1948 which authorises the Governor-General to make such regulations "as appear to him to be necessary or expedient for the general purpose of this Act." The general purpose of the Act is broadly defined in s 3 to be the promotion of economic stability in New Zealand.

Ultra Vires

The Act has of course been used to authorise regulations covering a great diversity of economic activity, but the applicant argued that these regulations aimed at preserving petroleum supplies exceeded the powers conferred by the Act because the Act was confined in scope to money matters such as wages, rents and prices.

Predictably, the applicant's argument was unsuccessful. As in their earlier judgment in *NZ Shop Employees Industrial Association of Workers v Attorney-General* [1976] 2 NZLR 21, the Court of Appeal were impressed by the extraordinary breadth of both the empowering section and the Act as a whole, (the Act being little more than a declaration of a general purpose followed by an authorisation for the Governor-General to make regulations to implement the purpose). Confronted with such an Act the Court of Appeal reiterated Turner P's dictum in the *Shop Employees* case that it should be given a "liberal" interpretation. However, the Court was careful to stress that even this sort of Act does not offer a blank cheque to the government. Cooke J held at p 78 that "[i]t is not to be supposed that by the 1948 Act the New Zealand Parliament meant to abandon the entire field of the economy to the Executive" and he warned that "[a] tenuous connection or remote connection with economic stability would not be enough; it would invite an inference that the regulations had not really been made for the purpose authorised by Parliament." McMullin J also recognised at p 84 that there were limits on the regulation-making power confined under the Act. Thus if, for example, the Government purported to use this Act to make regulations deregistering a union engaged in an industrial dispute, the regulations could well be held invalid even assuming they had some spin-off bearing on economic stability. The discretion to make regulations is wide but emphatically not unfettered.

However, both Cooke J at p 78 and McMullin J at p 84 accepted Turner P's view in the *Shop Employees* case that ultimately the question of ultra vires was one of opinion and degree. This is yet another indication of the general change in administrative law away from an emphasis on legal principles and technicalities to one on judicial pragmatism, policy and discretion. For example in the area of jurisdictional error the whole question has been similarly described as ultimately a "value-judgment" by Barker J in *Bay of Islands Timber Company Ltd v Transport Licensing Appeal Authority* (unreported, Supreme Court, Auckland 4 April 1977 A1569/75). Administrative lawyers today are increasingly obliged to concern themselves with predictions of judicial policy.

In the most general terms such predictions are not impossible. It is for instance fairly certain that Courts will show restraint when reviewing regulations dealing with emergency conditions. Thus in the *Shop Employees* case Turner P, in upholding the validity of the challenged regulations, said at p 530 that when ". . . the dangers of galloping inflation are imminent and financial disaster is not impossible, drastic legislation regulation becomes essential." That approach was dramatically

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different to his vigorous attack on wide subjective empowering clauses in his seminal judgment in *Reade v Smith* [1959] NZLR 996 when he pointedly said at p 1000 that the cases dealing with wartime regulations should not be used as "a touchstone for validity of Regulations made under more normal conditions". Thus the question of validity of particular regulations cannot be divorced from their social and political context.

Extrinsic evidence

One of the more important features of *Brader's* case was the acceptance of affidavit evidence from the Ministry of Energy. The admitted affidavit attempted to explain the circumstances of the enactment of the regulations by relating the importance of petroleum in the economy, and it attempted to explain the effects of the regulations by stating the savings of petroleum since that enactment. The relevance of such extrinsic evidence had been accorded only sporadic judicial attention in the past. The position emerging from such cases as *Carroll v Attorney-General* [1933] NZLR 1461, *Kerridge v Girling-Butcher* [1933] NZLR 646 and *Jensen v Wellington Woollen Manufacturing Co Ltd* [1942] NZLR 394 seemed to be that extrinsic evidence was inadmissible if it was led to establish the purpose or object of a regulation, but that it was admissible if it was led to show the circumstances and effects of a regulation. Referring to *Carroll's* case McMullin J drew on this distinction and held at p 83 that extrinsic evidence was admissible where ". . . regulations are so technical in content as to require some elucidation as to their practical working." McMullin J and Cooke J held these carless day regulations fell into such a class.

There are however problems with admitting extrinsic evidence even of this type. Necessarily the Courts must become more involved in factual analysis, which offends the purist's notion of judicial review being confined to legality. It also means that the Courts inevitably admit extrinsic evidence of the objects and purpose of the regulations through the backdoor. It is a natural assumption that the regulation achieved what it was intended to achieve and it is a little artificial to maintain that circumstances, effects and objects can be neatly separated.

Repugnancy

Finally brief mention should be made of the applicant's argument in *Brader's* case that the regulations were repugnant to both the common law and statute. The argument of repugnancy of economic stabilisation regulations to other statutes had been successfully upheld in *Auckland City Corporation v Taylor* [1977] 2 NZLR 413 but not in the *Shop Employees* case; here the Court of Appeal had little difficulty in finding no repugnancy to statute. The argument of repugnancy to the common law was also summarily rejected on the ground that there was no natural common law right or liberty to use a car. And it must be true that the argument of repugnancy to the common law will always be a most optimistic one for, as noted in *Powell v May* [1946] KB 330, most regulations and bylaws prohibit what would otherwise be lawful at common law.

CONFIDENTIALITY ORDERS UNDER THE COMMERCE ACT 1978 — 2

BY LL STEVENS LLB (Hons) (Auck) BCL (OXON)

This is the concluding part of the article the first part of which appeared in last month's issue

4. When do Confidentiality Questions Arise?

Generally, issues regarding the protection of confidential information are likely to arise at three separate stages of investigations, inquiries or proceedings under the Commerce Act. These are:

(i) during an investigation by either the Examiner of Commercial Practices (in respect of trade practices under Part II or monopolies, mergers or takeovers under Part III) or the Secretary of Trade and Industry (in respect of price control matters under Part IV); and

(ii) at the interlocutory stages of any inquiry before the Commission; and

(iii) during hearings by the Commission of inquiries or appeals pursuant to the various inquiry and appeal provisions of the Act.[26]

Each of these situations will be examined in turn.

(a) Investigations

The Examiner and the Secretary are given wide powers of investigation under the Act. These powers are secured by s 38(2) for trade practice matters, s 81J(1) for monopoly, merger and takeover matters, and s 86 in respect of price control investigations. Two of these provisions, ss 38(2) and 81J(1), define the Examiner's powers by authorising him to exercise all powers conferred upon the Commission in s 12 of the Act. Section 12(1) in turn empowers the Commission to:

(a) Inspect, examine, and audit any books or documents; or

(b) Require any person to produce any books or documents in his possession or under his control, and to allow copies of or extracts from any such books or documents to be made; or

(c) Require any person to furnish, in a form to be approved by or acceptable to the Commission, any information or particulars that may be required by the Commission, and any copies of or extracts from any such books or documents as aforesaid.

Although the Examiner and the Secretary are bound by s 19(1) of the Act to maintain the secrecy of all matters coming within their knowledge when carrying out their functions and duties under the Act, and are required not to communicate such matters to any person, such a limitation does not apply to matters coming to their knowledge "for the purpose of carrying the Act into effect." (s 19(1)(a)).

Thus, the Examiner or the Secretary would be able to disclose confidential material obtained during the course of an investigation or preparation for an inquiry to, say, a complainant, potential witnesses or persons involved in the industry under consideration, unless steps were taken to protect such material. The Act has no specific machinery for protecting confidential information at this stage. However, it seems that two alternative methods of achieving protection could be used. First, any person requested by the Examiner or the Secretary to supply confidential documents or material, or to answer questions which would result in the disclosure of confidential information, could, before supplying the material or answering the questions, obtain an undertaking from the Examiner or the Secretary that the confidential information will not be disclosed to any party or person, say, outside the office of the Examiner or the Secretary. It may also be necessary at the same time to seek an assurance that the confidential information will not, following the investigation, be included in any Report for distribution beyond the Commerce Commission.

As the Examiner is required to report to the Commission:

[26] Section 41 for trade practice inquiries; s 64 in respect of monopoly inquiries; s 76 for merger or takeover inquiries; s 82(7) for price control inquiries; and s 101 for appeals against decisions of the Secretary in relation to price control.

(a) pursuant to s 40 regarding trade practices; and
(b) pursuant to s 62 on monopolies; and
(c) pursuant to s 75 on mergers and takeovers;

and as the Secretary is as a matter of practice required to report to the Commission on price control matters, it would not be proper or reasonable for any such assurance to extend to prevent disclosure to the Commission itself. Once the confidential information reached the Commission its disclosure could be restricted by relying on the provisions referred to in the text under parts **4(b) and 4(c)**, post.

The alternative method, which could be used if any undertakings or assurances sought were not given, or if it were thought desirable on account of the extreme confidentiality of the information, would be for the person requested by the Examiner or the Secretary to produce information to withhold it until the Commission itself had made an order embodying proper safeguards.[27]

With respect to merger or takeover investigations, the Examiner has express power under s 81J(2) to divulge secret matters for the purpose of obtaining information, subject to complying with certain statutory conditions. This power exists for the purpose of properly carrying out any investigation under Part III of the Act, where:

"(a) It is necessary for the Examiner to obtain any information or seek the views of any person (not being a person who has, directly or indirectly, a pecuniary interest (apart from an interest in common with the public) in the subject-matter of the investigation); and
"(b) In order to obtain that information or seek those views, it is necessary for the Examiner to divulge any matter which is secret in relation to that person in terms of s 19 of this Act."

The conditions which apply to any matter divulged under s 81J(2) are referred to in s 81J(3) as follows:

"(a) The Examiner shall before divulging the matter record the name of the person in a register to be kept by him for the purpose; and
"(b) That person shall observe and perform the requirements prescribed under subsection (1) of section 19 of this Act and be subject to the provisions of subsection (2) of that section as if he were a person engaged or employed in connection with the work of the Examiner."

Notwithstanding these protective conditions it would still seem desirable for parties or persons supplying confidential information to the Examiner pursuant to the powers contained in s 81J to seek appropriate assurances to ensure the confidentiality of the information and specifically to invoke the provisions of s 81J(3).[28]

Normally the Examiner should be willing to give such assurances in a proper case. However, the fact that assurances are given by the Examiner may not result in the information remaining confidential if the matter later comes before the Commission, as the Commission has indicated that it still has a discretion to determine the confidentiality of material supplied under s 81J(2) of the Act.[29]

(b) Interlocutory applications

Most proceedings before the Commission under the Commerce Act commence with a preliminary hearing to determine applications for party status pursuant to s 14. Generally, the Commission will by this time be in receipt of a report from either the Examiner or the Secretary concerning the subject matter of the inquiry. Depending upon the nature and contents of such report, and depending also upon the course followed during the investigation concerning the protection of confidential information, there may well arise for determination certain issues regarding confidentiality.

The nature of the applications made at this stage will be governed by the type of proceedings, the scope of any investigation preceding any report,

[27] It may be that such orders could be obtained by the Examiner or the Secretary pursuant to the provisions of s 12(1) or s 15(3) of the Act.

[28] This course was followed by counsel for LD Nathan & Co Ltd in *Re Proposed Takeover by LD Nathan & Co Ltd of McKenzies (NZ) Ltd* (1981) 2 NZAR 321 at 338. (Decision No 42A, para 17).

[29] Ibid, at 338 (Decision No 42A, para 18). ("The Commission . . . considers it retains discretion (sic) as to confidentiality and publication, even over material originally supplied to the Examiner pursuant to s 81J"). As to confidentiality in the context of mergers and takeovers generally, see G T Ricketts and D A R Williams, "Mergers and Takeovers under the Commerce Act 1975", NZLS Triennial Conference paper, pp 8-9.

and the report itself, as well as other relevant factors. Such an application was made by counsel for LD Nathan & Co Ltd during the preliminary hearing in *Re LD Nathan & Co Ltd*. The application related to two aspects of the Examiner's report under s 75. The first was in respect of an appendix containing a confidential Nathan board report dealing with various aspects of the proposed takeover of McKenzies. This application was not opposed at this stage[30] and a confidentiality order was made by the Commission.

The second part of the application sought certain deletions from the Examiner's report of reference to the appendix which was already the subject of a confidentiality order. In addition, an order was sought restricting the manner in which the report might be used by the parties to whom it was issued. The Commission granted both applications. The report was to be confidential until submitted in evidence at the substantive hearing. In Decision No 42A, para 22, the Commission outlined its order that "the use of the Examiner's report, as amended and furnished to the parties, be strictly confined to the purposes of these proceedings and that the report, extracts, quotations or comment on its contents not be made public or otherwise released to the media." Copying the report or any part of it was also forbidden, except with the written consent of the Chairman of the Commission.

Counsel for LD Nathan & Co Ltd also sought to have access to the documentation used by the Examiner in the preparation of the surveys referred to in his report at paras 4.2, 5.4 and 5.7. Counsel for the Examiner acceded to this application and, with counsel for LD Nathan & Co Ltd, agreed to the form of an order making the documents available to all parties. The Commission resolved to adopt the form agreed on and ordered accordingly.[31]

Finally, with regard to interlocutory confidentiality applications, it should be noted that any order made may not remain in force at all later stages of the inquiry. The following comments of the Commission describe the approach applied:[32]

> "While the Commission acknowledges the rights of any party, and the duty of the Examiner, to have regard to the confidential nature of any material during the early development stages of a proposal, this status cannot be presumed to apply through all stages. In considering the arguments in support of such applications, and in determining whether or not to grant them, the Commission must be guided by the relevance of the material at the later stage of its substantive hearing and the public nature of its proceedings. It must also ensure the proper conduct of that hearing and the testing of evidential material during it. The Commission must equally seek to avoid harm to any party which might occur through the misuse or unnecessary disclosure of such material."

A similar theme was articulated in the judgment of Woodward J, in *Re Queensland Co-operative Milling Association Ltd*, supra, n. 12, p 17, 228:

> ". . . there may be matters on which it is necessary for the Tribunal to set out previously confidential material so that the Tribunal's reasons for decision may be clearly understood. In such cases the legitimate private interest in maintaining confidentiality would give way to the public interest in understanding why the Tribunal has reached a particular decision."

(c) Applications during the hearing

Such applications will usually relate to either oral or documentary evidence to be presented by witnesses at the hearing. In view of the usual practice adopted by the Commission of calling for the filing and subsequent exchange of evidence two weeks before the start of the substantive hearing, it is necessary for parties or their legal advisers to isolate the evidence for which confidentiality will be claimed *before* the filing of briefs of evidence. Evidence which will be the subject of such an application is nevertheless required to be filed with the Commission and clearly identified as potentially confidential so that it is not subject to the exchange procedure.

The Commission generally hears applications for confidentiality at the outset of the hearing. However, as the hearing proceeds, issues may arise which make it necessary for the parties to produce confidential material as part of their case. An application in respect of such material may be made during the course of the hearing.

A situation may arise during the hearing where confidential information has been accidentally released to other parties, counsel, or even the press.

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[30] At the substantive hearing one of the parties applied for the release to it of the appendix. For the reasons given in *Re LD Nathan & Co Ltd*, supra, at 337-339, paras 15 to 20 of Decision No 42A, this application was declined.

[31] Ibid, at 339 (Decision No 42A, para 23).

[32] Ibid, at 340 (Decision No 42A, para 26).

The fact of such release should not, it is submitted, preclude the making of a confidentiality order by the Commission. Such an order may at least have the effect of preventing publication of the information, or preventing further distribution than has already occurred up to the time of the making of the order. The enforcement of a confidentiality order in these circumstances (or any prosecution for an offence against say, ss 9(4) or 15(4)), would depend upon whether there existed any evidence of breach after the time when the confidentiality order was made.

Applications for confidentiality orders at the hearing are generally made pursuant to s 9(3) or s 15(3) of the Act. The Commission hears counsel or agents in support of such applications and also receives submissions from other interested parties before making an order. The type of order made will vary with the nature of the information the subject of the application. The Commission normally spells out the conditions attaching to the order with great particularity.

The following example of the type of conditions imposed is taken from a confidentiality order in the Lion Breweries Ltd/Dominion Breweries Ltd trade practice inquiry relating to the supply of pints and cans of beer to the Duke of Marlborough, Russell. (Decision No 52) The order was made subject to the following terms and conditions:

"1. That the use thereof shall be strictly confined to the purposes of the proceedings relating to the Report until and if made public during the proceedings before the Commission.

"2. That the named counsel shall maintain and aid the secrecy of the said documents, information and particulars and shall not communicate any matters therein contained, other than that which becomes public during the proceedings, to any person except as now provided, namely that the named counsel may consult with one another with respect to any matter arising from the information before the Commission or with any person nominated by counsel for the Examiner as the appropriate person with whom the matter might be discussed.

"3. That the documents, information and particulars so made available to the counsel as aforesaid and pursuant to this Order shall not be copied in any manner by those counsel except with the express consent in writing of the Chairman of the Commission.

"4. That the documents, information and particulars supplied pursuant to this Order and any copies authorised to be made pursuant to this Order shall be returned forthwith to the Commerce Commission upon demand.

"5. That the documents, information and particulars listed in the Schedule and supplied in pursuance of this Order, and any copies authorised to be made under condition 3 hereof shall, if not previously returned under condition 4 hereof, be returned to the Commerce Commission no later than the day after the last day of hearing of the proceedings relating to the Report.

"6. That leave is reserved to all parties to apply further."

In this way the potential for misunderstanding the order or possible breaches of the order arising from confusion can be significantly reduced.

5. Modes of Protecting Confidential Information

Reference has already been made to two methods of ensuring confidentiality, namely (a) by securing an undertaking of the Examiner or the Secretary not to disclose information,[33] and (b) by obtaining from the Commission a detailed order either at an early stage of the proceedings (eg at the party status hearing) or at the outset of the hearing itself.[34] In cases where an order has been made, it may however be necessary for counsel to test the accuracy or validity of such information by cross-examination during the course of the hearing. In such a case, the Commission may decide that it is proper to sit in private pursuant to an order

[33] See discussion, ante, Part 4(a).

[34] In the Fletcher Holdings Limited/Carter Holt Holdings Limited takeover inquiry a confidentiality order under ss 9(3)(b) and 15(3) of the Act was made *prior to* the public hearing in order to protect from publication the whole of the Examiner's report under s 75. The report included an appendix consisting of a highly confidential Fletcher board report on the strategy of the proposed takeover. See order of the Commission dated 13 October 1980.

made under s 9(3)(a).[35] An order for this type of hearing was made during the hearing (15-25 June 1981) of the Inquiry into the Advisability of Removing Alcoholic Liquor from the Positive List. It was the need to lead evidence of individual private company financial results (and test such evidence by cross-examination) which necessitated such an order. It is to be observed that most of the evidence in this case was presented during the public hearing.

An important question which may arise from an order to hear evidence in private is whether counsel appearing for a party to the proceedings may disclose confidential evidence to, say, the Managing Director or other senior officer of a client company, where counsel is of the opinion that such disclosure is necessary to enable him to obtain proper instructions. This issue arose in Australia in the case of *Ex parte Tooheys*.[36] The Federal Court of Australia on appeal from the Trade Practices Tribunal considered the powers of the Tribunal contained in s 106(2) of the Trade Practices Act 1974. It was held that the relevant parts of this provision — not materially different from s 9(3) of the Commerce Act — permitted the Tribunal to make an order prohibiting disclosure of information even to the representatives of parties to the proceedings. Nimmo J stated, (at 17,560):

> "I am satisfied that the legislature intended the Tribunal to have powers, if and when it saw fit, to exclude any person including a party from hearing the evidence or part of the evidence to be given before it or from acquiring the knowledge of it from anyone who was permitted to hear it".

The Federal Court had earlier referred (at 17,556) to various cases where, because of the nature of the information involved, disclosure of the information was restricted to legal advisers only.[37]

Whether or not such an order should be made in any given case in the discretion of the Commission will depend upon a large number of relevant factors, including the matters referred to in s 2 above. An example of a case where an order was made enabling counsel to disclose confidential information to an expert instructed to assist in the preparation and presentation of the client's case occurred in *AC Hatrick Chemicals Pty Ltd*.[38] There Deane J, sitting in the Trade Practices Tribunal, held that, subject to appropriate undertakings, counsel requiring the assistance of an economist could disclose the contents of certain confidential documents to the economist.[39]

Apart from confidentiality issues arising during investigations by the Examiner or the Secretary, or during the hearing of inquiries under the Act, such issues also arise in connection with practices where notification is required to be given to the Commerce Commission. Examples of practices in this category are individual resale price maintenance agreements or arrangements (ss 28 and 29) and collective pricing agreements (ss 27 and 29). It is not unusual for applications or notifications filed pursuant to these statutory provisions to contain confidential information.

The Commission is now required by s 130A of the Act to maintain a register or registers in which may be entered or filed any report, notice, application, evidence, submission, or other document or thing given or made to the Commission under the Act. Section 130A(2) provides that every such register shall be made available, in whole or in part, for inspection, copy, or publication by such persons, in such manner, and subject to such conditions as the Commission may order.

Confidentiality in respect of such registers is dealt with by s 130A(3) which provides that "this section is subject to any order for the time being in force and made under s 9 of this Act by the Commission."[40] Orders under s 9 may be made by the Commission of its own motion, or on the application of any party concerned. The forms for applications under ss 27 to 29 alert the parties to the need to identify any confidential information. If,

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[35] Similar powers exist in relation to appeals to the High Court. See, for example, s 45(1) (as to trade practice appeals) and s 81(c) (as to monopolies, mergers or takeovers).

[36] (1977) ATPR para 40-054, p 17,553.

[37] See *Warner-Lambert Co v Glaxo Laboratories Ltd* (1975) RPC 354; *Wellcome Foundation Ltd's Patent* (1975) RPC 107; *Scott v Scott* [1913] AC 417; and *R v Carlstrom* [1977] VR 366.

[38] (1977) ATPR para 40-044.

[39] A summary of the principles applicable in such a case is given by Deane J p 17,510.

[40] Section 130A was inserted by s 39 of the Commerce Amendment Act (No 2) 1979 to clarify the obligations of the Commission with regard to the keeping of registers. It is understood that prior to this amendment a similar system operated with public and non-public parts of the Register being maintained. However, the Commission relied on s 8 (under which the Commission may operate its own procedure) as the authority to operate a system.

however, the parties do not identify what is clearly confidential information, the Commission may nevertheless act to protect the information of its own motion.

It must be stressed that the types of orders which might be made by the Commission on confidentiality applications generally will be as infinite and variable as the type of material the subject of the applications. In the final analysis, the type of order made should be one which best protects the legitimate interests of the litigants in the light of the competing policy factors referred to earlier in s 2.

6. Conclusion

The question of confidentiality of valuable competitive information in proceedings under the Commerce Act is an extremely important one for litigants and persons involved in Commerce Act proceedings, as well as their legal advisers. The decisions which might be made by the Commission when hearing confidentiality applications will often involve a consideration of widely conflicting interests and require a delicate balancing of a broad range of relevant factors.

In many cases litigants or other persons concerned in proceedings under the Commerce Act will be anxious to ensure that commercially valuable and sensitive information is protected as far as is legally possible. This need places a heavy onus on legal advisers and counsel in such proceedings to ensure that no competitive advantage which is capable of protection is lost. At the same time, the Commerce Commission must endeavour to ensure that the commercial issues arising under the Act (generally involving a high consumer and public interest) are litigated in the open and yet without detracting from the legitimate expectation of commercial litigants and other persons involved in the proceedings that information which could cause harm to their commercial and trading enterprises will be protected.

On the other hand, parties and others seeking to protect allegedly confidential information should be cautioned as to the practical and legal limitations of what is confidential information. It is possible that the potential damage or harm which some businessmen consider will flow from disclosure of certain types of information is imagined rather than real. As Mr Justice Cardozo once remarked,[41] "[businessmen] as a rule are not wholly in the dark as to the ways of their competitors."

However, it seems apparent from the New Zealand cases considered in this article that the Commerce Commission clearly recognises a commercial litigant's interest in preventing disclosure of genuinely confidential information and will seek to act at all times to preserve such interest. It is submitted that in appropriate cases before the Commerce Commission, counsel and agents might usefully draw assistance from some of the recent decisions under the Australian Trade Practices Act (outlined herein) which have done much to preserve the sanctity of confidential information. Those decisions, together with the principles emerging under the confidentiality provisions of the Commerce Act, will ensure that the confidence of the litigants themselves is earned and retained. This should in turn ensure that the Commerce Commission is better able to fulfil its tasks under the Commerce Act and so contribute properly to the administration of justice in a difficult and complex area of the law.

[41] See *Norwegian Nitrogen Products Co v United States*, 288 US 294, at 323 (1933).

REFUGEES AND THE LAW

By A J F SIMMANCE

The following paper is the text of an address delivered on 12 August 1981 to the closing plenary session of the 7th Lawasia Conference in Bangkok. The author is the permanent regional representative for South Asia on the United Nations High Commission for Refugees.

A copy of the paper was submitted to us by Mr D L Tompkins QC, a New Zealand delegate to the Conference, who thought the address "a moving, vivid and eloquent statement of the plight of refugees". We agree, and hope readers will find it of interest.

Introduction

This is the very first opportunity which I have ever had to address many hundreds of the most eminent lawyers of an entire continent and it is almost as certainly the last. For, although I am a lawyer, I am not a very good one and, over the last four days, you have heard much wisdom from legal luminaries of a more elevated kind. My law is of a baser sort; I learned it, such as it is, in the rough and tumble of the criminal Courts, and my first Master in chambers never tired of telling me that the Law of Evidence was all the jurisprudence a criminal lawyer had need to know and that all else was a difficult, not to say dangerous, distraction. He lived by this precept. I shall try to do the same. I shall try to tell you what it is that, in the few years that I have worked among refugees, I have learned from the evidence of my ears and eyes. I shall talk, if I may, about refugee protection in practice, and try — but only imperfectly — to relate the practice to the theory. I say imperfectly because, in countries which have not acceded to the international instruments of refugee law, the connection between practice and theory can only be a tenuous one. The theory should underpin the practice, but in most of Asia I fear that the practice is almost severed from it, rather like a nearly amputated limb left dangling in mid-air. So the limb has to find a life of its own and that, as any doctor will tell you, is not exactly easy to achieve.

Protecting Refugees

At the practical, everyday, level, refugee protection means the protection of refugees from the authorities, from the public at large, from each other, and sometimes even from kindly but misguided souls who wish them well. By protection from the authorities, I mean, of course, protection in countries of asylum rather than in countries of origin, because in countries of origin the individuals we are concerned with are not yet refugees and it is one of the weaknesses of the international system that the cause of refugee situations (as Mr Bright of New Zealand has cogently reminded us) is something which we have little capacity to address.

(a) From the authorities

By the authorities of countries of asylum I do not always, or even usually, mean the central authorities, for these typically are just, sensible and humane. At least, that is the case in Asia, although there are other regions of which I might not say as much. The trouble is almost invariably at the local level, and that is why I would stress to you UNHCR's task of down-to-earth protection in the field. That task confronts us almost anywhere in the world and what I have to say about it applies not to Asia specifically, nor Africa, nor Europe, nor the Americas but to anywhere and everywhere where power corrupts and the strong are able to oppress the weak. In facing that task, it is the individual predicament which we confront. The public expression by a Minister of a sincere humanitarian conviction is small comfort to an individual refugee who is dodging bullets in the bush. It avails a refugee nothing if, while the central government is committed to the granting of asylum, the border guards are pushing him away. It means little that his right to property is safeguarded in the abstract when local officials are rifling his pockets for everything he has. Nothing matters very much when he is dead except a decent burial, and I have known a young UNHCR lawyer strive to secure him even that.

How, you may ask, does accession to an international convention by the central government attack the perpetuation of abuses at the local level? The answer, I think, is fairly simple. Local officials, even at the most junior levels, live by rules and regulations and are amenable to instructions and advice.

They are often members of a disciplined force and accustomed to do as they are told. Accession, particularly when it is followed by enactment (as it should be) of domestic refugee legislation, presents the perfect opportunity to tell them what to do. The essence of the Convention and the law can be conveyed in simple administrative instructions. Training courses can be held — and have been held in some countries, with the participation of UNHCR officers — to teach them the bounds of their authority towards refugees and the duties and obligations imposed upon them. Clarity replaces confusion and abuse. The very existence of the law can lead to order; law and order, the very words are linked together in our minds. Without refugee law, refugee protection is at best a haphazard and even a hazardous affair. I do not use the word hazardous lightly and, when a young refugee official trying to do his duty has a razor thrust against his throat at midnight (which I have known to happen), he does not use it lightly either. Indeed, he can probably think of a rather stronger term.

(b) From the public

The protection of refugees from the public at large, from the general run of humanity if you like, can range from resistance to petty exploitation to a struggle against criminality of the grossest kind. Refugees are easily deceived, cheated and defrauded, particularly when they have no access to, let alone remedy in, the local Courts. Often they pay through the nose for anything they buy, although, here in Thailand, I have been heartened to find that the shops set up by local traders in and around refugee camps almost always charge a fair and honest price.

But man is, after all, a predator and I am not so naive as to believe that the enactment of a law can, by itself, prevent the strong preying upon the weak. And the predatory act can be of quite horrifying dimensions. A few years ago, when I was in another country, we had a refugee child, a ten-year-old boy, who tried to intervene to prevent his mother being raped. A large hook was thrust into each side of his body. To each hook was attached a rope and he was hauled into the air, a form of crucifixion, and forced to watch his mother being raped again and repeatedly before his eyes. The young are resilient and the boy recovered in body (although permanently disfigured) and, I hope, in mind. The mother recovered in body but not in mind and lived "incapable," as Shakespeare puts it, "incapable of her own distress."

Now incidents like this, horrible as they may be, do not happen just to refugees. They do not happen with the connivance or support of governments (except for those of the Idi Amin variety), and governments in Southeast Asia, as I well know, are making determined efforts with international support for their prevention. UNHCR is fully associated with these efforts and supports them here as elsewhere in the world. I cannot demonstrate that a national refugee law or an international convention or both would necessarily make such efforts more successful. But I have an instinct, a gut-reaction (although that is an expression I dislike) that a ring of strong and resolute states in Asia and the Pacific, all signatories to the Convention and Protocol, all with national refugee laws and a growing, healthy body of refugee jurisprudence, would, by their existence and by public knowledge of the principles to which they openly subscribe, act as a powerful restraining force against the savagery which is in all mankind and without which no law save one governing the opening hours of the Garden of Eden would be required.

But even the Garden of Eden had its brighter side particularly before the advent of the fig-leaf! And, even though the subject of refugees is a sombre one, I ought to strike a lighter note. One of my colleagues not so long ago almost had to protect a group of prospective refugees from the innocent protestations of a charming air hostess, from whose country they were departing with the consent of the authorities, almost certainly never to return. In the language of airlines and to their visible apprehension, she repeated gently "Air Ruritania hopes you have enjoyed your flight and looks forward to the pleasure of having you aboard again." The spectre of airborne "refoulement" was, he tells me, visible in their eyes.

(c) From other refugees

About the protection of refugees from refugees I need say little but it is often a worry, even a preoccupation, in the field. No one pretends that refugees are perfect although the extent of prejudice against them can be a real shock. "Ah, UNHCR" I once heard a country of origin Ambassador remark, "You're the organisation that supports terrorists." "Indeed, and are you the country that creates them?" I should have replied but, to my shame, did not do so, restrained by the confines of humanitarian tact and, I confess, because I did not think of it in time.

But the fate of the refugee is bad for anyone, the rootlessness, the separation, the uncertainty, the

wandering — or, if not the wandering, its equally demoralising opposite, confinement in a camp. Camps are a perfect breeding-ground for vice, privilege and extortion. Whenever I am in a camp for long, I think with envy of those articles in the Convention which provide for freedom of movement, the right to employment and property, association, and the like. To be a refugee, even with such rights, is an indignity because it necessarily involves a loss of status; without them, it is a condition which, however humanely administered, borders dangerously on imprisonment and the less it is prolonged the better for all concerned. Let me just quote to you an extract from a report of something which happened thousands of miles from here on July the 4th (ironically the World's most famous day of independence), this year.

"Early in the morning, the combined security forces surrounded the camp, mounted a 90mm recoil-less rifle on a fence, pointed it into the compound and ordered the refugees to get into trucks. 'From a military point of view it makes sense,' Colonel X, spokesman for the armed forces, said of the decision to move the refugees to the prison, six miles away, 'so we can have control over these people day and night. I know both places, the camp and the prison, and they're better off in the prison'."

The refugees — who had just finished planting fields around the camp — did not, concludes the report "appear to agree" as they moved into their cells.

(d) From well-wishers

The last form of practical protection I have mentioned is that of protecting refugees from those who wish them well. Not only the road to hell but the road to refugee resettlement is sometimes paved with good intentions, usually the good intentions of those who erroneously believe that because a refugee has had to change his country of residence he ought to change everything else about himself as well. He ought to change his religion — which may be his greatest solace; if he is polygamous, he ought to change the number of his wives; he ought to change his diet, his table manners and his mode of dress. Now it is true, of course, that there are many and drastic adjustments to be made; but the culture, the faith, the ethnic cohesiveness and spiritual identity of a people should not not be lightly sacrified. Let us help the refugees in our charge to retain a pride in their origins and let us not delude them with promises of what may in some ways be a better but in others is almost certain to be a harsher, lonelier and more selfish life.

Conclusion

So where does it all end? It ends, in the words of the Statute of the High Commissioner, in permanent solutions by voluntary repatriation or assimilation within new national communities. From Thailand — and forgive me if, at last, I strike a local note — it has so far been mostly a matter of assimilation by resettlement in third countries to which well over three hundred thousand have already gone. Nearly twelve thousand went this July alone and many more are near their journey's end. Which reminds me of Shakespeare again "Here is my journey's end, here is the butt, the very sea — mark of my utmost sail." With your support and that of your Governments, we, the staff of the High Commissioner and all the agencies and individuals who help us, will continue to strive for a safe and happy journey's end for those whom we protect. We shall go on doing out best, but the journey would be less perilous and the destination surer if we had the international instruments of Convention and Protocol and not just bluff, persuasion, accident, sheer good luck and sometimes a little courage, to guide us on our way.

THE CONTRIBUTION OF ARAMOANA TO ADMINISTRATIVE LAW

*By PROFESSOR J F NORTHEY**

The future of Aramoana is now uncertain. Despite the efforts of the Environmental Defence Society Inc (EDS), the Royal Forest and Bird Protection Society of New Zealand Inc and the Coalition for Rational Economic and Environmental Development in New Zealand Inc (CREEDNZ), the Government's timetable was not interfered with. Only the withdrawal of one of the companies associated with the Aramoana smelter has cast doubt on its construction. This note will not be concerned with the economic, environmental, social and other issues raised by the project, but with the legal principles raised and clarified by the proceedings initiated by the societies which were the first to challenge the fast-track procedures.

A brief outline of the procedures included in the National Development Act 1979 must first be given. Section 3 calls for an application to the Minister of National Development for the making of an Order in Council applying the Act to the work. The work must be seen to be a major work likely to be in the public interest which is considered to be essential for one or more of the purposes enumerated in s 3(3)(a) and on which it is also essential that a decision be made promptly. Of necessity, the Order in Council is only a preliminary step because the final decision is made later under s 11 when the Planning Tribunal has made its inquiry, report and recommendation. Provision is made for those objecting to make an application for review to the Court of Appeal, whose decision is final. Though the effect of the privative provision (s 17) has not been challenged, it has been assumed to be effective to limit proceedings directed towards delaying the approval and commencement of the proposed major work.[1]

The proceedings in the Court of Appeal resulted in five judgments — four as the result of the proceedings brought by EDS[2] and the Royal Forest and Bird Protection Society and one on the application by CREEDNZ. They make significant contributions to the development of administrative law. The first judgment, of 15 June 1981, concerned the availability of discovery against the Crown; the second and third, given on 24 and 26 June 1981, deal with the claim to public interest immunity for documents leading up to the approval of the Order in Council on 27 April 1981; and the last two, each delivered on 15 July 1981, dispose of the challenge to the validity of the Order in Council. The last two raise a number of separate issues, the most important being the allegation of breach of natural justice or fairness, and bias or predetermination by the Executive Council, failure by the Council to consider the material relevant to the decision, and the locus standi of the applicants.

This note will consider in turn:

(a) discovery;
(b) privilege;
(c) natural justice and fairness;
(d) bias or predetermination;
(e) failure to take relevant considerations into account; and
(f) locus standi.

Discovery

The purpose of the Crown Proceedings Act 1950 was to facilitate actions against the Crown and to abolish some of the advantages enjoyed by the Crown in litigation. But the subject was not placed in a position of equality. For example, certain remedies may not be secured against the Crown. Its constitutional position made it inappropriate to direct the orders of certiorari, injunction, mandamus and prohibition against the Crown. But a declaration under the Declaratory Judgments Act 1908 could be made; such an order did not offend the constitutional proprieties. Moreover the pro-

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[1] The privative provision is a "time limit" clause, as to which see S A de Smith, *Judicial Review of Administrative Action* (4th ed, 1980), 357-376; H W R Wade, *Administrative Law* (4th ed, 1977), 560-590; J Alder, "time limit clauses and judicial review" (1975) 38 MLR, 274; N P Gravells, "Time limit clauses and judicial review — the relevance of context" (1978) 41 MLR 383, 399-403 and "Time limit clauses and judicial review — some second thoughts" (1980) 43 MLR 174.

[2] The recent judgment challenging the environmental impact report has not been included.

cedural advantages of the Crown in such proceedings were diminished. For example, discovery could be ordered where a declaration was sought in terms of s 27.

When the improved remedy, an application for review, was made available under the Judicature Amendment Acts of 1972 and 1977, the earlier position of the Crown was preserved by s 14 of the 1972 Act which amended the definition of "civil proceedings" in s 2(1) of the Crown Proceedings Act 1950.[3] It was decided that the general words of s 10(2)(i) of the Judicature Amendment Act 1972 (as substituted in 1977) as to discovery did not broaden the availability of discovery against the Crown; it remained available only when a declaration was sought. There was some doubt about the effect of s 4(2) of the Judicature Amendment Act 1972, which enabled a declaration to be made setting aside a decision when certiorari would previously have been the remedy to achieve that result. This doubt has been resolved by the Court of Appeal.

In the judgment delivered on 15 June 1981, discovery was ordered[4] of all documents relating to the Aramoana smelter project that were considered by the Executive Council or Cabinet on or about 27 April 1981 and those which recorded or transmitted any decision or advice then determined. The Crown had resisted discovery and interrogatories (which were described by the Court of Appeal as "fishing"). The Court confirmed that discovery and interragatories should not be ordered if the relief sought in the application for review was in the nature of certioari, mandamus or prohibition.

The applicants had claimed:

(1) a declaration that the Order in Council made under s 3(3) (SR 1981/107) was invalid;

(2) an order setting aside the purported decision of the Governor-General to apply the Act to the Aramoana smelter (thereby utilising s 4(2) of the Judicature Amendment Act 1972); and

(3) an order in the nature of certiorari to bring up and quash that decision.

The relief sought under (1) and (2) could have been granted, but it was doubted that certiorari lies to bring up and quash an Order in Council; see *Reynolds v Attorney-General* (1909) 29 NZLR 24, 38; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 2, 179, per Dixon J. Furthermore, certiorari, being a prerogative remedy, may not lie against the representative of the Sovereign. The Court of Appeal held that declarations were the primary relief sought; discovery was seen as a valuable adjunct to proceedings for a declaration; *Barnard v National Dock Labour Board* [1953] 2 QB 18, 43, per Denning LJ. Without discovery, the applicants would find it virtually impossible to challenge the validity of or basis for an Order in Council because all or nearly all of the relevant information was held by the Government. Moreover the National Development Act itself contemplated review, and public confidence would not be sustained if review were confined so narrowly as to seem to be rubber stamping.

The Court indicated that "the most satisfactory and just procedure at the hearing would be for the Minister of National Development to appear to give oral evidence and be available for relevant cross-examination." As will be seen, that view was not shared by the Government, which also resisted discovery, as will now be discussed.

Privilege

With discovery ordered, the stage was set for the claim to privilege made by the Deputy Prime Minister and addressed to the Secretary to Cabinet and Clerk of the Executive Council directing him to object to the production of the relevant documents and not to produce them unless the objection was not sustained by the Court. The lengthy direction claimed that discovery was contrary to the public interest, primarily because the documents related to the consideration of Government policy at the highest level where free and frank discussion would be inhibited if there were a possibility of their being made public later. The direction made no specific mention of the matters to which s 3(3) directed consideration.

The claim was rejected, Cooke J relying on the general principle recently explained by the Australian High Court in *Sankey v Whitlam* (1978) 142 CLR 1 and by the House of Lords in *Burmah Oil*

[3] "Civil proceedings" is defined as meaning "any proceedings in any Court oher than criminal proceedings; but does not include proceedings in relation to habeas corpus, mandamus, prohibition, or certiorari *or proceedings by way of an application for review under Part I of the Judicature Amendment Act 1972 to the extent that any relief sought in the application is in the nature of mandamus, prohibition, or certiorari.*" The words italicised were added in 1972.

[4] A similar decision was taken in *Ng v Minister of Immigration* (judgment 10 August 1981 (CA100/81)), overruling Holland J, who had chosen not to follow earlier decisions of the High Court.

Co Ltd v Bank of England [1980] AC 1090, that the Court has the power to inspect any document and to order production despite a ministerial objection. Both Richardson and McMullin JJ discussed the trend of recent decisions, including the two already mentioned, which had denied immunity from disclosure to Cabinet minutes merely because they related to government policies at the highest levels. To be balanced against that claim and the objects achieved by immunity is the public interest in the administration of justice.

While it is recognised that the instances when the claim to immunity will not be upheld will be few, the requirements in s 3 of the National Development Act, the provisions for review in s 17, and the doubts raised by the Deputy Prime Minister's direction as to whether Cabinet and the Executive Council had addressed themselves to the relevant considerations resulted in an order that the documents be produced for inspection by the Court. Only by production could the Court be satisfied that the decision of the Executive Council was made according to law.

The law on Crown privilege or public interest immunity has been gradually relaxed in favour of the citizen over the past forty years. From the wartime decision in *Duncan v Cammell Laird & Co* [1942] AC 624, where immunity was granted on the basis of the Minister's certificate, we have seen the Courts assert their control over the extent of the immunity. The New Zealand Court of Appeal contributed *Corbett v Social Security Commission* [1962] NZLR 878 with which the House of Lords caught up in *Conway v Rimmer* [1968] AC 910. Now the law in the United Kingdom, Australia and New Zealand is substantially the same. The subject's desire to have state documents disclosed is recognised and balanced against the public interest. Few, if any, documents will be accorded immunity solely on the basis of a ministerial certificate or direction. This reversal of attitudes can be explained by reference to a number of diverse principles or concepts. The notion of open government, now about to be given statutory recognition, is one. The Courts' involvement in the operation of the judicial system and the achievement of approximate equality where a citizen is challenging the state or a state agency is another. The bureaucracy should not assume that it will always be triumphant. The legislature and a perceptive judiciary have each played their parts.

The Court of Appeal ordered that the documents be produced on the following day. It was recognised that the timetable set by the Act demanded urgency and that "no discourtesy is meant by this immediacy". The documents were produced on 25 June 1981 and resulted in a short judgment delivered on 26 June 1981. The Court concluded somewhat anticlimactically that . . .

> "the interests of justice do not require any disclosure of the contents of the documents to the applicants. The applicants will suffer no injustice by non-disclosure."

That decision was made without prejudice to the right of the Crown to apply for leave to have the documents admitted in evidence at the hearing, which was set down for 30 June 1981. The Crown had failed in its two claims — one resisting discovery and the other to privilege, but the applicants had won only a Pyrrhic victory and had been denied the fruits of their success — access to the documents themselves. Their arguments and those of CREEDNZ as to the validity of the Order in Council would now proceed without the benefit of knowing what was contained in the documents supporting the decision of the Executive Council. But, as will be seen from the final two judgments, the task they had set themselves, of demonstrating that the action of the Government was unlawful and discharging the onus of proof when attempting to rebut the presumption of regularity attaching to official acts, was too heavy. This possibility had been recognised by Turner J in *Reade v Smith* [1959] NZLR 996, 1001, when discussing the challenge to the factual basis of an order in council.

Natural Justice and Fairness

Both EDS and CREEDNZ argued that they should have been given a hearing or the right to make submissions before the Executive Council advised the Governor-General to make an Order in Council under s 3(3). Whether the principles of natural justice or the separate requirements of administrative fairness apply is a matter of statutory interpretation. The Court is seeking to discover legislative intent, assisted, as Wootten J acknowledged in *Dunlop v Woollahra Municipal Council* [1975] 2 NSWLR 446, by the so-called *Durayappah* factors.[5] The legislation can settle the issue expressly, as it sometimes does by requiring that the tribunal's procedure be based on the principles of natural justice. Similarly those or similar requirements can be expressly or impliedly excluded. If so, *cadit quaestio*. But, in most cases, it will be a question of statutory

[5] See *Durayappah v Fernando* [1967] 2 AC 337.

interpretation as to the need for a hearing. The *Durayappah* factors assist at that point.

Briefly expressed, the Court's conclusion was that the claim to a hearing was incompatible with the scheme of the Act, which could not be interpreted so as to imply a hearing before the preliminary decision was taken in terms of s 3(3). It was noted that the Planning Tribunal accords a hearing at a later date; that was taken to be an expression of legislative intent in relation to the rights of objectors and others affected by the preliminary decision.

Without wishing to open up the issue as to the difference between natural justice and administrative fairness,[6] the distinction does appear to have been accepted by the Court of Appeal. But in any event, an obligation to accord a hearing by or the right to make submissions to the Executive Council could not be engrafted on to the Act. Many reasons were advanced:

- The unsuitability of the Executive Council as a body to conduct a hearing of or receive submissions from numerous objectors:
- The express provisions as to consultation with local bodies rendered it difficult to imply further rights or obligations:[7]
- The Act constituted a code:[8]
- The importing of a duty of administrative fairness is easier when the decision affects an individual personally, as in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 143, 144-145; here the legislation affected the entire country:
- The Act is unique and calls for the intervention of the Governor-General in Council at two stages of decision-making:
- Public policy considerations are dominant and those making the decisions are accountable to Parliament:
- The Act requires that copies of the application be sent to the Minister only (s 3(1)); the omission of the public is seen as deliberate.

It was accepted that judicial review was available in respect of decisions of the Governor-General and that the making of an order legislative in form and substance might be preceded by a procedure satisfying the requirements of natural justice. The Price Tribunal has been held to be a body which, after the parties have been heard, makes an order with legislative force. Compliance with the prior hearing requirements can be secured by judicial review.[9] The order of the Planning Tribunal approving a planning scheme after the completion of the hearing is another example of a tribunal with both legislative and judicial functions. For some reason, Richardson J saw it as unprofitable (and it certainly was unnecessary in the case before him) to label the functions of the Executive Council under s 3(3). It is submitted that the Executive Council, when approving an Order in Council, goes through two stages or processes. The first, which is administrative, is the consideration and resolution of the conflicting factors relevant to the decision to make an Order;[10] the second takes place when the Governor-General or the person presiding in Council signs the Order, which is clearly legislative in form and substance.

It is difficult to quarrel with the conclusion reached by the Court that a hearing by the Executive Council before taking the preliminary decision under s 3(3) was not intended by the legislature. Opportunity to object and to take part in a hearing by the Planning Tribunal is provided at a later date. The report and recommendation of the Planning Tribunal are placed before the Executive Council before the decision is taken under s 11 to declare the works to be of national importance.

Bias or Predetermination

It may be necessary to define these words carefully because, though they tend to be used indiscriminately, they may not mean the same thing. Ordinarily a person will be disqualified from taking

[6] See the author's address to members of the Auckland District Law Society published under the title *The basis for review in Administrative Law* (Legal Research Foundation, 1981).

[7] See also *Brettingham-Moore v St Leonards Municipality* (1969) 121 CLR 509, to the same effect. That case introduced the term "engrafted" in relation to the implication of natural justice requirements.

[8] See *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705, noted in [1973] Recent Law 51 and (1974) 6 NZULR 59. Presumably the addition of a hearing would have been seen as frustrating the purpose of the legislation.

[9] See *F E Jackson & Co, Ltd v Price Tribunal (No 2)* [1950] NZLR 433; *NZ United Licensed Victuallers Assn of Employers v Price Tribunal* [1957] NZLR 167; *Drewitt v Price Tribunal* [1959] NZLR 21.

[10] Because the Council "rubber-stamps" decisions of Cabinet, this portion of the process will take place in Cabinet before the advice to the Governor-General is tendered in Council.

a decision if he has a financial interest in the result or if he has a close relationship with one of the parties. A firm conviction, for example, against abortion, may disqualify a person from acting on an advisory panel. Adherence to a previously declared policy without regard for the particular circumstances of the case for decision may also be seen as a disqualification. But are these and other examples which could be given instances of bias, or predetermination, or both?

Bias was defined by Lord Thankerton in *Franklin v Minister of Town and Country Planning* [1948] AC 87, 103-104 in the following terms:

> "I could wish that the use of the word "bias" should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator . . . . But, in the present case, the respondent having no judicial duty, the only question is what the respondent actually did, that is, whether in fact he did genuinely consider the report and the objections."

In that case, because the function of the Minister was executive or administrative, bias was irrelevant and the House's sole concern was whether he had exercised his powers consistently with the statutory requirements.

Predetermination is more elusive, but the word suggests that the outcome was not the result of an impartial weighing of the relevant (and often conflicting) considerations. If the decider has a phobia or fixation about insurance companies, he may be unable to reach a proper decision if one of the parties is such a company. There may have been conduct on the part of the decider before the decision is taken which suggested that he preferred one result rather than the other. An enthusiastic Minister is more likely to be accused of being partial than one who has no interest in the policies being pursued by his Ministry. Predetermination may take many forms, but when it is shown to exist it should invalidate not only decisions to which the principles of natural justice apply but also those in respect of which administrative fairness is the standard expected.

The Court of Appeal, it is suggested, has contributed to the clarification of the law governing the effect of predetermination (not bias) and the tests to be applied. The requirements can be expected to vary. To describe the Court's approach as realistic is to do no more than adopt a term the Court itself applied. Just as Mahon J in *Anderton v Auckland City Council* [1978] 1 NZLR 657, analysed the meaning and significance of bias in a town planning situation, the Court of Appeal has contributed to an understanding of decision-making by Ministers individually and collectively.

The role of departmental advisers is acknowledged as is the experience and knowledge of Cabinet itself. This element is usefully summarised in this extract from the judgment of Lord Diplock in *Bushell v Secretary of State for the Environment* [1980] 2 All ER 608, 613:

> "The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise are to be treated as the Minister's own knowledge, his own expertise."

The test for bias accepted in *Ex parte Angliss Group* (1969) 122 CLR 546, 553, and *Turner v Allison* [1971] NZLR 533 was:

> "a suspicion of bias reasonably — and not fancifully — entertained by responsible minds."

If that test had been applied, the responsible man would probably have disqualified the Executive Council or at least the more involved members of it. That would have been sufficient to invalidate the decision. But decision-making at this level was seen as different from judicial decision-making, where premature indications of the way one's mind is inclining are to be eschewed. In relation to Aramoana or similar projects, the process is quite different. A proposal is followed by investigation and a tentative commitment to it. Public debate can occur simultaneously. Contributions are made by departmental advisers and consultants. At some stage, policy becomes firmer. At what stage can it be said that the decider no longer has an open mind — that nothing can change the direction chosen? The writer, who has had some experience of decision-making by politicians, finds that question impossible to answer except in general terms.

The Court of Appeal used such phrases as those that follow to describe the process of governmental decision-making and the commitment needed to disqualify:

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[11] See also the remarks of Somers J on the role of the Minister of Works and Development as Chairman of the National Water and Soil Conservation Authority in *EDS v National Water and Soil Conservation Authority* (1979) 7 NZTPA 385, 389-394, where he rejected the allegation of bias or predetermination.

— "Realism compels recognition" that the smelter was likely to proceed but "the Government was [not] irretrievably committed" to making the Order in Council.
— "It [is naive] to suppose that Parliament can have meant Ministers to refrain from forming and expressing, even strongly, views on . . . such projects . . . ."
— "What constitutes impermissible predetermination on the part of members of the Executive Council under the statutory scheme?"
— "Expression of commitment in principle is not a disqualifying factor under s 3(3)".
— "The application of the rules against bias must be tempered with realism. It would be unrealistic to expect Ministers to have completely open minds . . . ."
— "I think it would be quite unreal to expect those concerned to maintain a lofty detachment from the matter".
— "[T]he fact that . . . the Ministers, or any of them, may have formed views in favour of the project did not render invalid the decision reached on the advice which they tendered at the meeting of the Executive Council".

Cooke J expressed his view about disqualification in these terms:

> "In relation to decisions under s 3(3) I think that no test of impartiality or apparent absence of disqualification has to be satisfied. Any other approach would make the legislation practically unworkable. The only relevant question can be whether *at the time of advising*[12] the making of the Order in Council the Ministers genuinely addressed themselves to the statutory criteria and were of the opinion that the criteria were satisfied. If they did hold that opinion at that time, the fact that all or some of them may have formed and declared the same opinion previously does not make the order invalid . . . . But the newspaper reports fall short of showing closed minds."

These remarks, it is suggested, can be likened to the equally firm rejection of bias in the *Franklin* case, supra. In decision-making of the kind being discussed, neither bias nor predetermination, as ordinarily understood, is relevant. The question is: did the members of the Council discharge their statutory obligations with minds that were closed to any other outcome than approval of Aramoana? On that basis, the Council was not proved to have been disqualified. Clearly, the presumption of regularity of official acts and the onus of proof involved operated to protect the decision of the Executive Council.

The Relevant Considerations

The principal authority relied on was the Court of Appeal decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] KB 233, which supports the proposition that a decision-maker who makes a decision on the material presented which no reasonable man could have reached must either have failed to take account of relevant considerations or have taken into account irrelevant considerations. To establish their proposition the applicants relied on affidavits made by experts or on newspaper accounts. In the *EDS* case, the Cabinet paper was available (the Crown having put it in), but in the *CREEDNZ* case, the only material before the Court was that presented by the applicants. They very nearly succeeded and some criticism must attach to the tactics adopted by the Crown, which chose not to act on the Court's suggestion that the Minister of National Development give oral evidence and be available for cross-examination. The Court, again influenced by the presumption and the onus lying on the applicants, found that they had not proved the proposition that relevant considerations had not been taken into account.

The Crown was indirectly criticised for its reluctance to make the Cabinet paper available. Cooke J described the decision to put the paper in as wise and pointed out that the issues of public interest involved transcended the adversary nature of the proceedings. The applicants in *CREEDNZ* advanced seven matters which it was alleged had not been taken into account but which fell within s 3(3). Cooke J acknowledged that if it had been proved that *none* of these issues had been taken into account the order in council might well be held invalid. But while

> "Quite slight evidence may be enough to discharge the burden [of proof] where the allegation is that a certain matter has been taken into account (*Reid v Rowley* [1977] 2 NZLR 472, 477-8; *Fiordland Venison Ltd v Minister of Agriculture* [1978] 2 NZLR 341, 345-6). It is less easy to discharge the burden of proving a negative — that something has not been taken into account."

The applicants failed to discharge the burden of proving that the Executive Council had not directed themselves properly in law.

[12] The emphasis is in the original.

Richardson J introduced a further restriction on reviewability when he declared:

> "Finally, it is important to remember as Lord Wilberforce reminds us . . . [in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1047], that there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at. The willingness of the Courts to interfere with the exercise of discretionary decisions must be affected by the nature and subject matter of the decision in question and by consideration of the constitutional role of the body entrusted by statute with the exercise of the power. Thus the larger the policy content and the more the decision-making is within the customary sphere of elected representatives, the less well-equipped the Courts are to weigh the considerations involved and the less inclined they must be to intervene."

While there are certain cases which speak of benevolence on the part of the Courts when reviewing acts of elected bodies, there is no obvious reason, apart from familiarity with the local problem, why they should be in any different position in relation to review from any other statutory authority. The Courts, of course, are concerned to ensure that the law is observed and that the limits imposed on the power or discretion are not exceeded. Their entry into questions of "policy", except when exercising appellate power, is hazardous. Possibly the Judge was doing no more than voice a widely held belief that most lawyers, including Judges, have no special contribution to make to decison-making, other than their knowledge of the law. When opinions vary, as they did in relation to Aramoana, there was no justification for rejecting the conclusion of the Ministers and their departmental and other advisers who have to decide on the relevance and the weight to be attached to the material presented to them. What is relevant will depend upon the statutorily defined criteria in s 3(3); see *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*, supra, at p 1047, per Lord Wilberforce. The inclusion of those criteria curtailed the discretion conferred on the Executive Council.

Locus Standi

It is surprising how many times, since the application for review was introduced by the Judicature Amendment Act 1972, the issue of locus standi has been raised. The Public and Administrative Law Reform Committee might well have included in the draft attached to its Fifth Report (1972) a provision liberalising the rules on locus standi had this been foreseen. Its Eleventh Report on locus standi (1973) and the legislation it recommended have not yet been adopted. In the meantime, the Courts are continuing to lessen the height of the obstacle presented by the principle. This is illustrated by the EDS proceedings in respect of the Aramoana smelter.

The Crown had argued that neither EDS nor the Royal Forest and Bird Protection Society had standing to bring the proceedings. This was rejected. They had the right to appear before the Planning Tribunal under s 8(1)(f) and moreover they were responsible public interest groups. Given that the Attorney-General could not be expected to question the validity of the Order in Council, it must be open to individuals and societies directly concerned to institute proceedings. Arguments addressed to standing were described by Lord Diplock as "technical restrictions" and the denial of standing to pressure groups as a grave lacuna in our law. In *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93, 104, 107, he declared:

> "To revert to technical restrictions on locus standi to prevent . . . [challenges to breaches of the law] that were current thirty years ago or more would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English Courts in my lifetime . . . . It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney-General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are

accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a Court of justice for the lawfulness of what they do, and of that the Court is the only judge."

In this case none of the applicants was able to establish that the action of the Government was unlawful. The presumption of validity established in three statutes — the Evidence Act, s 46, the Regulations Act 1936, s 6 and the Acts Interpretation Act 1924, s 24 — was too formidable an obstacle to overcome. They may derive modest satisfaction from subsequent events which tend to confirm the doubts about the economic viability of the proposed smelter and the major expansion of exports and the significant opportunities for employment upon which the Order in Council was based; see s 3(3)(a)(iii) and (iv).

RECENT ADMISSIONS

Barristers and Solicitors

Badham, M J	Auckland	18 Nov 1981	Kumar, P M	Auckland	18 Nov 1981
Barclay, A J D	Auckland	18 Nov 1981	Le "Au" Anae, P	Auckland	18 Nov 1981
Bates, R A	Auckland	18 Nov 1981	Litchfield, G M	Auckland	18 Nov 1981
Becroft, A J	Auckland	18 Nov 1981	Lowndes, M A	Auckland	18 Nov 1981
Bolam, R D	Auckland	18 Nov 1981	MacMillan, G M	Auckland	18 Nov 1981
Bradley, C F	Auckland	18 Nov 1981	Matthews, R J	Auckland	18 Nov 1981
Burford, J A V	Auckland	18 Nov 1981	Miller, D J	Auckland	18 Nov 1981
Caulfield, C E	Auckland	18 Nov 1981	Murray, D K	Auckland	18 Nov 1981
Chan, J M	Nelson	9 Nov 1981	Napier, A P D	Auckland	18 Nov 1981
Collins, J A	Auckland	18 Nov 1981	O'Brien, K D	Wellington	11 Sept 1981
Creagh, P C	Auckland	18 Nov 1981	Peterson, M B	Auckland	25 Sept 1981
Dennis, D B	Auckland	18 Nov 1981	Rea, S M	Auckland	18 Nov 1981
Free, P N	Auckland	18 Nov 1981	Riley, G A	Wanganui	27 Aug 1981
Friedlander, P B	Auckland	25 Sept 1981	Sharma, A K	Auckland	11 Sept 1981
Galvin, W W	Auckland	18 Nov 1981	Shaw, S E	Auckland	18 Nov 1981
Gay, D R I	Auckland	18 Nov 1981	Shea, J L	Auckland	18 Nov 1981
Harmos, A W	Auckland	18 Nov 1981	Simpson, G G	Auckland	18 Nov 1981
Hutcheson, P M	Auckland	18 Nov 1981	Smith, P B	Auckland	18 Nov 1981
Jaine, D R	Auckland	18 Nov 1981	Sweetman, A J	Auckland	18 Nov 1981
Jensen, E M	Auckland	18 Nov 1981	Taylor, C L	Auckland	18 Nov 1981
Johas, M D	Auckland	18 Nov 1981	Temm, S M C	Auckland	18 Nov 1981
Johns, A A	Auckland	18 Nov 1981	Thomas, R P	Auckland	18 Nov 1981
Jost, M J	Auckland	18 Nov 1981	Wadsworth, G D	Auckland	18 Nov 1981
Kepple, F M V	Auckland	18 Nov 1981	White, M A	Auckland	18 Nov 1981
Kirch, P M	Auckland	18 Nov 1981	Woodley, R H	Auckland	18 Nov 1981

CONFERENCE PAPERS
ACCIDENT COMPENSATION

WHAT HAPPENED TO THE WOODHOUSE REPORT?

By GEOFFREY W R PALMER

The author, who is Member of Parliament for Christchurch Central, was educated at Nelson College and Victoria University of Wellington before going on to postgraduate work in the USA. A former professor of law, Mr Palmer has been integrally involved with the implementation of compensation schemes both here and in Australia. In this authoritative paper he traces the genesis of the New Zealand legislation, discusses its shortcomings, comments on the amending Bill which is still under scrutiny by Parliament, and indicates some of the ways in which the present Act differs from the Woodhouse Report recommendations.

1. Introduction

In the dozen years I have been involved with accident compensation the richness of the issues it throws up has never ceased to fascinate me.[1] The nature of the issues changes over time — those upon which attention is lavished while the policy is being settled are different from those upon which focus falls during an appraisal of the scheme's performance. Furthermore, the issues vary depending on the angle from which they are being viewed. I have had the good fortune to view the scene from a number of angles and a word or two needs to be said about them. The vantage points have been as:

- an adviser to governments on the appropriate reform policy to be adopted for personal injury law, both in New Zealand and overseas;
- a law professor researching personal injury law and teaching about it, both in New Zealand and overseas;
- a barrister advising on particular cases;
- a legislator required to scrutinise Government Bills on the subject and debate them;
- a Member of Parliament with constituency inquiries about accident compensation.

Varied as those angles have been they all have underpinning them the doctrinal outlook of a lawyer. It is most important to appreciate that lawyers are no longer the most important actors in personal injury law, if they ever were. The intellectual heritage of tort law and workers' compensation is the base from which lawyers begin their analysis of accident compensation. The catalogue of disciplines and interests which have a stake in accident compensation and its progeny is much wider:

- medical and para-medical professions;
- public administration people, systems analysis and computer experts;
- social workers and those concerned with income maintenance programmes generally and the pattern of social welfare;
- statisticians, actuaries and economists;
- those concerned with research and education into accident prevention;
- the rehabilitation community.

Using another set of criteria the interests concerned with accident compensation add up to potent political forces in our society:

- trade unions;
- employers;
- motor vehicle owners;
- the insurance industry;
- the self-employed;
- the legal profession.

There are a lot of people with many different axes to grind involved in the injury industry in New Zealand. Those people with the weakest voice are those who have been hurt. In this, the International Year for the Disabled, it is a point we should keep in mind. People who have suffered incapacity and disablement and who continue to suffer it must play a

[1] Over the years I have written a great deal on accident compensation. For this paper I have borrowed freely from those writings without acknowledgement.

bigger role in the development of policy in the accident compensation arena. I am prepared to argue that in recent years groups like the Employers Federation have had greater impact on accident compensation policy than the consumers of the system. The time has come to build some "consumer" representation into the administration of accident compensation. This should not be done by representation on the Board, however. Some mechanism needs to be devised whereby the views and experience of those whom the system is designed to serve are systematically monitored.

There is a growing literature on New Zealand's accident compensation scheme. Judge Blair has written a practical book for those giving legal advice under the Act.[2] I have written a long book dealing with the legislative history of the New Zealand scheme, developments in Australia and an analysis of the policy.[3] Profesor T G Ison of the Faculty of law at Osgoode Hall Law School of York University in Canada has made the most recent contribution after spending some months in New Zealand examining the operation of the scheme. Professor Ison focuses on the practical operation of the scheme in New Zealand.[4] The study carried out by the Bryn Mawr Graduate School of Social Work in Pennsylvania takes a multi-disciplinary approach.[5] Professor Monroe Berkowitz an American economist has published a book examining the economics of work accidents in New Zealand.[6] There have been some useful theses completed on aspects of the scheme[7] and quite a lot of literature in scholarly journals.

It is to be hoped that the emergence of this academic literature will heighten the quality of public debate in New Zealand on accident compensation issues. There is a great deal of public misunderstanding about the history of accident compensation, its features and its coverage. The media have had consistent difficulty in understanding and explaining the subject over the years.[8]

Costs of the Scheme

On few subjects has there been more public misinformation concerning the New Zealand scheme than on its costs, and the effect of these costs on those who bear them. The executive director of the New Zealand Employers Federation has described it as "a monster with a voracious appetite."[9] He was particularly critical of the fact that some of the levies on employers pay compensation for those who are not injured on the job. These criticisms overlook the important principle of community responsibility outlined in the Woodhouse Report. As the report pointed out "It is obvious enough that a worker does not cease to be a worker when he leaves his factory at 5 o'clock".[10] They also ignore the fact that employers as a group are relieved of the threat of common law claims. There can be no doubt that had the old workers' compensation and common law damages provisions survived in New Zealand employers would be paying a great deal more than the current average levy of 1.07 percent of wages. In New South Wales, for example, the average premium rates on employers for workers' compensation and common law coverage are about three times the average for New Zealand. Premiums there can run up to 30 to 40 percent of wages for some of the more hazardous industries. It must also be emphasised that employers are in a position to pass on the costs of the levies they pay, to the con-

[2] A P Blair, *Accident Compensation in New Zealand* (1978).

[3] Geoffrey Palmer, *Compensation for Incapacity — A Study of Law and Social Change in New Zealand and Australia* (1979).

[4] Terence G Ison, *Accident Compensation — A Commentary on the New Zealand Scheme* (1980).

[5] J C Kronick et al, *Community Responsibility: The New Zealand Accident Compensation Act as a Value Response to Technological Development.* Bryn Mawr Graduate School of Social Work, Pennsylvania (1978).

[6] Monroe Berkowitz, *The Economics of Work Accidents in New Zealand* (1979).

[7] J M Miller, LLM, Thesis, Victoria University of Wellington, *Dependants claims under Accident Compensation Act 1972* (December 1977). S St John, Auckland University, MA Thesis, *Cost Allocation in the New Zealand Accident Compensation Scheme* (1979).

[8] One recent example illustrates the point. "The Dominion" January 10, 1981 carried an editorial complaining that the Accident Compensation Act permitted a rape victim to secure compensation for pain and suffering. The editorial writer appeared to believe that accident compensation was confined to loss of earnings and the fact that it was not was a recent and unexpectd revelation. The writer had clearly not considered what redress may have been available to a rape victim at common law. And the writer was equally ignorant of the ideas of nervous shock and psychic trauma. No doubt the issues are difficult but those who elect to write about them in critical fashion would be well advised to make the effort to understand them.

[9] New Zealand Herald, April 28, 1979, p 5.

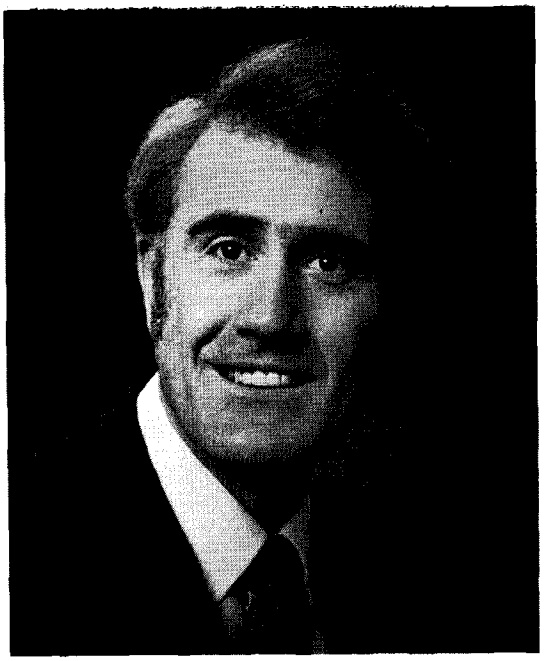
[10] Report of the Royal Commission of Inquiry. *Compensation for Personal Injury in New Zealand* para 46 (1967).

sumers of the goods and services they sell. In that sense the community pays. While charges have escalated rapidly in this field overseas the accident compensation scheme has permitted costs to employers to be held in New Zealand. The average levy rate in New Zealand has only risen by 7 cents since the inception of the scheme in 1974. It is interesting to note that the Employers Federation was the only major pressure group to welcome the changes proposed in the Accident Compensation Amendment Bill (No 2) introduced in 1980.[11] Note too, that the levy on private cars in New Zealand is $14.20 per annum compared with compulsory third-party premium for bodily injury of $124 per annum in New South Wales in 1980. The burdens of the New Zealand scheme are the lowest of their kind anywhere in the developed world. And they provide better benefits as well as wider coverage.

The doctrines of false economy so vociferously preached by the Employers Federation pose a long-term threat to the scheme. One has only to inspect the sad history of workers' compensation. When the scheme commenced in the United Kingdom shortly before the beginning of this century the level of benefits was relatively much more generous than when the scheme came to an end. In time workers' compensation became a subsistence programme, a sort of social backstop. Accident compensation was conceived on more liberal lines. It offers something to the whole community not merely to a segment of wage workers. The levels of income it protects are high. Those levels must not be permitted to fritter away either by inflation or reduced coverage. There is a risk this will occur due to pressures of the type described above.

Another point not to be overlooked is the international interest in accident compensation. It has attracted rapt attention everywhere and not only in the common law world. The number of overseas visitors to New Zealand to investigate the scheme is very considerable. I suggest that no innovations made in New Zealand since the Second World War have attracted more widespread overseas interest. I have myself had occasion to discuss the scheme seriously with Americans, Canadians, people from the United Kingdom, Australia, Japan, Germany, Sweden, Cyprus, Sri Lanka, Belgium, Israel, Papua New Guinea, as well as with officials from international organisations. The International Labour Organisation has been examining the scheme closely. Sir Owen Woodhouse has been much in demand overseas to explain his ideas.

[11] New Zealand Herald, November 10, 1980, p 3.



2. History

It has taken New Zealand a long time to reach the present point — a brief chronology will bring the main developments back to mind.

1962 — Report of the Committee on introduction of absolute liability for motor accidents. Majority in the negative.

1966 — Royal Commission on Personal Injury in New Zealand appointed.

1967 — Royal Commission report.

1968 — Interdepartmental Committee report handed to Government Caucus.

1969 — Official Commentary on Royal Commission's report presented to Parliament. Parliamentary Select Committee established to consider and report on the subject.

1970 — Parliamentary Select Committee chaired by Mr G F Gair reported in favour of a scheme differing in important respects from that recommended in the Woodhouse Report.

1971 — Accident Compensation Bill introduced into Parliament.

1972 — Accident Compensation Bill reported back from a Select Committee and passed.

1973 — Two Accident Compensation Amendment Acts passed. Scheme extended to cover non-earners.

1974 — Scheme began to function on 1 April 1974. Accident Compensation Amendment Act passed.

1975 — Accident Compensation Amendment Act passed. Committee established to investigate extending accident compensation to sickness.

1977 — Accident Compensation Amendment Act passed. Committee to investigate extending accident compensation to sickness disbanded.

1978 — Accident Compensation Amendment Act passed.

1979 — Accident Compensation Amendment Act passed. Cabinet/Caucus Committee began a review of the whole scheme.

1980 — Cabinet Caucus Committee report published. Two Accident Compensation Amendment Bills embracing the recommendations introduced. One changing the Commission to a Corporation was passed. The other held over for recess study.

The important changes currently receiving attention of a Parliamentary Select Committee include:

— taking the first step to change from a funded scheme to a pay-as-you-go scheme;
— extension of time limits in relation to claims for diseases arising out of employment;
— new basis for levy on self-employed whereby the self-employed person will have the option of paying levy on the average ordinary weekly wage and receive compensation on that basis for up to 13 weeks without proof of loss of earnings;
— making provision for ascertaining earnings at date of incapacity rather than date of accident where a period of incapacity does not arise at the date of accident;
— amendment to provisions related to cost of conveyance for medical treatment and payment of compensation for working hours lost while receving medical attention;
— injured person to contribute $5 to cost of each of first two visits to medical practitioner. Employer to pay the contribution where it is work-related accident;
— employers required to pay compensation for work-related accidents for first two weeks of incapacity at rate of 80 percent of normal wages;
— stand-down period before compensation paid extended from one week to two weeks except for work-related injuries as above;
— repeal of s 114 of the Act dealing with permanent loss of earning capacity;
— amalgamation of ss 119 and 120 so that all compensation for non-economic loss paid on a schedule. Maximum amount remains at $17,000. No payment at all where percentage of loss or impairment less than 15 percent;
— no compensation under pecuniary loss provisions for any damage to property.

One of the proposed amendments deserves to have the full text reviewed by this audience. It is the one dealing with personal injury suffered in the course of criminal conduct:

138A —

(1) Subject to this section, in any case where, in the course of and as a result of committing an offence, being (a) any offence under section 58 of the Transport Act 1962; or (b) any offence for which the maximum penalty is life imprisonment or a term of imprisonment of 2 years or more — any person suffers personal injury by accident and is convicted of the offence concerned and sentenced to a term of imprisonment, cover shall exist but no compensation shall be payable in respect of that injury.

(2) Where the Corporation has reason to suspect that any injury was suffered during the course of and as a result of committing such offence to which this section relates, it may refuse to make any payment of compensation until the expiration of 12 months from the date of the accident: Provided that if the injured person has been charged but not tried for the offence by the expiration of 12 months aforesaid, the Corporation may in its discretion extend that period of 12 months for such further period or periods as it thinks fit, having regard to any information it may obtain concerning the date of the trial.

(3) This section shall apply in relation to any accident occurring on or after the commencment of this Act.

I have strong views on some of the above proposals but I cannot really analyse them without making critical statements to which the Government cannot in this forum reply. I simply offer,

therefore, a general conclusion. Some of the projected changes will do harm to the scheme. Taken as a whole they do not represent progress. Some important shortcoming which exist are not dealt with at all in the Bill. Fortunately I will have the opportunity in another place to try and effect some changes. And I will be able to state my views without the need for studied understatement which exists here.

3. How much of the Woodhouse Report have we got?

There were two Woodhouse Reports. The New Zealand prototype arrived in December 1967.[12] The Australian super-charged model came off the assembly line in July 1974.[13] While the Australian Report has yet to be implemented — the Whitlam Government made a bold but unsuccessful attempt — it represents the mature development of Woodhouse policy. In general terms, the Australian Woodhouse Report has not influenced the accident compensation debate in New Zealand. That is a pity because the Australian Report developed significantly some of the ideas first advanced in the New Zealand version.

At least 36 major issues exist upon which decisions have to be taken in order to arrive at a coherent policy on compensation for incapacity or disablement. A decision on each of the issues involves the weighing of several possibilities and the rejection of all but one. In some cases the compass of the issues is small though often intricate — for example, what to do in the case of a person who, while incapacitated from one injury suffers another. Other issues are very broad indeed — for example, how to pay for the scheme.

The most important insight I have derived about the policy-making process is the fact that in compensation each policy decision tends to relate to every other. Often the relationship of one policy decision to other decisions is as important to the nature of the whole scheme as the relationship of one chosen policy compared with those possibilites which were rejected for it. To approach each policy issue piecemeal is to overlook the organic nature of the reform.

The essence of the Woodhouse style of reform is that the policy factors are arranged in a complex sort of equilibrium. Some examples that actually happened in New Zealand will serve to illustrate that point. How do you deal with ascertaining the earnings of the self-employed has consequences for the policy on rehabilitation and permanent partial incapacity. By choosing a proof of lost earnings method for permanent partial incapacity you immediately cause problems for the self-employed. If you decide against having a floor of notional earnings for non-earners who suffer permanent incapacity, that has complicating results for discovering the earnings of the self-employed. If there were a floor it would be available for them as well as for non-earners.

What must be appreciated is that a conceptually adequate solution for one problem, permanent partial incapacity for example, may be acceptable on its own terms but unacceptable when measured against other features of the scheme for which a decision on that matter has indirect consequences. In compensation schemes the subtlety and delicacy of the balance between the various features of the scheme are such that the right mix is not easy to achieve.

Another point. Both Woodhouse Reports contained sustained attacks against the common law system of damages as a method of dealing with the problems of personal injury. The case made out was accepted in New Zealand. That case met with much sterner resistance in Australia. But in both countries the nature of the suggested replacement gave rise to much more controversy than the analysis of the defects of existing programmes. Deciding upon the precise chracteristics of the new scheme is a great deal more diffiuclt than deciding that there is a need for a new scheme. The Accident Compensation Amendment Bill (No 2) 1980 which is still before Parliament demonstrates the point. The Government proposes to make a number of alterations to the detailed features of the scheme — but it does not propose to bring back the common law.

One feature of the New Zealand reform is that the development of policy can be traced through a series of published documents. We began with the report of the Royal Commission in 1966,[14] followed by the *Commentary* in 1969[15] and then the report of the Select Committee chaired by the

[12] Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (1967).

[13] Report of the National Committee of Inquiry, *Compensation and Rehabilitation in Australia* (July 1974).

[14] Report of the Royal Commission, supra n 12.

[15] *Personal Injury — A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury In New Zealand* (1969).

Hon G F Gair.[16] Now we have the report of the Cabinet/Caucus Committee chaired by the Hon D F Quigley.[17] We began with the pristine vision of the Woodhouse Report itself — a document little influenced by what was acceptable to the most interested groups concerned with the issues. Each report after that has been closer to the political process than its predecessor with the result that the amount of pragmatism has increased and the amount of principle and clear vision has decreased. This has led one acute foreign observer of the New Zealand experiment to comment ". . . if revisions are recommended through the hit and miss process and the transitory demands of party politics, there is a risk of the idealism being lost, and of changes being made without full appreciation of their consequence or of their significance in the total structure".[18]

The survival rate of Woodhouse policy as recommended in 1967 was about half — of 36 major policy issues, the Woodhouse Report prevailed in 17. Successes included such vital questions as the removal of the common law and other existing remedies and the principle of earnings-related compensation. Even where the precise recommendations did not prevail the Report provided important ingredients of the final policy. Some of the matters on which the Royal Commission did not prevail were matters of detail such as the age limits. The major questions upon which the Woodhouse policy was rejected concerned:

- administration;
- the appeal mechanism;
- limitations on short-term compensation;
- compensation for permanent partial incapacity;
- the method of raising levies — especially differential rating and penalties;
- widow's benefits;
- a notional earnings floor for non-earners.

Some of the departures from Woodhouse policy involved some groups receiving or appearing to receive more compensation than they would have done under the recommendations. This is true of the limitation on short-term compensation, provision for permanent partial incapacity, compensation for non-pecuniary loss and widow's benefits. Others cut down the bounty recommended by the royal commission — the decisions on non-earners and coverage for those travelling outside New Zealand.

A survey of the chief differences between the recommendations of the Woodhouse Report and the existing legislation serves to illustrate, I think, just how far the scheme we have departs from the blueprint. The Woodhouse Report was anchored firmly in fundamental social principle. Most of the developments we have seen since then have been less securely fastened.

4. Administration

There are some important matters of policy still remaining to be resolved in the accident compensation scheme but the focus of concern has shifted to a substantial extent from policy to administration. There has been a trend for people to be more concerned with how the scheme is being administered, how the management systems work, than with the merits of the rules. In some quarters that view has reached the stage of people saying that there is nothing wrong with the Act if only it was administered properly. I have heard that view expressed by both lawyers and trade unionists. In one sense, of course, it is a policy concern. How the scheme works on the ground is in fact the policy as implemented.

When the heat of the legislative battle is over and there is a statute on the books, the words in that statute can be made to come alive in many different ways. The scheme's functioning in important respects does not depend on proper statutory interpretation or even the ideas that lie behind the provisions in the legislation. The statute does not say the State Insurance Office must be the agent of the Accident Compensation Corporation. It does not say whether benefits should be paid through an on-line computer network or a decentralised manual system of payment by cheques. The legislation does not say whether people at the desk must greet claimants with a smile, whether they should adopt a suspicious approach to claims or take up an open and generous attitude. And it is a mistake to think that the policy goals of the scheme can be protected by allowing wide rights of appeal and review. Such rights are necessary and do provide a check on arbitrary decision-making, but such criteria as speed of payment or effective monitoring of rehabilitation will not come from such a source.

From the inception of the scheme until the end

[16] Report of the Select Committee on Compensation for Personal Injury in New Zealand, laid on the Table of the House of Representatives (1970).

[17] Government Cabinet/Caucus Report. *The New Zealand Accident Compensation Scheme: A Review* (October, 1980).

[18] Terence Ison, supra n 4 at 186.

of 1980 it was administered by the Accident Compensation Commission which was a body corporate of three members appointed for three-year terms. The arrangement was clearly designed to give the administration of the new scheme some independence from Government. In many respects, however, the Commission functioned as an ordinary Department of State. It generated policy on accident compensation (prior to the Cabinet/Caucus Review conducted under the chairmanship of Mr Quigley) advised Ministers and Select Committees and prepared Cabinet submissions. But since the bulk of the revenue is automatically levied by statute and not subject to Parliamentary appropriation, ordinary Government procedures for control of expenditure were not operative. In some ways the Commission was in a privileged position compared with other organisations, notably the Department of Social Welfare.

Part of the reason for the existence of a Commission lay in the adjudicative functions entrusted to it. The problems to be confronted with any form of administration of accident compensation revolve around the blending of the right mix of independence and accountability. The Government of the day should not be able to influence the exercise of the wide discretionary powers given by the Act. At the same time there needs to be public accountability for the broad administration of the scheme and the legislation itself. And there is the question of Ministerial responsibility. It seems clear that an ordinary Department of State could have carried out the functions of the Accident Compensation Commission. So long as the benefits are defined with clarity and insulated from all possibility of political or Ministerial dictation in the determination of claims it is difficult to see what the objection can be. The Woodhouse Report never envisaged that an independent authority would continue to administer the scheme indefinitely. The recommendation was that the scheme "should be brought to life and set upon its course by an independent authority".[19] It was also recommended that the scheme "should operate within the general responsibility of the Minister of Social Security and be attached to his department for administrative purposes".[20] That never occurred. The fact that the scheme comes within the portfolio of the Minister of Labour is an historical accident due mainly to the fact that the scheme's strongest backer at the formative stages was the late T P Shand, who as Minister of Labour was concerned with worker's compensation and was instrumental in having the Woodhouse Royal Commission established.

The options available for the shape of administration appear to be:

— a Commission as it existed prior to 1981;
— a Corporation as it presently exists;
— a Department of State.

Obviously a number of possibilities and variations exist within each choice. And it is equally clear that effective or poor administrative practices can be adopted under any of the arrangements.

The arguments in favour of the Department of State seem to be stronger than for the others. Accountability is better provided for; and it is simple enough to insulate the benefits against interference. But if it is to be a department that obviously brings up the question of the relationship of the whole scheme to the Department of Social Welfare and the benefits paid by that department. There has been a marked reluctance to see accident compensation benefits as in any way related to social welfare benefits. I can myself see no escape from facing up to that issue. It should be possible to take the best from the administrative experience of accident compensation and the Department of Social Welfare and build a new merged department. But before that can happen a basic policy decision will have to be taken which is discussed in the next section of this paper.

One of the most substantial sources of complaint, and much of it has come from members of the legal profession, has related to the adversary attitudes which have been taken up in the administration of the scheme. There has been something of the attitude of an insurance company out of whom money must be prised with the help of lawyers. Some of this penny-pinching has probably cost more than it has saved and is certainly incompatible with the principles upon which the scheme is based. I have myself as an MP found it necessary to appear on applications for review for constituents in cases which should never have gone so far.

The legal profession has been involved in the scheme more than was envisaged in the Woodhouse Report. Had all the recommendations of that Report been adopted the need for legal talent in the scheme would have been much reduced. Given the way the scheme has been run and the unnecessarily complicated quality of the statute, the involvement of lawyers has been necessary to protect the rights of claimants, mostly in those 2% or

[19] Report of the Royal Commission, supra n 12, para 495.
[20] Ibid.

so of cases where permanent incapacity has occurred.

There is an urgent need for streamlining the whole of the claims administration. Professor Ison who has examined the system closely remarks: "A serious problem with this structure is than it can deny procedural due process. Almost every decision adverse to a claimant is made from the file documents by someone who has had no direct communication with the claimant".[21]

I wrote in 1978 that the administration of the Act in New Zealand has not matched the vision of the original blueprint. The style of administration has too often been characterised by an abundance of caution, a stubborn inflexibility and an undue sensitivity to public criticism. That remains my opinion. I am not persuaded that the new Corporation will do better; indeed it could easily do worse. Nevertheless, on balance the administration of accident compensation so far would have to be judged a moderate success. Few of the problems of the scheme relate to fundamental principles. There is much less room for argument under the new scheme than there was in the systems which were replaced.

People are paid quickly in the great majority of cases. The social problem of the uncompensated victim has disappeared. There has been some impetus for rehabilitation promoted by the scheme. The removal of the right to sue has been accompanied by no floods of protest. The common law action for personal injury in New Zealand has been buried and there is little demand for its exhumation. The unnecessary waste and expense of the old systems have been cut away. If the administration of the scheme has lacked dynamism and vision that is because those qualities are scarce in New Zealand. The style of our public administration is safe and cautious — not bold and visionary. My assessment is tinged not with sadness at what is but rather with dreams of what could have been. So for balance let me turn again to Professor Terence Ison. He found in New Zealand "a noticeable modesty in the national character, with consequential reluctance to believe that they may have the best system yet operating".[22] I know we have the best scheme yet operating. What I say is how much better it can yet be made.

5. Sickness

The biggest unresolved issue arising out of the Woodhouse Report is the relationship of accident compensation to the rest of the income maintenance system. The point comes down to a simple one of social equity. How can the person with cancer be treated less generously than the person hurt in a motor accident? In my view it is impossible to find a persuasive argument against the proposition that people with similar incapacities should be treated the same way whether the origin of their trouble was accident, disease, congenital incapacity or is simply unknown. The Woodhouse Report could find no logical reason for the exclusion of disease from its recommended scheme and hinted that the extension should be made in due course. The Australian Woodhouse Report included coverage of incapacity arising from sickness, disease and congential incapacity within the comprehensive scheme recommended. While that recommendation did not assist the legislative passage of the scheme, it cannot be doubted it was just in principle.

The argument that it is too expensive to make the extension is not compelling. First, the extended coverage can be phased in. Then it must be remembered that considerable amounts in social welfare benefits are already being spent. The expenses of trying to make the distinction between incapacities resulting from personal injury by accident and those resulting from some other cause would be saved. Substantial sums now expended on occupation sick pay schemes and sickness insurance would be saved.

When the conditions attached to the accident compensation benefit are examined alongside other social welfare benefits the nature of the injustice in the system becomes evident. New Zealand spends large sums on income maintenance:

Estimated Expenditure on Income Maintenance 1980-81 Financial Year.

Social Security Act Benefits	$750 million
National Superannuation:	$1,453 million (before tax claw-back which is estimated at $290 million)
Accident Compensation:	$175 million (includes investment income and ignores tax claw-back and money placed in reserve)

[21] Terence Ison, supra n 4, at 81.
[22] Ibid, at 187.

Despite the outlay this system of income maintenance in New Zealand flunks the elementary test of social justice — it does not treat people fairly. That is because we suffer from a plurality of programmes with different tests of eligibility, paying different rates of benefit. Let me try and illustrate the problem more graphically. Take the ordinary New Zealand male who may earn $200 per week, before tax, which is not a fortune. The situation is described as at February 1981.

Simply by reaching the age of 60 a substantial benefit is available to everyone without regard to other income, capacity to earn, need or anything else. For a married couple both over the age of 60 their combined benefit before tax amounts to $135.46

Misfortunes can befall a person before he reaches 60. He may lose his job and not be able to secure another, an increasingly common occurrence in New Zealand. He may suffer a heart attack and be off work for three months. He may be involved in a car crash and be badly knocked about. Let us postulate all these occurrences to our average person who has no sick pay arrangements or other help to fall back on. What will happen to him? On reaching the age of 60 he will receive national superannuation. He can, of course, still work, and get his superannuation, or he might retire. If unemployed he could be eligible for an unemployment benefit. A social security sickness benefit may be paid to him for the heart attack. Accident compensation will be paid in respect of the car accident. The bottom of the barrel is the unemployed person. It is better to be single and sick, than single and unemployed. We can be pardoned for wondering whether New Zealand's cash benefit laws are more in the nature of a lottery than a humane and rational method of maintaining income for people. The unfair and unjust discrimination results because the choice of benefits depends on the cause of the misfortune. The particular variety of misfortune which has befallen him will dictate the weekly amount of money he will get: [The figures reflect the early 1981 position]

Single Person	Before Tax	After Tax
Weekly earnings while working	$200.00	$152.04
National Superannuation plus wages	$281.28	$200.08
National Superannuation by itself	$ 81.28	$ 69.66
Unemployment	$ 66.00	$ 56.58
Sickness benefit	$ 66.00	$ 66.00
Accident Compensation	$160.00	$126.04

The unfairness stems not just from the dollar amounts but from the tests of eligiblity. The unemployment and sickness benefits are subject to an income test. The insidious way in which the dual discriminations of differing benefit amounts and differing tests of eligibility work needs little further elaboration.[23]

The anomalies in our present benefit structure are:

- Some income maintenance benefits are universal, some are income-tested.
- Some benefits are flat rate, others earnings-related.
- Some benefits are automatically adjusted for inflation, others are not.
- Some benefits are abated by a method which reduces incentives to return to the work-force.
- Some benefits are subject to personal income tax, others not.
- Tax rebates and income maintenance benefits mesh together in a fashion that can produce injustice between groups. For example, the low-income family can be in considerable financial difficulty when the youngest child reaches 5 and family tax rebate is phased out.

The system cries out for reform. The piecemeal nature of the system should be capable of consolidation. There should in justice be comparable levels of support for those in comparable situations. The need is for a programme of integration. But even having decided that reform is needed the pattern that reform should take is an extraordinarily complex issue. I will not canvass the details.

My conclusion from all this is simple. Distinctions between people based on the cause of their incapacity must be eliminated. That can be accomplished in a number of ways. I have no doubt it is the most important piece of unfinished business arising out of the Woodhouse Report.

6. Other Changes which should be made

(a) *Permanent partial incapacity*

Few problems are more intractable in compensation law than permanent partial incapacity. There is not space to cover the technical problems

[23] Further detail on how New Zealand arrived at this point is to be found in Geoffrey Palmer (ed), *The Welfare State Today — Social Welfare Policies in the Seventies* (1977).

relating to this subject in detail in a paper of this type. Suffice it to say that in no area did the recommendations of the Woodhouse blueprint find less favour than in those relating to compensation for permanent partial incapacity. The departure related partly to the question of non-earners. The 1967 recommendations proposed to compensate non-earners (including housewifes and others) "as from the fifteenth day after the day of injury, but compensation in such cases be paid as from the day after incapacity commences whenever it lasts for eight weeks or longer".[24] That recommendation was not followed. Neither did the attack on lump sum compensation find favour with the policy-makers who followed the Royal Commission.The result is that lump sums are available under the Accident Compensation Act. Woodhouse proposed to compensate permanent partial incapacity by periodic payment, not lump sums.

I do not see how it is possible to deal with the problem of permanent partial incapacity on the same basis as temporary incapacity. I think it poses very serious problems for rehabilitation which have been entirely overlooked so far. The Woodhouse Report in Australia has recommended a method of handling the problem using physical impairment percentages as a schedule to compensate all monetary and non-monetary losses. In my view the method adopted by the Australian inquiry should be adopted in the New Zealand legislation.

(b) *The changing value of money*

High rates of inflation in New Zealand have eroded the benefits of the accident compensation scheme in rather a serious fashion.There is no automatic up-dating of the benefits. The formula in the Act is tied to general wage orders, but general wage orders have been abolished and therefore the increasing of benefits for inflation is dependent on the making of orders in Council.This is unfortunate. In my view, all benefits payable under the Act including the dollar amount mentioned in the legislation should automaticaly be up-dated for inflation by use of a relevant index. These questions should be removed from political and administrative vagaries.

(c) *The prolixity of the legislation*

The Accident Compensation Act was first passed in 1972. It has been massively amended on several occasions since that time. Despite the reprinting of the Act in a consolidated form in 1975 the legislation is a mess. The prolixity of the legislation stems from three main sources. It was decided in the early stages of the drafting that since valuable rights were being taken away, everything that could be spelt out should be spelt out. The legislation therefore looks more like an instrument of private contract than a piece of social welfare legislation. Separate schemes were established for motor vehicle injuries, injuries to earners and the supplementary scheme. This division has no legislative advantages at all. If it is desired to keep such matters separate it can be done on an administrative basis. The 1973 amendments were so large that the Act should have been re-drafted from scratch then. That opportunity was not taken. There will be no fundamental re-drafting on the occasion of the current amendments either. There is an urgent need to re-draft and simplify the accident compensation legislation.

(d) *Rehabilitation*

This is a vast field but my conclusion on the subject is very simple. Compared with compensation rehabilitation has been neglected. The new scheme has of course been of considerable assistance to many who are seriously disabled, but much more could be done. The whole rehabilitation scene in New Zealand needs to be taken by the scruff of the neck and shaken. The required co-ordination will never be achieved until accident compensation is extended to disease so that there is some uniformity across the whole field. At the moment rehabilitation is balkanised.

(e) *Safety*

The accident compensation scheme has not been used in the way that its founders hoped as a method of supporting safety efforts in industry and elsewhere. Professor Ison, who has looked into this matter thoroughly in New Zealand and who has had experience administering similar schemes in Canada, concludes "the present structure of health and safety responsibilities does not reflect any coherent design to meet articulated needs. It is suggested that a restructuring is needed and that three basic prinicples ought to be followed. (1) The roles of education and exhortation and of enforcement ought to be combined in the same agency or department . . . (2) The Department of Health should not be responsible in any way for occupational health . . . (3) Occupational health and safety require a specialised staff separate from those who administer employment standards . . .".[25] With

[24] Report of the Royal Commission, supra n 12, para 493.

[25] Terence Ison, supra n 4, at 176.

respect, I adopt those recommendations and rely on his reasoning.

(f) *Funding*

There is little doubt that accumulating heavy amounts of reserves in time of high inflation is a futile occupation. It is impossible to calculate on an actuarial basis the sort of reserves that are required to support the scheme on a funded basis. Furthermore, there is no need for a public scheme of the character of accident compensation to be funded. A decision has been taken to convert the scheme from a funded one to "pay as you go" but there are likely to be some teething problems in accomplishing that objective. Furthermore, it has yet to be demonstrated that there is value in retaining the system of differential risk classification brought over from the old worker's compensation insurance scheme. There are many arguments heard as to why accident prevention is advanced by a system of differential premiums. It has never yet been empirically demonstrated. I am persuaded after years of trying to work through this issue in many different countries that it is better to finance the scheme by way of flat-rate levies. They are administratively simple. An economist who has studied this subject, Professor Munroe Berkowitz, is convinced "We are not maximising the opportunites for accident prevention in New Zealand. Much work needs to be done. The conclusions of these studies are that the optimum accident rates can be approached if more attention is paid to economic factors which are involved in safety and in the prevention of accident."[26] Berkowitz believes that the market should be used to internalise costs by means of differential levies. The argument is one of the most fascinating in the accident compensation sphere. It can never be defeated in theory and never proved to work in practice. I doubt whether the debate will ever end.

7. Summary

(1) The Woodhouse Report called for an integrated scheme of accident prevention, rehabilitation and compensation. That aim has yet to be achieved. In particular rehabilitation and accident prevention must be pursued with much greater vigour.

(2) The Woodhouse Report was never enacted. Only about half the recommendations survived. There is a need to return to the fundamental social principles of the Woodhouse Report.

(3) The Woodhouse Report in Australia has not influenced thinking in New Zealand as much as it deserved to. Many of the solutions to current New Zealand problems are seen to have been worked out in that report.

(4) The administration of the scheme in New Zealand has been safe and cautious — not bold and visionary. It has tended to be too rigid and overly legalistic. Nevertheless the scheme is far superior to the compensation systems it replaced and is highly economical. The scheme may be better administered by a Department of State.

(5) The biggest unresolved issue arising out of the Woodhouse Report is the relationship of accident compensation to the rest of the income maintenance system. The person who is injured and the person who suffers from disease must be treated the same. Distinctions between people based on the cause of their incapacity must be eliminated.

(6) The legislation must be redrafted and simplified.

(7) The method recommended for dealing with permanent partial incapacity in Australia should be adopted in New Zealand.

(8) Benefits should be automatically indexed to inflation as should all other monetary limits in the Act.

(9) The time has come to build some consumer representation into the administration of accident compensation. Those people with the weakest voice are the ones who have been hurt.

(10) There is widespread international interest in New Zealand's Accident Compensation Scheme.

The brief summary of highlights of the discussion that followed presentation of the paper is culled from the report in the Conference Committee: "Conference Brief", to which we are indebted:

The session attracted 80 delegates, many from Australia, reflecting the interest of practitioners there in the concept of no fault compensation.

Mr Palmer stated that, since his paper was prepared, the select committee of Parliament of which

[26] Monroe Berkowitz, supra n 6, at 198.

he is a member had completed its hearings, and he predicted that the Government would not proceed with the most controversial of the proposed amendments.

Most likely to be deleted were:

1. The contribution by the injured person or his employer to medical costs for the first two weeks.

2. The requirement of a stand-down period for the first two weeks in relation to non-work accidents.

3. The provision requiring the employer to pay the first two weeks' compensation for work related injuries.

4. Repeal of s 114.

5. Amalgamation of ss 119 and 120 so that all compensation for non-economic loss is paid on a schedule, with no payment unless the impairment exceeds 15 percent.

Mr Justice Sangster of the Supreme Court of South Australia agreed with Mr Palmer that all distinctions between disadvantaged members of the community should be eliminated. There should not be separate schemes, separate qualifications and disparate benefits for a whole series of selected but overlapping persons. The objective should be to work towards universal and equal assistance for whatever need.

Mr B D Inglis QC, the Chairman of the new Accident Compensation Corporation, stated that the following policies had been formulated by the Corporation in the past $3^1/_2$ months.

1. There is to be a new emphasis on prevention and rehabilitation.

2. Compensation is to be looked on as an entitlement; there is no room for a suspicious or grudging attitude towards claimants.

3. Claimants must be positively helped by the Corporation to get the true measure of their entitlement.

4. The Corporation is to advise the claimant what information is needed to establish his entitlement.

5. The Corporation is to help the claimant to get the information he needs quickly.

6. The Corporation will settle claims and start payments with the mimimum of delay.

7. If the claimant's solicitor raises a legal point he must be put in touch with the staff member qualified to handle that point at once. Legal officers will always be available.

8. If a dispute arises the point should be open to reasonable negotiation and settlement, if possible, to avoid delay and expense to both sides.

9. If a review is successful, or at least justified, the claimant should recover his reasonable legal expenses. A simple guide may be established as to what is reasonable, or the profession may be encouraged to set up local committees to whom disputed costs can be referred.

10. The Corporation will contribute towards the claimant's legal expenses in establishing proper entitlement, even though no application for review has been filed.

11. Periodic compensation will in general not be stopped or reduced until reasonable notice and opportunity to make representations have been given.

NEW ZEALAND LAW JOURNAL
1981 — INDEX