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# Necessary Reform and Needless Change

Readers of the *Economist* will have seen during 1983 a series of six articles on English justice. They were in many ways a depressing series. The general tenor of the articles was well summed up in the title given to the first of them namely, *A Legal System Under Stress*.

The articles looked at such topics as the division of the legal profession between barristers and solicitors, the Judges, the costly and time consuming processes of the Civil Courts, the need for procedural reform in criminal trials and finally of course the inevitable question of legal costs and legal aid.

In the first articles, the ironic comment by a High Court Judge early in this century is quoted to the effect that "Justice like the Ritz Hotel is open to all". The article goes on to comment that this joke is now wearing rather thin.

One of the major difficulties involved in all talk of law reform is that there is often a tendency to look to peripheral matters. No one would pretend that the profession itself and the Court system are perfect, and suggested reforms must always be considered with an open mind. But the crucial problem really relates to the change that is taking place in the law itself both in what it is and the matters with which it deals. It is these changes that need to be recognised and understood if the problems that result from them are to be looked at realistically.

The first and most obvious difficulty is the proliferation of statutes and precedents. Parliament sees its main and principle function now as the production of more and more statutes. It can be said that in a very real sense it now exists solely for that purpose, and it judges its own effectiveness and proclaims its value to the public in terms of the number of laws it manages to produce in any Parliamentary session.

To the practising lawyer, the ever growing array of volumes of the Statutes of New Zealand is as appalling in terms of the thought of what might be contained in them as in the price that has to be paid for them. Furthermore the reports of decisions keep growing in number and variety. In this respect the doctrine of precedent makes the ready availability of decisions that are – or might be – relevant, quite essential. The availability of computer retrieval of precedents will make it inevitable that submissions will become more and more complex and refined.

The point about all this is that the sheer mass of the law has totally altered the context in which the mythical average citizen might need the services of a lawyer, and the flexibility of attitude and approach that is required both from practitioners and from Judges.

It is a commonplace saying that institutions and organisations must change or die. This in itself is true enough; but there is also of course the risk that an institution can change and die, with the death being brought about by the very changes that are undertaken.

Proposals for reform have to be looked at both sympathetically and critically. They must be looked at sympathetically for the simple reason that there is always room for improvement. They must be looked at critically to see that they will effect a real remedy for the problem that exists and not have an incidental effect that is deleterious in other areas. Mere change must not be confused with useful reform.

In this respect one of the great problems that arises is in relation to the speedy disposition of cases. As a general principle it is impossible to argue that cases should not be dealt with expeditiously. But any movement for reform in that area has to be considered very carefully in relation to the purpose of the judicial system. This is not in the first instance to be efficient and speedy in the determination of cases. More important is that each individual case be considered with that degree of care and attention that the litigants are entitled to. The Courts exist for the sake of the litigants and not the other way around. Efficiency in the working of the Courts is itself of course an essential element in doing justice, but as between the two justice must come first.

The matter was neatly put some years ago by Henry Cecil in his book on the English Judge. He took the view that if a case came before him as a Judge and counsel indicated that an adjournment was sought because the case was not yet fully prepared, it was better for the Judge to go and play golf, after awarding costs as might be appropriate against the party in default, rather than try the issue on a basis that one of the litigants must feel was unjust.

**P J Downey**

# Obituary

# Professor J F Northey

*At the Memorial Service for the late Professor J F Northey one of the speakers was Mr Justice Chilwell, who as he said spoke as a friend rather than a Judge. His Honour also prepared a short obituary notice giving brief details of Professor Northey's career. The Judge has agreed to the obituary notice and some extracts from his remarks at the Memorial Service being published as a tribute to the memory of Professor "Jack" Northey.*

## Career

The death of Auckland University Professor J F Northey BA, LLM, D Jur, LLD occurred on 6 October 1983. Appointed Professor of Public Law in 1954 and Dean of the Faculty of Law in 1965, he held those positions without interruption until his death. In August his service to the Law School was recognised by those assembled in plenary session for the opening of the Centennial of the School by a resolution which made reference to the "great things" he had done during a life of devotion to the School. The resolution carries the signatures of His Excellency The Governor-General, the Chief Justice and the Attorney-General. It is recent testimony of the strength of Professor Northey's contribution to the largest Law School in New Zealand.

He was a University Council member for 12 years, a member of several Professional Boards, of the Senate and of Council Committees. There were occasions when he served as Assistant Vice-Chancellor, Deputy Vice-Chancellor and Acting Vice-Chancellor.

The Professor did not confine his activities to the University. His opinion was frequently sought by members of the legal profession and he encouraged participation by commercial people in the working and reform of commercial law. This he achieved through the Legal Research Foundation in which he had the guiding hand since it was established in 1956. His interest in law reform coupled with his special interest in public and administrative law made him a natural choice for appointment to the Public and Adminsitrative Law Reform Committee.

For 16 years he worked with that Committee and was its Chairman for eight. He devoted much time to the work of the Committee. Its work has been prodigious. It has achieved a standard of excellence which has received high praise within and without New Zealand. The Committee was responsible for one of the most important enactments of this century – the amendment to the Judicature Act providing for review by the High Court of administrative decisions.

Professor Northey's interests extended beyond New Zealand. In 1951 he obtained his Doctorate of Jurisprudence from the University of Toronto. In recent years he held visiting appointments to the University of the South Pacific. The Cook Islands Government appointed him their constitutional adviser in 1979, a position which he held until 1982. He advised that Government on certain far-reaching amendments to its Constitution which came into force in 1982. The Professor wrote extensively in many fields of law. His written work is well-known throughout New Zealand and overseas.

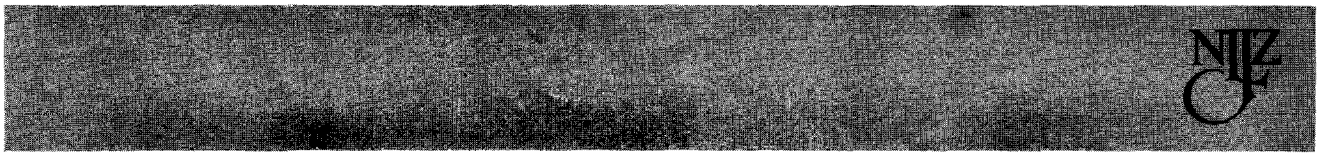
## Memorial Service Tribute

Life is for living. In fact we consume life. Few would really wish that today remain forever. We would become bored with it. We would miss the excitement of tomorrow. So we quite deliberately consume life knowing that there is a limit. Some do it at a faster pace than others. Usually they are the ones who have a significant impact upon others. Jack Northey consumed his life at a very fast pace.

Death brings an end to consumption. The limit has been reached. But it does not bring an end to impact. In some cases it may enhance it. History tells us that. . . . I believe that everyone has impact: it may be something which remains within the family not extending further. That is not the case with Jack Northey. His impact has spread far. It was impact for good never for evil. . . . This concept of impact may take many forms. In the case of Jack Northey it was, I believe, influence. Few could have contact with Jack without being influenced.

Of course his influence goes far beyond us. It goes up the road to the Law School and beyond. How many hundred present and former members of the staff are there? How many thousands of law students are there who carry Jack's influence? The complete answer can never be known nor the quality of the influence. I would add it up by giving a descriptive name to the Law School. It is Jack Northey's Law School. Whatever changes occur in the future those presently living who have lived in Jack Northey's Law School will carry that experience for about 60 years. The chances are that his influence will extend far beyond that. But 60 years cannot be contradicted. . . .

This is the occasion and the time now for me to say: Thank you, Jack, for your magnificant service to justice, for your fearless enhancement of professionalism, for your fearless resolution of the problems involved in the creation of your law school. More importantly thank you for your great contribution as a husband, as a father and as a patriach of a wider family.



# Case and Comment

## Contracts — Exclusion Clauses — Limitation of Liability

In *George Mitchell (Chesterhall) Limited v Finney Lock Seeds Limited* [1983] 3 WLR 163 (Court of Appeal decision noted [1983] NZLJ 96) the House of Lords unanimously confirmed that exclusion clauses are not to be deprived of effect by the doctrine of fundamental breach and that in all cases, it is a question of construction as to whether an exclusion clause protects the party for whose benefit it was inserted into the contract. Lord Bridge, delivering the primary judgment, cited *Photo Production Limited v Securicor Transport Limited (Securicor 1)* [1980] AC 827, as giving "the final quietus to the doctrine that a 'fundamental breach' of contract deprived the party in breach of the benefit of clauses in the contract excluding or limiting his liability". – ibid, at p 168. (Although in *Securicor 1* only Lord Diplock expressly adopted the "*Cootesian*" approach to exclusion clauses in that case).

Two points may be made. First of all, the Lords of Appeal have maintained a distinction, drawn previously by them in *Ailsa Craig Fishing Co Limited v Malvern Fishing Co Limited (Securicor 2)* [1983] 1 All ER 101, between limitation clauses and exclusion clauses. In that case, Lords Wilberforce and Fraser stated that limitation clauses are not, as a matter of contract, as hostile as exclusion clauses – ibid, at pp 102-103, 105-106 respectively. In their view, limitation clauses are more consensual in nature, being more likely to have been expressly agreed to by the parties than would be the case with exclusive clauses. Consequently, in the Judge's view, limitation clauses are subject to less rigorous principles of construction than the exclusion clauses (primarily with respect to the issue of whether they protect a party from negligence – see *Canada Steamship Lines Limited v R* [1952] AC 192 PC).

With respect, one wonders how often the basis for this distinction would be true, ie, whether parties generally do address their minds to limitation clauses more than exclusion clauses. Further, one wonders whether a more valid distinction is that, as both a matter of contract and as a matter of construction, the operation of an exclusion clause must be limited in the realisation that it cannot have been intended to absolve one party from all responsibility or liability for the misperformance or non-performance of his contractual obligations. Were this the intention, there could be no intention to contract. There is no need for this rule of construction with respect to a limitation clause because of the very nature of such a clause.

The second point is that there is now a trilogy (at least) of House of Lords decisions which affirm that the doctrine of fundamental breach has perished and that exclusion and limitation clauses are to be construed (admittedly contra proferentem) as qualifying the primary and secondary obligations assumed by the parties. It is quite true that in England, there exists a check on the operation of such clauses, firstly, by virtue of the provisions of the Unfair Contract Terms Act 1977 and secondly, by virtue of the provisions of the Sale of Goods Act 1979. However, it is submitted that the conceptual correctness of the statements by the House of Lords as to the operation of exclusion clauses should be adopted by the Courts in New Zealand, leaving the boundaries of consumer protection and other related matters to be determined by the legislature. (Cf s 4 Contractual Remedies Act 1979 with respect to misrepresentation).

**S K Dukeson**

## Legal Professional Privilege — Australia Moving Towards the New Zealand Approach

In a recent decision of the Full Court of High Court of Australia (Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson, JJ) handed down on 26 October, 1983 the majority of their Honours, Gibbs CJ and Mason J dissenting, held that legal professional privilege in Australia is not merely a rule of evidence confined to judicial or quasi-judicial proceedings. The majority held that it is a substantive rule of law applicable also to administrative inquiries. The case is *Baker v Campbell* (as yet unreported. The references in this comment are to the copy of their Honours' judgments distributed by the High Court itself). In reaching this decision the majority, inter alia, referred extensively to the New Zealand Court of Appeal decision in *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191.

The decision in *Baker v Campbell* represents a reversal of the recent attitude of the High Court towards restricting the ambit of legal professional privilege. Firstly, in *Grant v Downes* (1976) 135 CLR 674 the Court had restricted the privilege to confidential communications between legal adviser and client for the *sole* purpose of enabling the client to obtain, or the legal adviser to give, advice or for the *sole* purpose of litigation actually occurring or contemplated by the client. Confidential communications between a legal adviser or the client and a third person made for the *sole* purpose of litigation actually occurring or contemplated by the client were also to be covered. The *sole* purpose test thus adopted narrowed the ambit of the

privilege considerably. The High Court reiterated that test in *National Employers Mutual General Insurance v Waind* (1979) 53 ALJR 355.

In the United Kingdom the *dominant* purpose test was adopted by the House of Lords in *Waugh v British Railway Board* [1980] AC 521. In New Zealand the *appreciable* purpose test was adopted in *Konia v Morley* [1976] 1 NZLR 455. The decision in *Baker v Campbell* did not affect the sole purpose restriction on legal professional privilege.

Secondly, the High Court had even further restricted legal professional privilege in *O'Reilly v Commissioner for State Bank of Victoria* (1983) 57 ALJR 130 by deciding that the privilege is a rule of evidence only and, as such, is available only in judicial or quasi-judicial proceedings. In *O'Reilly* the privilege was held not to be available in an administrative inquiry held by the authorised delegate of the Commissioner of Taxation under the Income Tax Assessment Act 1936 (C'th). The majority of their Honours in that case refused to be persuaded by the decision of the New Zealand Court of Appeal in *West-Walker*, and followed the reasoning of the English Court of Appeal in *Parry-Jones v Law Society* [1969] 1 Ch 1 where the privilege was taken to be "merely a contractual duty of confidence" (Diplock, LJ p 9).

In fact, if the High Court had not granted leave to the plaintiff in *Baker v Campbell* to argue afresh whether legal professional privilege was confined to judicial or quasi-judicial proceedings, *O'Reilly* would have decided the issue of the limits of the privilege in *Baker*. The High Court allowed the plaintiff to re-argue the limits on the grounds that there had been Canadian decisions (*Re Director of Investigation and Research and Shell Canada Ltd* (1975) 55 DLR (3d) 713, *Solosky v Queen* (1979) 105 DLR (3d) 745 and *Descoteaux v Mierzwinski* (1982) 70 CCC (2d) 385) and US and New Zealand decisions contrary to the *O'Reilly* approach.

In *Baker v Campbell* the plaintiff had retained a solicitor to advise him in relation to aspects of a scheme which he had devised to minimise liability for sales tax. A Magistrate issued a warrant to the police under s 10 of the Crimes Act 1914 (C'th) authorising the police to search the solicitor's offices and to seize documents specified generally in the warrant. The documents were all brought into existence for the purpose of the plaintiff obtaining the professional advice of the solicitor and some of the documents were created solely for that purpose. The question arose whether the documents, in the solicitor's possession, were subject to legal professional privilege and, if so, was that common law privilege modified or abrogated by s 10 itself.

The judgment of Wilson J is perhaps, the most interesting as His Honour changed his approach to the limits of the privilege from the narrow *O'Reilly* approach to a broader approach in keeping with that taken by the Courts in other common law countries. His Honour also took the unusual step of referring to a decision of the European Court of Justice, *AM & S Europe Ltd v Commission of the European Communities* [1983] 3 WLR 17, in support of the broader approach.

Wilson J stated (p 41) that confidentiality alone cannot be the basis of this privilege even though originally it may have been so. He agreed that:

> The public interest which led the common law to favour the relationship between solicitor and client over other confidential relationships was the recognition that the involvement of representatives skilled in the law who had been fully instructed was indispensible to the proper functioning of the legal system. . . .

However, he stated that the privilege could not now be limited only to legal proceedings. Once the privilege had been extended to communications between legal adviser and client "undertaken with the object of seeking or giving legal advice" only, then that showed that the public interest involved in the privilege extended beyond legal proceedings. As Wilson J said (p 42):

> In fostering the confidential relationship in which legal advice is given and received the common law is serving the ends of justice because it is facilitating the orderly arrangement of the client's affairs as a member of the community. Furthermore, in promoting the faithful discharge of his responsibilities and the enjoyment of his rights under the law the ends of justice are being served. It is in the public interest to encourage the service of such ends.

Wilson J also referred to the further reason that to deny the benefit of the privilege to answer a search warrant would effectively also deny the benefit of the privilege in any subsequent legal proceedings. His Honour further said that the limited range of communications to which the privilege extends will of itself ensure that the privilege is still "confined". This is surely a reference to the sole purpose test which Wilson J is using now as the major limit on the privilege.

The majority of the High Court in *Baker v Campbell*, using similar reasoning to Wilson J above, then decided that s 10 of the Crimes Act (C'th) did not clearly disclose a legislative intent to take away the common law privilege which was, therefore, available to answer a search warrant issued under that section.

Having given such a wide ambit to legal professional privilege Wilson J dealt with the problem of the procedural difficulties raised where the claim of privilege is contested in an administrative inquiry or in answer to a search warrant. Wilson J stated (p 44) that these difficulties could be overcome "if both sides co-operate in a reasonable and responsible way". Gibbs CJ, in dissent, strongly argued (p 16) for the provision of a procedure under which an independent authority, either judicial or administrative, could promptly determine such disputes. Mason J (also in dissent) used the argument that there was no such independent authority as one of his arguments to say the privilege did not apply to non-judicial proceedings.

I conclude by quoting, in favour of the High Court's new approach, the words of Deane J (p 70):

> That general principle [that legal professional privilege extends to administrative inquiries] represents some protection of the citizen – particularly the weak, the unintelligent and the ill-informed citizen – against the leviathan of the modern state. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents.

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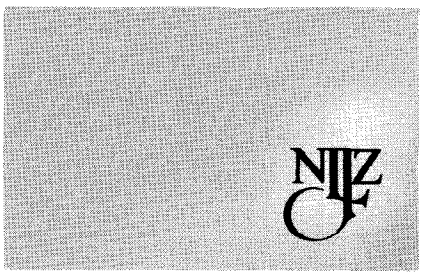


# COMPANY TAKEOVERS

*By P E Ratner, Research Officer, Securities Commission, BA, Wesleyan University, JD, Columbia Law School, admitted to practice in California, Connecticut, New York and New Zealand.*

*The author has been for three years Research Officer for the Securities Commission. In this article he looks at the background to the three volumes that the Securities Commission has recently published on the topic of company takeovers. The attention of practitioners with an interest in this field is drawn to the fact that the Securities Commission is currently considering the issues dealt with in this article. Comments on the issues involved would be welcomed by the Securities Commission, but must be made promptly.*

Pursuant to s 10 of the Securities Act 1978 (the "Act"), the Securities Commission has recently published material for a review of the law on company takeovers, entitled *Company Takeovers: A Review of the Law and Practice*. There are three volumes:

Volume 1 — *A Review of the Law and Practice* — outlines the main arguments for and against reform of the law relating to company takeovers; summarises the relevant legislation in overseas jurisdictions; and contains a proposal for reform.

Volume 2 — *Reports of the Securities Commission on the Takeovers of: Bing Harris & Co Limited by Brierley Investments Limited; Property Securities Limited by City Realties Limited; and The Canterbury Frozen Meat Company Limited by Primary Producers Co-operative Society Limited* — contains the Commission's reports on three takeovers resulting from hearings held by the Commission pursuant to s 10 of the Act. These reports have been with the parties to the particular matters for some time but, with the exception of the Bing Harris report, they have not previously been made public.

Volume 3 — *Legislation in New Zealand and Selected Overseas Jurisdictions* — contains extracts from the text of the relevant legislation and codes of practice in New Zealand, the United Kingdom, Australia, Canada and the United States of America.

Although the publication contains a fairly specific set of proposals for reform of the law — which I will return to later — it must be stressed that the Commission has made no determination as to whether it should recommend reform to the Minister or, if it does, what form that recommendation will take. As stated at para 7 of Volume 1, the "proposals are put forward as suggestions to focus discussion and should not be taken as representing the concluded views of the Commission". Although s 70(3) of the Act — which *requires* the Commission to give interested persons a reasonable opportunity to make submissions on its recommendations for regulations on various matters — does not apply in respect of recommendations for law reform under s 10(b), the Commission has adopted a policy of issuing background papers and inviting comments from interested parties before making law reform recommendations[1].

At this point I believe it is appropriate to interject two comments. The first is that the views expressed here are my own and do not necessarily reflect those of the Commission. The second is of a personal nature. I have been a research officer at the Commission since January 1981. During that time I have regularly attended the Commission's monthly meetings and participated — both as a draftsman and adviser — in the formulation of the Securities Regulations 1983 (SR 1983/121), the recommendations for Contributory Mortgage Regulations,[2] the proposed Nominee Legislation, and the notices of exemption granted by the Commission pursuant to s 5(5) of the Act. I do not believe that it is a breach of s 24 of the Act to disclose that the members of the Commission have a wide variety of background and disparate viewpoints; a situation which, more often than not, leads to intense discussions concerning matters of policy.

During my three years with the Commission, I am not aware of a single submission that has not been carefully considered. As a staff member who is often called upon to draft, redraft and redraft yet again, I have been occasionally frustrated by the Commission's willingness to consider and act upon the submissions it receives. As a member of the public, who will ultimately have to live with the ramifications of the Commission's decisions, I gain no small measure of assurance from the knowledge that the individuals charged with making recommendations to Government in this area have not fallen into the trap of believing that they, and they alone, hold the answers.

This latter observation is particularly apt in the area of company takeovers which, if the experience of overseas jurisdictions is a true measure, is one of the most complex and difficult areas in the field of securities regulation. It is one in which legal and economic considerations are so thoroughly enmeshed as to put those who attempt to reach the heart of the matter in mind of the mythological snake Ouroboros which swallows its own tail. The Commission is ultimately accountable for its recommendations but those who do not take advantage of the opportunity to contribute their considered opinions and

experience must accept some measure of responsibility if they are dissatisfied with the result.

Not all points of view can be met. The possibilities range from a complete absence of regulation to requirements for some form of government or independent appraisal and approval of every takeover offer. Each point of view has its adherents and a bibliography of the legal and economic literature would, itself, comprise a substantial volume. The difficulty of reaching a consensus is well illustrated by the recent report of an advisory committee appointed by the US Securities and Exchange Commission to study and make recommendations on the reform of the law on takeovers in the United States.[3] That report, prepared by a mixed panel of practitioners, business persons and academics, contained no less than three dissenting opinions. Thus, at the risk of undue repetition, I want to stress that the proposals for reform are just that – proposals put forward to provide the centre point for informed debate. The jury has not yet retired for deliberation.

In dealing with proposals for reform of the law the starting point is the existing law. The principal source of statutory regulation in the area of company takeovers[4] in New Zealand is the Companies Amendment Act 1963 (the "1963 Act").[5] One other potential source of law should be mentioned and that is the Commission's proposed nominee legislation which was recommended to government in the form of a draft bill in May 1982. The substance of the proposal is that any person who acquires or disposes of a "relevant interest" in 5 percent or more of the voting securities of a public listed company must promptly disclose the fact of the transaction, his identity and the price at which the transaction took place. Thereafter, acquisitions or dispositions of 1 percent or more must be reported until the person's holdings fall below the 5 percent threshhold.

The concept of relevant interests takes account of the fact that a seemingly limitless variety of sophisticated arrangements with a view to controlling the exercise of voting rights is in use. It is not sufficient to base a law concerned with providing relevant information to the marketplace on the legal concept of ownership. Broadly speaking, under that proposal a person acquires a relevant interest in a share when he enters into any agreement, arrangement or understanding whereby he has the power to control the acquisition or disposition of voting shares or to exercise the voting power attached to them.

Depending upon one's viewpoint as to the objects of a takeover law, it may be argued that the enactment of that legislation would be sufficient. Certainly it will lead to a better informed market and, to some extent, disclosure of prices will bring pressure on offerors to treat all offerees equally. However, it will not prevent "first come first served dawn raids", pre-emptive transactions,[6] and pressure tactics designed to stampede target company shareholders. The Commission has expressed the view that the nominee legislation should proceed independently of the takeover review and that the enactment of the reporting legislation will probably not be sufficient to establish and maintain an informed and competitive market for securities or for the control of public listed companies.

Turning to the 1963 Act, it is fair to say that it has become a dead letter. This arises from two principal features of the legislation. The first is s 3(a) which provides that the 1963 Act does not apply in respect of any "scheme involving the making of offers for the acquisition of . . . any shares in any company, if offers are made to not more than 6 members of that company". The exemption allows a person to obtain control of a company by purchasing the shares of major shareholders without the necessity to comply with the Act. A combination of factors – among them the increased size of institutional shareholdings, the greater willingness of institutions to trade actively in those holdings, and the nature of corporate governance (which, in some cases, results in effective control attaching to ownership of parcels as small as 10 percent, has meant that a large number of transactions which, by almost any definition, ought to be classified as company takeovers are exempt from the provisions of the 1963 Act.

A much more significant gap in the 1963 Act arises because its provisions apply only to a "takeover offer". That term is defined in s 2 as "an offer in writing for the acquisition of shares under a takeover scheme". The term "scheme" which is not defined was described by Dixon CJ as a "vague and elastic word" in *Australian Consolidated Press Ltd v Australian Newsprint Holdings Ltd.*[7] In a series of decisions, the Courts have held that the 1963 Act applies only to offers contained in a written document, eg, *Multiplex v Speer* [1966] NZLR 122; *Carter Holt Holdings Ltd v Fletcher Holdings Ltd* [1980] 2 NZLR 80.

The significance of this exception was most recently considered by Quilliam J in the as yet unreported case of *Tatra Industries Ltd v Scott Group Ltd* (unreported HC Wellington No A244/83, Judgment 19 August 1983). Briefly, the facts of the case were these. On 10 June 1983, Tatra Industries Limited ("Tatra") which then owned about 12 percent of the shares in Scott Group Limited ("Scott") "stood in the market" with an offer to acquire up to 51 percent of the shares of Scott. Standing in the market is a procedure whereby a sharebroker announces at a trading meeting of the Stock Exchange that on behalf of his principal – whose identity may or may not be disclosed – he will accept offers to sell shares in the target company at a stated price on a first come, first served basis. By 15 June, Tatra had acquired 51 percent of the shares in Scott and ceased trading. Scott refused to register transfers of the shares on the basis that the contracts were in breach of the 1963 Act and proceedings were instituted by Tatra under the Declaratory Judgments Act 1908 to determine the validity of what had been done.

It was conceded by all parties that Tatra had not, in the conventional sense, sent written offers to the Scott shareholders. However, Scott pointed to three writings which it submitted constituted "an offer in writing for the acquisition of shares under a takeover scheme" for the purposes of the 1963 Act. These were: (1) The notice given by Tatra to the New Zealand Stock Exchange of its intention to stand in the market pursuant to the Stock Exchange Rules for Acquisition of a Substantial Shareholding; (2) Newspaper accounts of the offer which contained, among other things, certain remarks made by the Chief Executive of Tatra; and (3) The chalking up on the Board of the Stock Exchange of Tatra's bid quotation.

Relying on the earlier decisions, the Court held that none of these "writings" brought the business within the purview of the 1963 Act. Of particular significance is the statement by Quilliam J that:

> Having regard, however, to the general scheme of the 1963 amendment I do not consider that the expression "offer in writing" *was ever intended to include the normal day to day practices of the Stock Exchange.* If that had been intended then I believe the legislation would have been expressed in much wider terms, [emphasis added].

The present position then – at least in respect of cash takeover offers – is that compliance with the 1963 Act is optional. Those who wish to avoid the disclosure obligations under that Act may do so simply by standing in the market. If for

no other reason, it is submitted that the present legislation which differentiates transactions for the control of companies on grounds of form and not substance is unsatisfactory and merits reform.

Having determined that reform of the law is needed, however, is only the starting point. The next question which the Commission asked is: what ought to be the objectives of a takeover law?

The Commission indicated the policy reasons for and against a takeover law. They are legal and economic. In the past, the legal reasons seem to have received most prominence, probably because the development of takeover law, like the rest of commercial law, has mainly been done by lawyers. The legal reasons emphasise the equality of securities in the same class, and one certainly cannot deny that equality amongst equals is an important matter. There are, however, strong economic arguments about takeovers which, in the process of policy formation, are probably more important than the legal ones.

Takeovers have become an important means of allocating resources within the economy. After all, the object of the process is to transfer the control of resources from one group of people to a different group of people. This is part of the ordinary processes of competition in a market economy, but two features must be borne in mind. First, companies are not commodities. They are complex entities that, it is argued, cannot be dealt with as commodities. Secondly, there is no continuous auction market for the control of a company. Contests for control are unusual affairs, each with its special features.

At an early stage, the Commission came to the view that as a general proposition, takeovers should neither be encouraged nor discouraged. The natural forces, or the "invisible hand", at work in an economy should not be turned aside by any artificial bias in the law. The law should be neutral in attitude, being neither for nor against takeovers, but merely making them possible under rules characterised by an even-handed fairness to the participants. So the Commission looked closely at the institutions and mechanics by which takeovers take place. Does the law and practice provide mechanisms or techniques appropriate for the business? This is the most important question in the argument about a takeover law. Are the existing mechanisms on and off the Stock Exchange appropriate to establish and service a market for the control of companies?

After reviewing the arguments and experience on this matter, both here and overseas, the Commission has moved towards the conclusion that changes are necessary to provide a market appropriate for dealing in the control of companies. That is, a market designed for specialties, not commodities, which is both efficient in the sense that prices reflect information (and, perhaps more importantly, relevant information is available to the participants to enable them to make informed judgments about prices) and competitive. One must also be conscious of the distinct possibility that legislative interference in the market place can lead to unforeseen consequences and distortions. The arguments for and against such a policy are outlined in Volume 1 — particularly in chap 4.

Volume 1 concludes with a series of specific proposals for reform of the law. The main paragraphs are reproduced as an Appendix and it should be stressed that the brief summary contained here cannot substitute for a careful study of the proposals themselves.

7.2 proposes the repeal of the existing law and I believe there will be general support for that.

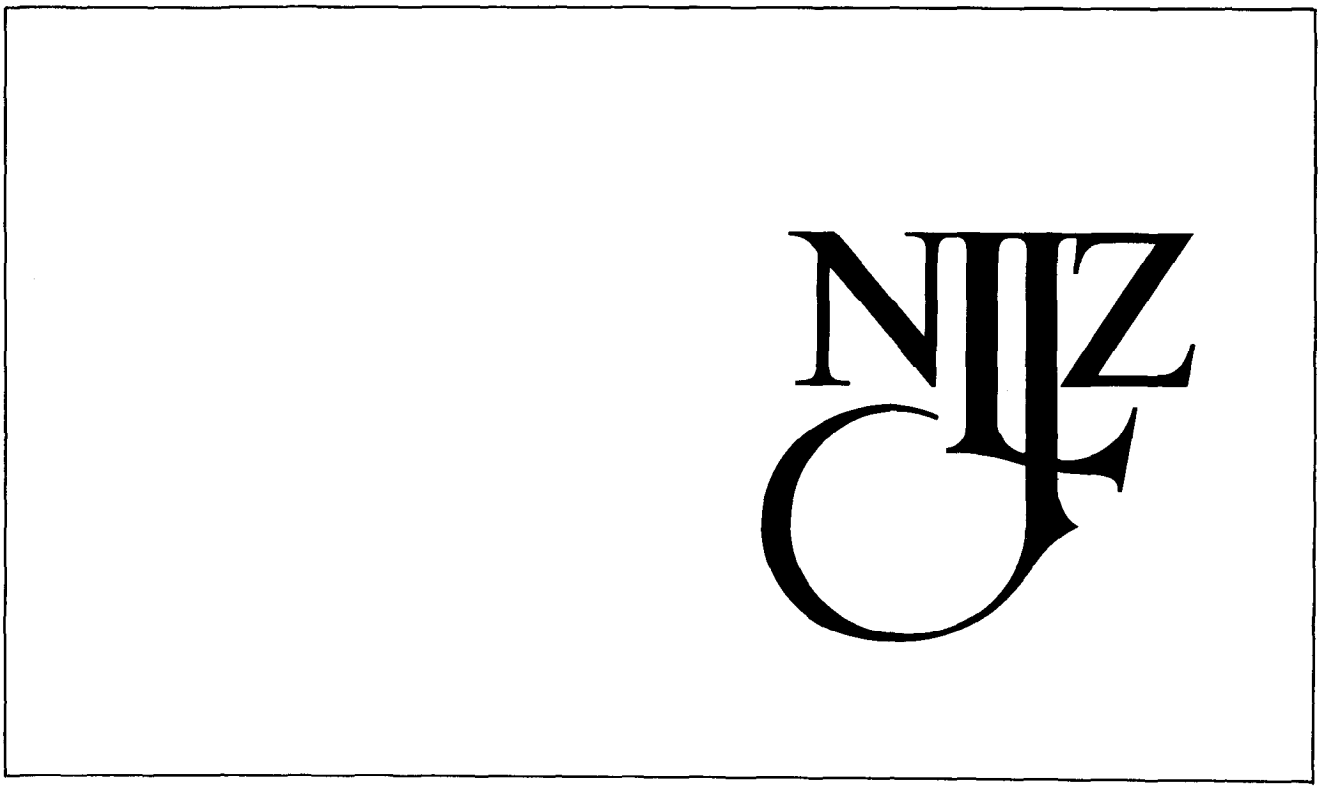
7.3 proposes that the same definitions put forward in the Commission's recommendations about nominee shareholders should be used in a takeover law. That is, the law should apply to the acquisition of relevant interests in voting securities so that its provisions are triggered before, rather than after, *de facto* control may have already passed.

7.4 introduces the main theme. The old idea of a "takeover scheme" would be discarded. Instead, the methods by which relevant interests in voting shares could be acquired in accordance with the law would be defined on the following basis:

(a) Acquisitions where the holding remains below 20 percent could be made by any means.

(b) Acquisitions which take the holding above 20 percent but below 90 percent could be made only by one of the following:

(i) By a "takeover offer".



(ii) By "standing in the market".
(iii) By "creeping purchases" of not more than 3 percent in any 6 months.
(iv) By subscription to a new issue.

(c) Acquisitions above 90 percent could be made by any means.

The draftsman of a new statute would probably begin by saying that it shall not be lawful to acquire relevant interests in voting shares except by the prescribed means. That is what the Australians do in their Companies (Acquisition of Shares) Act 1980, and it has the advantages of directness and simplicity.

A new kind of takeover offer is described in para 7.5. This would be a written offer for all the issued securities or for a defined number or proportion of them, ie, the offer might be total or partial. It would be the only method of making a partial offer that will lift the holding above 20 percent by more than 3 percent in any six months. For example, if I want 49 percent, I would be able to get it only by a takeover offer or by creeping purchases (which, of course, will be reported to the market).

7.5 describes a new proposal for standing in the market. The offeror names his price, and must accept all comers. Consequently, it would not be possible to offer to purchase a defined proportion of more than 3 percent in any period of six months if the acquisition would lift the purchaser's holdings above 20 percent.

The Commission considered, but did not propose the adoption of, a number of interesting ideas overseas. One of the most controversial of them is Rule 34 of the City Code on Takeovers and Mergers, London. It requires a person who has obtained 30 percent to make a bid for the rest, thus giving the other shareholders the opportunity to quit their holdings by sale to him.[8] Another is the Ontario legislation's prohibition against conditions attaching to offers other than the right to establish a minimum number which must be tendered before the offeror is bound.[9] Yet another are the provisions of the American legislation which contain a general prohibition against the use of "fraudulent, deceptive or manipulative acts or practices" in connection with tender offers – a section which has been interpreted by the federal Courts as applying to certain defensive tactics as well as to activities of offerors.[10]

Finally, I would draw attention to Volume 2 of the Takeover Review which contains the reports of the Commission on the three takeovers concerning which the Commission has held hearings. It is all very well to debate the pros and cons of policy on a theoretical plane. Decisions, however, ought to be considered on a practical level because that is where the worth of any policy is ultimately tested. Even a cursory reading of the Takeover Review will reveal the impact which these investigations have had upon the Commission's thinking in this matter. While the Commission cannot say for certain what would have happened if its proposals had been in force when these three takeovers occurred, it is at least possible to state with certainty what are the results under the present legislation.

There, are, I suggest, many lessons to be derived from these three studies. Shareholders are treated unequally. Offerors are able to conclude unreported transactions with major shareholders in public companies which effectively pre-empt potential competitive bidders and prevent the boards of target companies from negotiating with the bidder from a position of any strength. Offerors can obtain access to information known only to themselves and the boards of the target company.

Whether such practices ought to be encouraged, discouraged or left to the common law are the decisions which must be made. The point has often been made in the past that inaction is itself a form of action for it is an endorsement of the *status quo*. We can choose to adopt new rules or we can choose to do nothing. The publication of the Takeover Review indicates that we have reached a time of decision.

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1 See, "Nominee Shareholdings in Public Companies; A Review of the Law and Practice with a Proposal for Reform", Securities Commission, and especially the Terms of Reference attached as Appendix A at p 170.

2 "Contributory Mortgages; Proposals for regulations under the Securities Act 1978", Securities Commission, 7 December 1981. A Proposed Second Draft was circulated to interested parties in September 1982. The Commission expects to release a proposed Third Draft early in 1984.

3 "Advisory Committee on Tender Offers; Report of Recommendations", US Securities and Exchange Commission, 8 July 1983.

4 There is some measure of difficulty with terms in this area. For the purposes of this paper, I am using the term "company takeover" both in the sense of meaning an acquisition of shares in a company, either directly or indirectly, whereby a person obtains an interest in a sufficient number of shares to exert control over the policies of the company and the more popular sense of acquisitions of substantial parcels of shares in a company. I leave to the reader to determine for himself what is the level at which "control" can be said to exist and what are "substantial parcels". The term "offeror" is used to mean a person who seeks to acquire shares – including one who invites others to make offers to sell – and "offeree" has the reciprocal meaning. The company whose shares are the subject of the offer or invitation is referred to as the "target company". See Vol 1, para 1.5 at pp 2 and 3.

5 Other sources of regulations are: The Companies Act 1955; The Commerce Act 1975; Rules promulgated by the New Zealand Stock Exchange; the Overseas Investment Act 1973; and the Overseas Investment Regulations 1974. See Vol 3, pp 1 to 67.

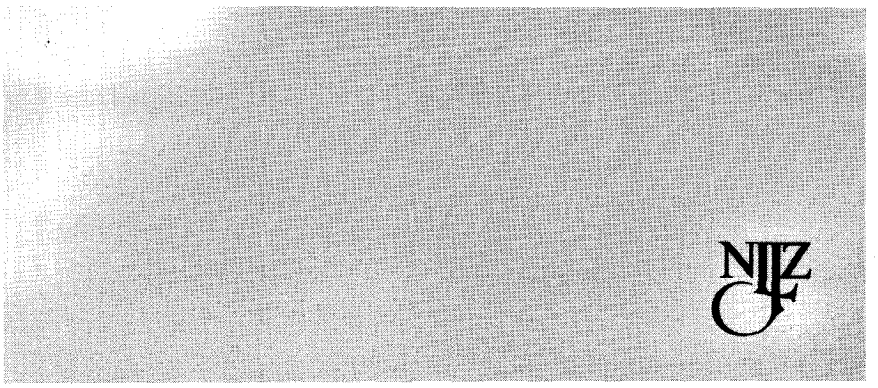
6 A pre-emptive transaction can be said to be one in which a person acquires an interest – by means of outright ownership, options or informal arrangements – whereby he controls a sufficient number of shares in the target company to control the acceptance of a competing offer.

7 (1960) 105 CLR 473 at 479. The concept of what is a "scheme" for the purposes of the Commerce Act 1975 caused considerable difficulties in *In the Matter of a proposed takeover by Fletcher Holdings Ltd of Carter Holdings Limited*, Commerce Commission Decision No 47, 24 September 1980, Mr JR Tipping dissenting.

8 Volume 1, para 6.2.12 at pp 66 and 67; Rule 34 of the City Code on Takeovers and Mergers is set out at pp 105 and 106 of Vol 3.

9 Volume 1, para 6.4.8 at pp 84 and 85; Ontario Securities Act, s 89(1), (12) set out at p 274 of Vol 3.

10 Volume 1, para 6.5.8(j) at p 102; Securities Exchange Act of 1934, s 14(e) set out at p 313 of Vol 3.



## Appendix

*Extract from "Company Takeovers"*

**Published by the Securities Commission — 5 October, 1983**

**Chapter 7 — Proposals for a New Takeover Law in New Zealand**

7.1 In this section we put forward some proposals for the framework for a new takeover law in New Zealand, with a view to attracting specific comment from interested parties. We would stress that these proposals are put forward as suggestions to focus discussion and should not be taken as representing the concluded views of the Commission. If the theme can be captured in a sentence, it is that the proposals are designed to allow competition for the control of companies in an open and informed market for control.

7.2 *Repeal* The Companies Amendment Act 1963 should be repealed and replaced by a new Part of the Securities Act 1978.

7.3 *Application* The new part should apply in respect of "relevant interests" in "voting securities" that have been issued by a "public issuer" defined in the same term as those proposed by the Commission for a new law on the disclosure of substantial shareholdings. Those definitions are as follows:

[Omitted]

7.4 *Acquisitions* The new Part should prohibit the acquisition of a relevant interest in a voting security except:

7.4.1 where, immediately after the acquisition, the acquirer would be entitled to relevant interests in not more than 20 percent of the voting securities issued by an issuer, or

7.4.2 by means of a general offer to all holders of voting securities in accordance with paragraph 7.5 (a "takeover offer"), or

7.4.3 by means of an offer in the market to take all of the voting securities tendered to the offeror within a specified period at a price stated by the offeror and in accordance with paragraph 7.6 ("standing in the market"), or

7.4.4 by any means if the voting securities in respect of which relevant interests are acquired during any period of six months do not exceed 3 percent of the voting securities issued by an issuer as at the end of that period, or

7.4.5 by any means, if, before the acquisition, the acquirer has lawfully acquired the beneficial ownership of more than 90 percent of the voting securities issued by an issuer, or

7.4.6 by subscription to a new issue of voting securities offered by the issuer to all the holders of voting securities pro rata to their holdings, or

7.4.7 in accordance with the terms and conditions of an exemption made by the Commission under s 5(5) of the Act.

7.5 *Takeover Offers*

7.5.1 a takeover offer should be required to be in writing.

7.5.2 a takeover offer should be required to be made to every holder of the securities of the class for which the offer is made.

7.5.3 there should be no limitation on the nature of the consideration that may be offered (which may consist of cash, securities, assets in specie or any combination) except that identical consideration should be offered for each security in the same class of securities.

7.5.4 the consideration offered for each security must not be less than the highest price (or equivalent) paid or provided by the offeror or its associates during the three months preceding the offer.

7.5.5 if a higher price (or equivalent) is paid or provided by the offeror or its associates during the currency of the bid, that price (or equivalent) must be extended to all offerees and acceptors.

7.5.6 a takeover offer may be partial. In this case pro-rating provisions should apply in the event of over-acceptances, (with provision to minimise odd lots).

7.5.7 a takeover offer may be conditional upon acceptances being received in respect of a number of securities stated in the takeover offer, and it should not be possible to waive that condition.

7.5.8 acceptance of a conditional offer should be revocable by the offeree at any time before the condition is fulfilled.

7.5.9 the offer should open not earlier than 14 days after the date the offer is made and should close not earlier than 21 days after opening.

7.6 *Standing in the Market*

7.6.1 an offeror who proceeds by standing in the market should be required to make an announcement through a member of the Stock Exchange to the effect that during a period of 21 days commencing on the first trading day 14 days after the announcement, the member offers, on behalf of the offeror (who shall be named) to purchase all the securities of a specified class tendered to him at a cash price designated by the offeror.

7.6.2 an offer need not be made directly to any member of the target company. The offer need only be communicated by means of a public announcement through the New Zealand Stock Exchange in accordance with the rules of the Exchange.

7.6.3 the consideration offered must be cash.

7.6.4 the consideration offered for each security must not be less than the highest price (or equivalent) paid or provided by the offeror or its associates during the three months preceding the announcement.

7.6.5 If the consideration is increased, the same consideration should apply in respect of all acceptances whenever received.

7.6.6 Partial offers should not be permitted. All shares tendered must be accepted. No pro-rating provisions are necessary.

7.6.7 The offer must be unconditional. A separate contract will be created by each acceptance. Consequently, acceptances will not be revocable.

[7.7 to 7.11 omitted]

7.12 *Further proceedings*

The Commission desires to reach a decision before 28 February 1984 on the question whether or not to recommend the enactment of new legislation on the lines indicated in paragraphs 7.2 to 7.10. Further proceedings in the review will be settled having regard to the responses to those proposals.

# The use of forms

*By J V B McLinden, Barrister of Wellington.*

*"Forms are for mediocrity, and it is fortunate the mediocrity can act only according to routine. Ability sheds its light unhindered." (Napoleon I, Maxims [1804-15])*

While many might imagine they are free to spurn the drudgery often associated with routine and forms, in reality few can afford to do so. Inspiration alone may produce erratic results. The hallmark of the good criminal lawyer is not occasional brilliant success, but a high and uniform standard of performance in the many hundreds of cases he may deal with while he is practising in this area of the law.

Unless you are especially gifted and intelligent the chances are that from time to time the preparation and handling of a case may suffer from overwork, oversight, boredom, laziness, ignorance of the law or any one of a large number of other factors that can affect people working in volatile high pressure situations.

If you accept that this may happen to you then you may feel it is wise to take pre-emptive measures to try and counter faults that may slip in so that even in difficult conditions there is still a good chance that you will faithfully carry out your basic preparation.

Investigating a case is often a tedious job. The prospect of making numerous enquiries from the police, the Court, the client, and any other witnesses may appear so formidable that sometimes corners are cut and only cursory inquiries are made. Nobody can adopt a "holier than thou" attitude in respect of these faults because we are all susceptible to the temptation of taking the easy way out.

The use of a standard form of inquiry cannot offer a magic solution to the problem, but it can (if used regularly) get you into a habit of making set inquiries which cover most of the basic aspects of the investigation and preparation of a criminal matter. The use of the form may also have a psychological advantage in that the questions are all set out in front of you and once they are answered you have "broken the back" of a large part of the inquiry. You will also be able to monitor at a glance the progress you have made on preparation of the case.

**A suggested option**

Set out below is a standard form criminal inquiry sheet used by the author for a number of years. Its content has been updated and revised from time to time. There are a number of comments and qualifications in relation to its use. Firstly, it is not held out to be an exhaustive or "model" type of form. While it has generally served the author's needs adequately, you might wish to design one to suit your own requirements. Next you must remember that it is only a *starting* point, to give you an indication of the inquiries you have made, and what is left to do. You will see there is no area left for client's explanation or brief, because that is something you should prepare independently. The form is divided into four basic sections:

1. Court history and miscellaneous matters incidental thereto.
2. Police material relating to arrest, previous convictions, admissions, searches, identification, summary of facts, co-defendants, officer in charge of the case, etc. (It should be noted that the questions are fairly superficial and should only be used as a starting point in any challenge you might wish to raise to any police evidence.)
3. Client's personal history – family and employment, education and health, matters relevant to name suppression, etc.
4. Steps to be taken for a defended hearing, witness details, pre-trial investigative steps, pre-trial applications (summary and indictable), etc.

The form's content is largely self-explanatory. Each lawyer must develop his own style and technique in relation to the work he does. Whichever approach is used, one cannot afford to ignore the advice in the following quotation:

> It is best do do things systematically since we are only human, and disorder is our worst enemy. Hesiod, *Works and Days* (8th century BC).

---

**COURT**

**POLICE** v _____

Solicitors: _____

Stage first involved: _____

Charges: Section Max penalty

_____

_____

Hearings _____ (A) Police request

_____ (B) Counsel's request

_____ (C) POR/SWR and sentence

_____ (D) Med exam for A/J per detention

_____ (E) formal proof

_____ (F) S 398/47a CJ Act

_____ (G) No proof of service

_____ (H) For prelim hearing

No plea NG G Trial Court custody
Police
bail/custody $
Court bail $
OR surety
Report daily _____
Name suppression (interim) granted/refused (final) granted/refused

Co-defendants _____

_____

Sentence: District Court Judge _____

Probation Officer _____

further particulars/voir dire/name suppression/exhibit examination.

Has alibi notice been served on Crown: Yes/no

Dates committed _____ Service _____

## PERSONAL HISTORY

Address _____

Bus phone _____ Employer _____ Pay _____

Pte phone _____ Occupation _____

Employed since _____ Business reference _____

Unemployed since _____ Means of support _____

Place and date of birth _____

*Education* Secondary _____ Grade _____

University _____ Degree

*Health:* Psychiatric _____ Narcots abuse _____

Alcoholic abuse _____ Physical health _____

_____

*Family* Married Single Divorced De facto

Children & ages _____

Partner's name _____

Parents details _____

_____

_____

Character witnesses _____

_____

Social/cultural/charitable/sports clubs _____

_____

On probation/other charges pending at time of alleged defence? _____

Detail _____

_____ Probation officer _____

Name suppression (yes/no) Grounds (Family/health/job/other)

Evidence available _____

Licence obtained _____ Glasses _____

Undue/extreme hardship if disqualified (Yes/no)

Evidence available _____

Will limited licence be required _____

Can defendant make restitution (detail) _____

_____

Election (Summary/trial) Plea (guility/ng)

Is alibi evidence available (Yes/no)

Consent to I/D parade (Yes/no)

## DEFENDED PREPARATION

Copy defendant's written statement obtained: Yes/no

Have all traffic/drug certificates been requested? Yes/no

When _____ Received _____

Have prosecution been requested for witnesses not calling? Yes/no

When _____ Received _____

Witnesses not being called by police/ traffic _____ Date interviewed/ by _____

No of prosecution witnesses and est length of hearing _____

Has site been visited (where/when) _____

What witnesses would def like called

Name _____ Address _____ Tel _____

Is I/d in issue: Yes/no

Has prosecution been requested for s 344C i/d information: Yes/no

When _____ Received _____

Is police scientific evidence being called: Yes/no

Particulars _____

Have prosecution plans/photographs has obtained: Yes/no

Defence experts necessary: Photographs: Yes/no. Chemical: Yes/no

Psychiatric: Yes/no. Engineering: Yes/no

Other _____

Are pre-trial/other motions/applications needed relating to: witness/severance charges/offendors/345/347/344A Evidence/361B Judge alone/

Fine $ CC $ Imprisonment

Conv & Disch Disch s 42/CJ Amon & Discharged

Probation Corrective training

Come up if called on in _____ Disq driving _____

Supervision/care Social Welfare _____ Periodic det/Comm Ser _____

Withdrawn Dismissed

Medical expenses _____ Witness expenses _____

Order to return prop _____ Restitution _____

## POLICE SECTION

O/C _____

Time/date/place arrested _____

Persons present at arrest _____

Did police have search/arrest warrant Yes/no

Content _____

Written/oral admissions Details obtained Yes/no

Interviewing officer/s _____

Caution: Yes/no Start time _____ Finish _____

Persons present during questioning _____

What evidence did police confront you with _____

_____

Between/during/after questioning were you: promised anything; threatened; offered violence; under influence drink/drugs; in need of sleep/refreshment/toilet relief.

Brief particulars: _____

_____

Evidence of police misconduct (photographs medical examination/witnesses)

_____

Were you physically examined? Yes/no

Did police take blood (Yes/no), hair (Yes/no), nail scrapings (Yes/no)

Other _____

Searches (home, car, person). When and what found: _____

_____

Identification (parade, photos, eye) when (particulars) _____

_____

Are police doing scientific tests yes/no (particulars) _____

_____

Time/date released from police custody _____

Prosecution summary of facts: _____

_____

Previous convictions: Date Penalty

_____

_____

# Judicial Appointment — Mr R G Gallen

The appointment of Mr R G Gallen QC to be a Judge of the High Court was announced on 1 December.

The new Judge attended Waipawa District High School and did his law studies at Victoria University of Wellington. He was for many years a partner in the firm of Lusk Willis & Co at Napier. In 1976 he became a Barrister on his own account.

Mr Gallen chaired the Commission of Inquiry in the Abbotsford Landslip and subsequently the Committee that enquired into procedures at Oakley Hospital in Auckland. He has taken an active interest in Law Society affairs and has been President of the Hawkes Bay District Law Society.

The outside interests of the new Judge have been varied, but have centred more particularly in the field of Church and education. Mr Gallen is a member of the general committee of the Presbyterian Social Services Association of Hawkes Bay and Poverty Bay, and chairs the committee responsible for administration of the Hillsbrook Children's Home. He has also served recently as a convenor of the Joint Committee of the Presbyterian Church's General Assembly with the Maori Synod; and is currently convenor of the Committee that operates the Te Wakiti Scholarship Scheme.

The new Judge is expected to be sworn in sometime in January and he will sit in the first instance in Auckland before moving permanently to Hamilton.

# Lessons from the bottom of the harbour

*By Philip Burgess, Senior Lecturer in Law, Law School University of New South Wales*

*This paper was originally presented to the annual conference of the Australasian Universities Law Schools Association, August 1983. The author is a New Zealander now resident in Sydney. This article is concerned with the background to the tax evasion/tax avoidance scandals that were revealed by the Costigan Commission in Australia. The author also deals with the particular role and responsibility of law schools in teaching about tax law. While the emphasis is on the Australian situation the article should be of considerable interest to New Zealand practitioners in regard to the legal principles at issue. It is also an indication of the similarities and differences between the two legal systems in respect of the common political and legal problem of when does tax avoidance become, and not just appear to the layman to be, tax evasion.*

During much of 1982, tax avoidance and evasion occupied Australian newspaper headlines. In February, the Royal Commission into the Painters and Dockers Union (the Costigan Commission) requested an extension of its terms of reference so that it might investigate the involvement of members of the Union in the unlikely area of tax avoidance schemes. Then, in May, the new State Labour government in Victoria tabled in Parliament a report by investigators appointed under the Companies Act 1961 which extensively documented the use of some thousands of companies for tax avoidance and evasion (the McCabe-Lan Franchi Report). The Liberal-National Party Federal government announced in July that it would legislate to recover from shareholders in companies which had evaded company tax the amount of tax due, and in August the Costigan Commission was able, in recounting the conduct of affairs in the Deputy Commonwealth Crown Solicitor's office in Perth, to give some explanation as to how such large scale avoidance and evasion had been allowed to go on for so long. The publicity continued with the announcement of the details of the recoupment legislation in September and subsequent lobbying activity as that legislation passed through Parliament.

To those who know something of the history of tax avoidance in Australia, the events of 1982 were the culmination of a process which had been set in train by the imposition of the first income tax in South Australia in 1884. Yet it was not inevitable that the imposition of income tax should have led to the schemes exposed in 1982. The origins of the bottom of the harbour debacle can be traced back a long way and the blame allocated to a sizeable number of persons, institutions and political decisions.

It may well be asked, what is the point of such an exercise? At the lowest level, the history of tax avoidance helps us to to understand the shape of our present tax law. It also serves to indicate the type of reform which is effective. It is necessary to know where the traps lie. We should not be overawed by the apparent success, until recently, of the tax avoidance industry as a barrier to the aims of a progressive income tax.

## Origins of the Australian income tax

In early colonial days tax policy seems to have been dictated by the theory that, taxation being a necessary evil, it was best to tax other evils rather than to prohibit them. Thus in the infant colony of New South Wales the first local taxes were import duties levied on spirits, wine and beer in 1800. Shortly afterwards import duties were extended to tobacco and foreign goods. By the time responsible government was achieved in New South Wales (1856) the import tariff schedule (a "free trade" tariff) extended only to spirits, wine, beer, tea, coffee, sugar and tobacco products. The tariffs, together with excise on similar locally produced goods, provided enough income to run the "nightwatchman state" of the era, and for all the Australian colonies remained the most important source of government income until well after federation in 1901.

Land and income taxes as introduced in South Australia (1884), New South Wales (1895) Victoria (land 1877, income 1895) Queensland (dividends 1890, other income 1895) Queensland (dividends 1890, other income 1902) Tasmania (land 1880, income 1894) and Western Australia (1907) were seen as taxes on the relatively wealthy. For example in New South Wales the rate of income tax adopted in 1895 was 2½ percent with a general individual exemption of £200 which was high enough to exempt most workers.[2] Eventually most states imposed a higher rate of tax on income from property. But income tax in particular does not appear to have been introduced with any other purpose in mind than the balancing of revenue and expenditure in times of economic depression. State governments of various

political persuasions introduced income taxes during the long trade depression of the 1890s because revenue from other sources had declined.

Later, an element of progressivity crept into the rate scales, and is seen clearly in the first Commonwealth income tax introduced by W M Hughes in 1915. The original state income taxes however were of a flat rate type with most potential taxpayers exempted and were imposed as supplementary means of raising revenue. This is not to say that income tax was popular when first introduced. In a report to the Governor of South Australia in 1900 it was said:

> 4. Your Commission has found the system of inspection to be very annoying and harassing to the taxpayers, and they fear if it is persisted in the revenue will in the long run suffer a severe loss, despite the assertions of the officials of the department that the system has resulted in the collection of a large amount of money, much of which your Commission believe was not justly due by the taxpayers, and which otherwise would not have been paid. The Commission consider that this may be a fact, as far as the system has been prosecuted up to the present, but these are strong indications that in future this plan will result in a large amount of evasion, with disastrous results to the revenue. Several witnesses have stated that they have already taken, or intend to take, into partnership wives or other members of their families in order to lessen the rigor of the tax.

The maximum rate of tax was 5 percent, applicable to income from property in excess of £800, an annual income beyond the dreams of avarice for most residents of South Australia in 1900. Nevertheless, tax planning began early, spurred as much by estate duty considerations as by income tax.

While ideology seems to have played little part in the introduction of income tax the same cannot be said for land tax, which in some jurisdictions was avowedly directed at breaking up large estates and encouraging closer settlement. But the rates adopted were far too moderate to have much effect and did not prevent Sir Sidney Kidman for example from amassing some 100,000 square miles of cattle properties in several states. In successive annual reports in the 1920s the then Federal Commissioner of Taxation recounted the largely unsuccessful attempt to clear up Sir Sidney's outstanding land tax debts. The same annual reports also record the low number of persons liable to pay income tax in the 1920s and the tiny number liable to tax at the maximum rates. In short, until World War Two income tax was of concern only to the well off and tax planning a pursuit of a handful of wealthy people who eschewed Kidman's attitude of outright defiance.

## World War Two and the rise of the tax club

The war changed all that. Government policy, influenced by recent memory of the struggle to repay overseas debt in the depression, was to finance as much of the war effort as possible from taxation.[3] Personal and company income tax rates rose to previously unimaginable heights with maximum personal marginal rates to 90 percent in some cases, see *S A v Commonwealth* [1942] 2 AITR 273 per Lathan J at 276. In order to make these rates effective private companies were made subject to a specific tax on undistributed profits. This emergency wartime regime, retained after the war, was to cause much of the trouble later. Although maximum personal rates were reduced after the war, particularly from the advent of the Menzies government in 1949, the nominal tax burden on businesses organised as private companies remained higher than on similar businesses organised as partnership or trusts. "Public" companies were also more favourably treated, not being subject to undistributed profits tax, though from 1951 private companies generally paid primary company income tax at a rate 5 percent less than that for public companies: see Slater *Law & Taxation of Company Distributions in Australia* para 210. The result was inevitable. A more sophisticated type of tax planner appeared, the legally literate accountant, who devised the first dividend stripping, eg, *Newton v F C of T* (1958) 98 CLR 1, and artificial public company schemes, eg, *W P Keighery Pty Ltd v F C of T* (1957) 100 CLR 66.

As before, the customers remained the relatively wealthy, but their need for tax planning was now great as the prospect of wealth being redistributed away from them was now acute. So the "tax club" was formed. Its origins and development were well charted by Max Suich in an article in the *National Times* in August 1978.[4] It originally consisted of tax officials and "the best and most respected tax accountants" drawn together by the peculiar charms of the Income Tax Assessment Act. Perhaps the pre-eminent member was a tall and literary accountant John Gunn who co-edited the first standard work on Commonwealth income tax.[5] Trusts and other tax minimisation devices were permitted but the tax office had in reserve s 260, which had been implemented successfully on several previous occasions,[6] to catch schemes which appeared too cheeky. During the 1950s the tax office did attack in the Courts some arrangements on other grounds, eg, artificial public companies in *Keighery's* case but the less complicated use of partnerships and trusts was allowed. Amendments to block up loopholes uncovered by such legislation followed at a leisurely pace.

One might pause here to ask why it was that the tax avoidance industry did not enjoy such phenomenal growth in New Zealand. There seem to have been three main reasons.

1 A decidedly more unsympathetic stand to artificial tax avoidance by the Courts exemplified in *Arcus v CIR* (1963) 13 ATD 101; *Elmiger v CIR* (1966) 14 ATD 271; *Mangin v CIR* 70 ATC 6001 (albeit by the Privy Council, but upholding NZCA). The burning of unsophisticated farming fingers in some of the paddock trust schemes in the late 1960s made it more difficult to market other schemes in the 1970s.

2 A quicker response by the legislature in the early 1970s when the inadequancies of s 260 (Australia) and s 108 (New Zealand) became clear.[11].

3 Relatively saner private company tax provisions which did not so markedly penalise the carrying on of business in that form and thus did not provide the same incentive to develop highly artificial schemes.

In this history the private company for tax purposes has a central place. The tax treatment of this entity accounts for much of what happened, for it was the techniques used to ameliorate the inequitable tax regime which led to the highly artificial schemes of the 1970s.

The high tax rates during World War Two could be justified by the exigencies of war even though top marginal rates approached total confiscation. The retention of top marginal rates in excess of 50 percent was justified in terms of egaliterianism, a policy which had apparent bi-partisan acceptance, since the Menzies government retained a maximum personal rate of 67 percent applying to that portion of incomes in excess of £16,000. Private companies were taxed after the first £5000 at 35 percent during most of the 1950s but only 35 percent of trading income in excess of £2000 could be retained without penalty. Thus, for a

maximum marginal rate shareholder, £100 earned through a wholly owned private company, the effective tax rate varied from 63.2 percent, assuming full use of the retention allowance through 78.3 percent if a full distribution was made, to 90.8 percent if no distribution was made. Clearly, redistribution of income was proceeding at too fast a rate for such a taxpayer, even if he acquiesced in the official personal top rate.

It was hardly surprising that a number of devices were resorted to in order to avoid the undistributed profits penalty and lower the tax burden generally. The revenue members of the tax club winked at the use of trusts which could have the effect of lowering tax on company distributions to nil, provided they were loaned back to the company. It was the Ligertwood Committee, not the tax office, which led the agitation for reform in 1961. Oddly enough the tax office in *Keighery's* case, challenged another device which had a less drastic revenue effect (liability on distributions was postponed rather than eliminated), the artificial public company. This rather technical conception relying on peculiar rights attached to redeemable preference shares allowed the controllers of an essentially private company to make no distribution while remaining a public company for tax purposes. The High Court found the device not to be affected by s 260 on the basis that the taxpayer had exercised a choice given it by the Act to be taxed as a public company at a higher primary rate (40 percent). This scheme with some amendments was not rendered obsolete until 1973, after the success of a later version of the Keighery scheme which required and obtained the collusion of "genuine" public companies; *FC of T v Casuarina Pty Ltd* 7 (1971) 2 ATR 161.

There remained the problem of extracting undistributed profits from the company without paying further personal tax. A relatively unsophisticated dividend stripping operation fell foul of s 260 in *Newton's* case largely it seems because the stripped companies were sold back to the vendors. Later versions of the dividend strip avoided this elementary mistake and were ultimately proved effective in *Slutzkin v FC of T* 77 ATC 4076. It was the increasing difficulty for the purchaser during the 1970s in avoiding tax on distributions from his newly acquired company which led to the bottom of the harbour schemes, first to avoid tax on company distributions and ultimately to avoid current year company tax liability.[12]

It is extraordinary that the anomalous treatment of private companies was allowed to go on for so long. Only in the late 1970s, with increases in the retention allowance in successive budgets to the present level of 80 percent of trading profits, together with the tightening of the trust and children's income provisions, did it become attractive to carry on business directly through a private company, with an effective tax rate of 52.5 percent if distributions are kept to a minimum. For 30 years a situation was permitted to exist in which the nominal rate was as high as 90 percent and the real rate 35-40 percent (for clients of the tax club). After the invasion of the Visigoths the real rate entirely disappeared.

How could this happen? Some indication is given in a paper Darryl Davies QC, once a member of a taxation board of review and now a Federal Court Judge, gave to a Perth accountants conference in 1977, and quoted by Suich. Davies pointed out that the Commonwealth Treasury had always sought to uphold and enforce the provisions of existing tax legislation notwithstanding that it had known that the legislation had operated unequally. Further the Treasury and the Taxation office had not attempted to inform public debate on tax matters by providing meaningful information on what actually happened in the Australian system. The truth of this assertion is amply borne out by anyone who examines Treasury's published submissions to the Asprey Committee.[13] If further tax was required Treasury would suggest raising indirect taxes rather than reforming the direct tax system. In its submissions to the Campbell committee it also opposed alterations to the company tax structure.

It can be implied from Treasury's disclosed attitude that it was indifferent to notions of equity and sought only to raise revenues by methods suited to its own ideology regardless of injustices perpetrated in the process. But when the Visigoths arrived even Treasury had to act, or income tax revenues from non PAYE taxpayers would have completely disappeared.

The cynicism and secrecy at Treasury was combined with diffidence at the Taxation Office and outright incompetence at the Crown Solicitor's. Investigation of "bottom of the harbour scheme" had commenced as early as 1973 yet nine years later, as Costigan reported, no proceedings had been taken against the promoter despite the obtaining of eminent legal opinion to the effect that a conspiracy to defraud the Commonwealth had been committed. "Doubts" about the legal position had been resolved by the passing of the Crimes (Taxation Offences) Act 1980 but by then the Visigoths had moved out. Retrospective recovery of tax from vendor shareholders was thus resorted to without any real regard being given to the degree of culpability of any individual; it was enough that a company in which he had been a shareholder had not paid its tax. A draconian solution was imposed in an attempt to retrieve a situation largely brought about by official neglect. It would have made more sense to sack the top 20 Treasury officials and send them off into the cold without the comfort of superannuation payments.

Instead the same advisers suggested to the incoming Labour Government in 1983 that more revenue could be raised by literally destroying almost every business involved in a bottom of the harbour scheme by extending the scope of the Company Tax Recoupment Act to all retained earnings including capital accretions. The remnants of the tax club, amongst others, were able to lobby sufficiently hard to have this measure defeated by the narrowest of margins in the Senate.

Finally, it now seems possible that some form of estate duty will be reintroduced at the federal level where it can be made effective and that despite election rhetoric a true capital gains tax will appear. Ironically, the income tax system for most taxpayers has become proportional, as it was when first introduced.

## The role of the Courts

In the press the High Court during the Barwick era has taken much of the blame for the continuing prosperity of the tax avoidance industry. It is true that before and since Sir Garfield's term as Chief Justice the Commissioner of Taxation succeeded in a number of anti-avoidance cases and during his term there were a number of outrageous examples upholding frank avoidance schemes, eg, *Currans* case.[14] But the demise of s 260 cannot be blamed entirely on the High Court. That section's effectiveness was always limited by its lack of a reconstruction provision as well as its indefinite ambit. Moreover, the motive of the judicial destroyers of s 260 may have been as much a desire to goad the legislature into action as a desire to promote tax avoidance.

In *Cridland* it was Mason J, not normally a friend of the tax planner, who wrote the majority judgment, and he pointedly referred to Kitto J's criticism of the section nearly 20 years earlier in *Newton* and the legislative failure to heed

those words. Now with the new Part IVA general anti-avoidance provision a strange peace has descended on the arena. Artificial schemes have disappeared and the Commissioner sees no need to apply the section. The pity is that the legislature did not heed earlier those wise words of Kitto J at 96 CLR 596:

> Section 260 is a difficult provision, inherited from earlier Legislation and long overdue for reform by someone who will take the trouble to analyse his ideas and define his intentions with precision before putting pen to paper.

The alleged perfidy of the High Court has now been replaced by another judicial problem, the danger of incompetence at first instance. Until 1973 first instance jurisdiction either on objection as of right or on appeal from a board of review where a question of law was involved was exercised by single members of the High Court. The jurisdiction was evidently regarded as burdensome, trivial and time-consuming for in 1973 it was transferred to the State Supreme Courts, and upwards of 100 Judges now had the opportunity to exercise the jurisdiction previously exercised by seven, see ss 187 and 196 of Income Tax Assessment Act. In New South Wales alone since 1973 over 20 Judges have sat on tax appeals. It was not surprising that a number of questionable and inconsistent decisions were given.

The creation of the Federal Court in 1977 and its investment with appellate jurisdiction in tax matters has improved the situation, the Federal Court being responsible for some very lucid joint decisions which have settled some questions rather than create new difficulties, eg, *FC of T v Cooke & Sherden* 80 ATC 4140. Leave to appeal to the High Court being now by special leave only it is possible the Federal Court may bring some cohesion to the body of Judge-made tax law. However there is much to be said for investing only a select number of Judges with tax jurisdictions. The present system positively encourages forum shopping.

The Federal Court appears to have adopted a moderate line towards tax avoidance, permitting the modest service trust income splitting arrangements in *FC of T v Phillips* 78 ATC 4361, but rejecting the outrageous "gift" scheme in *Leavy v FC of T* 80 ATC 4438, and artificial deduction schemes in, *Ure v FC of T* 81 ATC 4100, and *FC of T v Elbery* 81 ATC 4661. The High Court on the other hand seemed collectively unwilling to settle outstanding questions surrounding the interpretation of s 26(a) in *FC of T v Whitfords Beach Pty Ltd* 82 ATC 4031. The legislature may well beat them to it.

## The future of tax planning

Tax planning clearly still has a future. Although the Commissioner has expressed warning rumbles, those tax shelters deliberately incorporated into the Assessment Act are likely to continue to attract investment. Some are protected by particularly noisy lobbies, eg, the film industry. While it is ALP policy to replace s 23(q), which exempts from Australian tax the income of residents devised and taxed abroad, with a tax credit system,[14] taxpayers with international business will still find tax advantages overseas. The new Division 13 dealing with transfer pricing is likely to prove difficult to administer as the Commissioner, lacking information and expertise, will find it difficult to re-write all but the most outrageous transactions.

Until either the Act is amended or the Commissioner changes his practice, considerable scope will remain for employee fringe benefits. And of course, the best tax shelter of all, capital gains, will remain even if a capital gains tax along US or Canadian lines is introduced. The Visigoths have been vanquished and there will be demand for professional planners with integrity and a sense of proportion. A steady stream of tax litigation will continue. The investment allowance introduced only since 1976 has been a fertile source of litigation because its very complexity has been a source of uncertainty and future tax legislation is not likely to be less complicated.

## What should the law schools be doing?

Some years ago, Professor Yuri Grbich appealed for a better understanding of the lawyers' role in tax planning and for a greater self awareness and sense of responsibility on the part of both practising lawyers and law teachers specialising in tax.[15] I fear his call went largely unheeded but the wisdom of that appeal has now become obvious. Teaching last year's dodge is pointless. Inculcating an ability to spot and develop loopholes is irrelevant in the changed legislative and judicial environment. Three aspects stand out as worth pursuing in law school tax courses.

The first is history. A considerable handicap here is the almost complete lack of research on the history of taxation in Australia. The most recent general work I have been able to find was published in 1925. Much useful material is buried away in the various Royal Commission reports and in reports of the Commissioner of Taxation. Published taxation statistics are compiled in a way which seems designed to conceal trends rather than expose them. The standard practitioners text almost ignore the historical background. Yet if future tax practitioners are to have any perspective at all they must somehow absorb some history. Clearly considerable research and writing opportunities exist here.

The second is policy. Ideas about taxation seem to be created only infrequently so obsolescence is not a major problem. There is a considerable body of published material [16] much of it easily accessible to law students. There is always a danger of preaching in this area but perhaps it is better to be explicit and to avoid the hidden curriculum which characterised the traditional law school tax course. "Policy" here of course means an attempt to get to grips with economic analysis of taxation and to understand the distributional and allocative functions of various tax regimes, as well as more general considerations about social justice and the ideology of, say, progressive taxes.

The third is case analysis, a rigorous critical approach bearing in mind the political purposes of taxes. The traditional tax dodgers' training course was at least very good at case analysis, criticism being made easier and synthesis being made more challenging by the fact that so many of the cases were inconsistent. The success of the lawyer-inspired schemes of the 1970s was in large part due to the high degree of technical virtuosity produced by rigorous case analysis. This technical skill is the lawyer's unique ability and I would be the last to suggest it be jettisoned in favour of a vague concept of social responsibility, but it should not be taught in an ethical vacuum. This does not mean that lecturers should preach, only that they should not confine themselves to technical analysis alone.

It is perhaps ironic that recently at a seminar organised by the Economic Society of Australia the high priest of the technical approach, Professor Ross Parsons, expressed his despair over the fate of progressive income tax which he regarded as an unattainable concept whatever its merits. Professor Parsons saw it being replaced by indirect taxes such as sales tax or value added tax.[17] I would contend that if we really want it, a progressive income tax and wealth redistribution from the rich to the poor (instead of from the poor to the moderately well off, as at present)[18] are still possible.

I am not sure if the Australian body politic wants it. There was a feeling at about the time of the introduction of the first income taxes that income from personal exertion should be taxed less heavily than income from property but no strong sentiment in favour of progressive taxes at least as reflected in the legislation. At the same time the surprisingly heavy early estate taxes demonstrated a distaste for inherited wealth. Steeply progressive income tax scales with confiscatory top marginal rates were born of wartime necessity and were hijacked by the post-war Labour Government for its own purposes, particularly the financing of social welfare. The Liberal Governments from 1949 to 1972 allowed the rate structure to remain unchanged because moderate inflation and consequent fiscal drag made increased tax revenue possible without nominal increases, because real economic growth kept public discontent at a minimum and because the rich were saved from confiscatory taxes by the membership of the tax club. Few politicians had a strong commitment to wealth redistribution through the tax system, rather the aim was to meet the voters' manifold demands in the most painless way possible.

The crisis came when the post-war economic boom ended, the rich moved to protect their fortunes from erosion by high inflation and the government's ever growing tax burden fell more heavily on wage and salary earners who were for the first time in 30 years experiencing a decline in real wages and significant unemployment. It is much more difficult to re-distribute wealth from the rich to the poor when total national income is declining particularly in a country where most voters seem to believe "what I get I keep".

In such a climate the easiest way to collect tax is at source at a flat rate from everybody. Yet now it seems, just as the rich are standing still and the poor are getting poorer we are about to experience almost for the first time an effective progressive tax structure, albeit one which is proportional for 80 percent of taxpayers. It is no wonder that a visiting British management consultant was recently heard to remark that in his discussions with Australian businessmen he found them interested only in two activities, property speculation and tax avoidance.

What we need is a well run efficient tax system we can forget about while we get on with the real job of creating new wealth of which the creators are guaranteed a fair share (in my view 50 percent) and the government the rest. Such a system is not unachievable and other countries have such systems. We do have fuss-free taxes, eg, the crude oil levy. Income taxes will never be so efficient and painless but they can be collected from the rich as well as the poor, particularly if it becomes apparent to the rich that they are unavoidable. For such taxpayers, the hey-day of the tax club may soon be only a rosy memory. Welcome to the Taxpayer's Club.

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1 Here I rely heavily on S Mills *Taxation in Australia,* MacMillan 1925.

2 In the *Harvester* case Higgins J set the basic wage at £2 2s weekly or £109 a year; *Aust Encyclopaedia* Vol 1 p 445 ff. Even by 1914 average weekly earnings for males in NSW were only £2 16s for a 49 hour-week.

3 There was an almost identical development in New Zealand: see BDA Greig, Finance, Public, in *Encyclopaedia of New Zealand* Vol 1 at pp 662-665.

4 M Suich "Tax – Australia's Billion Dollar Scandal", *National Times* 14-19 Aug 1978 pp 27-29.

5 Baldwin & Gunn "The Commonwealth Income Tax Act" 1937.

6 Particularly in *Jacques v FC of T* (1924) 34 CLR 328 (deduction scheme); *Clarke v FC of T* (1932) 48 CLR 56 (avoidance of tax on lease premium); *Bell v FC of T* (1953) 87 CLR 548 (dividend strip); *Newton v FC of T* (1958) 98 CLR 1 (dividend strip).

7 Preliminary research by Kinross (UNSW student thesis) indicates that Sir Garfield decided for the taxpayer in about 90 percent of the tax cases on which he sat, compared with 40-50 percent for the other High Court Judges during the years 1970-1981. When apprised of these figures his honour said that they did not surprise him.

8 *Truesdale v FC of T* (1970) 1 ATR 667 in which the highly relevant New Zealand decision of *Tucker v IRC* (1965) 9 AITR 658 was summarily dismissed from consideration.

9 These schemes were not always successful as the provisions had been recast in more sophisticated form in 1965. Compare *K Porter & Co Pty Ltd v FC of T* 77 ATC 4472 (scheme failed) and *FC of T v Students World*, 78 ATC 4040 (scheme succeed).

10 *Westraders v FC of T* 80 ATC 4357; *Curran v FC of T* 1974 131 CLR 409. The loss to the revenue owing to the last two schemes is identified at $127.6 million in 1977-78 alone; Federal Commissioner of Taxation 61st annual report 1982 pp 19-20. The same source also gives a total for "scheme related disputed tax liability" of $1,009 million as of October 1982.

11 After s 108 shattered in the Commissioner's hands in *CIR v Gerard* (1973) 74 ATC 6027, it was slightly over one year before a re-cast section appeared.

12 Costigan indicates this occurred as early as 1973.

13 "Company Income Tax Systems". Treasury Taxation Paper No 9 November 1974.

14 The mechanics of the schemes have occasionally defeated aspiring avoiders; see *Coolibah Pty Ltd v FC of T* 80 ATC 4469; *Deane v FC of T* 82 ATC 4112.

15 Grbich "Asserting Human Purposes over a Self-Justifying Tax System" AULSA Conference 1975.

16 Particularly useful in an Australian context is Groenwegen "Australian Taxation Policy Survey 1965-1980" published by the Taxation Institute Research & Education Trust and "Australian Taxation Policy" (1980) by the same editor.

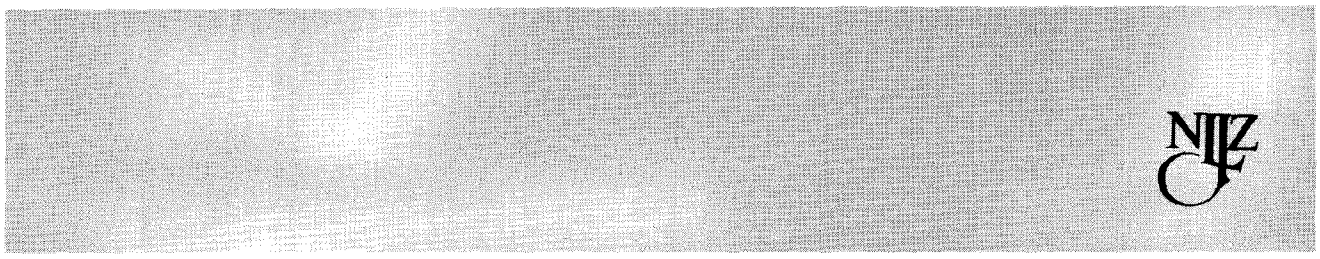
17 Professor Parson's paper is to be published in "Economic Record".

18 See Kakwani "Redistribution Effects of Income Tax and Cash Benefits in Australia" Centre for Applied Economic Research 1983; Cass, "Taxation and Social Policy" in UNSW Occasional Papers no 8 pp 13-17.

## Dead Men Don't Tell Tales

The following letter appeared in an issue of *The Economist* for 26 November 1983.

> SIR – In your article on crime in the United States (12 November), you included the following statement: "more than half the murders . . . were carried out by acquaintances of the victims . . . this compounds . . . the likelihood that victims will be either too young or too old to go to the police."
>
> Methinks the problem is: they are too dead.



# BOOKS

## *The Liquor Laws of New Zealand*

*By L H Southwick QC, Alan Dormer and G R Halford. Butterworths Wellington (1983).*

*Reviewed by J J McGrath, Barrister Wellington*

This is the first textbook published on the subject of New Zealand's liquor laws since 1964. That fact alone will ensure *The Liquor Laws of New Zealand* of a warm welcome from the profession. There have of course been major changes to the Sale of Liquor Act 1962 in the course of 19 amendments over the last 20 years and for nearly all of that period practitioners have coped with this long, complex and inconsistent statute without the aid of an up-to-date textbook.

This book is the successor to the third edition (1964) of *Luxford's Liquor Laws* and Mr L M Southwick QC was a joint author of that work. He and his co-authors have now succeeded in writing a most comprehensive and readable summary of the laws regulating the sale and supply of liquor in New Zealand. Their book is not an annotation of the Sale of Liquor Act 1962 and the other statutes dealing with the subject. Indeed it is the exception rather than the rule for lengthy extracts from those Acts to be quoted. It is a commentary presented in chapters that deal with specific subjects with at least one chapter being devoted to each of the main licences made available under the Sale of Liquor Act in recent years and further chapters dealing with hotel and tavern operations, the wine industry, penal provisions and other general topics.

The style and format of the book recognises that those who read and refer to it will not just be lawyers. With the introduction of licensing of sports clubs in the 1976 amendment and, to a lesser extent, the creation of the flexible food and entertainment licence in 1980 many more lay people need to have an understanding of the Sale of Liquor Act than previously was the case. The book is written for them as well as for the profession. However full references supporting the author's views are given to the statutory provisions, regulations and to decisions of the High Court and Licensing Control Commission many of which are unreported. The book accordingly meets the needs of those who wish to research particular topics in detail as well as those who wish to have ready access to a reliable statement of the law in this field.

The extent to which Parliament has changed our liquor laws since passing the landmark Act of 1962 has lead to a complete rewriting of the text of *Luxford*. Whatever one may think about the process by which Parliament handles reform of liquor legislation and in particular the longstanding tradition of a conscience vote it is beyond argument that the last 20 years has seen a degree of liberalisation of the restrictions over liquor supply and sale that is unmatched in New Zealand's history.

Only 20 years ago New Zealanders were still subjected to six o'clock closing of hotels; taverns were a newly adopted and unknown concept; purchase and consumption of liquor in sporting clubs was illegal, though rife and licensed cabarets, theatres and function rooms were all yet to come. *The Liquor Laws of New Zealand* accordingly covers extensive new gound arising from changes to the legislation. Furthermore the development of a greater awareness in the community of the scope of the supervisory powers of the Courts over tribunals such as the Commission and Licensing Committees has also lead to an increased number of High Court decisions which the authors identify and discuss.

The value of the book's discussion of Licensing Control Commission decisions lies in the indication that they give of the Commission's policy in particular areas. Since its creation in 1948 the Commission has enjoyed wide discretionary powers, particularly in making decisions on whether to authorise or grant applications for new licences or to permit the removal of existing licences. In recent years those discretionary powers have been extended and the Commission now determines permitted trading days and hours in respect of certain types of licence such as the club licence. While the Commission has made it clear it must determine each application on its individual merits it has chosen to state in a number of decisions policy views which tend to guide it in subsequent cases.

It is impossible to divine these views from the Act itself and many important Commission decisions are not reported. Generally they are unknown to practitioners new to the field or who practice occasionally only in liquor licensing matters. Accordingly the assistance to be obtained from discussion of and reference to many Commission decisions in this book is invaluable. Practitioners approaching an application to the Commission or a Licensing Committee can readily learn if policy considerations will weigh with the tribunal and *The Liquor Laws of New Zealand* is a readily available means of ascertaining that information. It will enable a legal adviser for example quickly to advise on the prospects of a chartered club obtaining a right to off premises sales or the proprietor of an unlicensed restaurant obtaining a food and entertainment licence.

The book also contains some useful discussions on topical issues in liquor licensing such as the survival of hotel and tavern premises licences following demolition of the building to which they attach and the ability of the holders subsequently to remove them to new premises. The nature of the book however has led to the omission of a number of full discussions appearing in the third edition of *Luxford* relating to penal provisions in the Act or historical matters. Probably these areas are thought by the authors no longer to be of direct interest or relevance to everyday practice. However one would have liked to see further elaboration in areas such as the extent of the liability on hotelkeepers and touristkeepers to provide accommodation and meals to travellers where the common law rules are still important in practice. However while discussion is abbreviated there are still references to the main cases for those who need to look further at such specific issues.

*The Liquor Laws of New Zealand* overall is a well written, readable and comprehensive book in an area of legislation that engages more practitioners now than ever it did previously. It is also a valuable reference source. Practitioners who recall how quickly the last edition of *Luxford* became out of date will be pleased to know that the publishers plan to annotate the book each year. That will be essential if Parliament continues to treat liquor law reform as a matter requiring a lot of small advances rather than a few major ones.

## *The Judge, Discretion, and the Criminal Trial*

*By Rosemary Pattenden. Published by the Clarendon Press (1982). ISBN 0 19 825373 7. $NZ90.85*

*Reviewed by P J Downey*

The growth of judicial discretion in the criminal law has been very marked in recent years. This is not restricted to matters of procedure, but includes the admission or otherwise of evidence.

Rosemary Pattenden is a lecturer in law at the University of East Anglia. In this book she surveys the areas in which discretions are to be exercised, in a full and useful manner. She points out that there is now a marked difference from the rather rigid situation that existed last century.

The whole point about a discretion, of course, is that it is impossible to lay down fixed rules so as to indicate the inevitable outcome in any particular case. That would be to reintroduce the very rigidity that the exercise of the discretion is intended to avoid. Nevertheless, since the discretion has to be exercised in a judicial manner it follows that some degree of restraint is imposed on the Judge in the way in which he exercises it in particular cases.

It is this principle, that a discretion must be exercised judicially, that makes the exercise of a discretion by a Judge reviewable by a higher Court on appeal. This book is particularly useful in its analysis of the grounds on which the exercise of a discretion can be questioned in an Appellate Court. The author lists the following:

(a) the Judge purported to exercise a discretion that does not exist;
(b) the Judge refused to exercise a discretion because of some misconception of law as to its existence or scope;
(c) the Judge in exercising an existing discretion failed to observe specific limitations on it;
(d) the Judge exercised his discretion by considering irrelevant matter, by ignoring relevant matter, or by over or under emphasising relevant matter;
(e) the Judge exercised his discretion on an erroneous view of the facts;
(f) the Judge exercised his discretion unreasonably;
(g) the Judge exercised a discretion judicially but the result was a miscarriage of justice;
(h) the Judge failed to consider a discretion when he was under a duty to do so.

The book makes no reference to New Zealand cases or statutes. Rosemary Pattenden might have found such cases as *R v Capner* [1975] 1 NZLR 411 on the discretion to exclude police evidence unfairly obtained, or *R v Hartley* [1978] 2 NZLR 199 on the discretion to discharge a prisoner improperly returned to New Zealand by the Australian police, to be of considerable relevance to her general topic. There is, of course, a wealth of English authority cited; and the book contains generous reference to judicial authority from Australia, and to the statutes relating to criminal law and evidence in all of the Australian States.

While probably not of great value to the ordinary practitioner in the daily round of practise the book is useful for reference on particular points; but it must of course be read subject to the New Zealand statutory provisions as set out in the Crimes Act, the Summary Proceedings Act, and the Evidence Act.

## *The Impact of Publicity on Corporate Offenders*

*By Brent Fisse and John Braithwaite, State University of New York Press, 1983, viii and 393 pp (including index). Paper $US14.95, cloth $US44.50.*

*Reviewed by Michael Stace, Institute of Criminology, Victoria University*

The bulk of this book by two Australian-based authors consists of 17 case studies of large corporations accused of illegal activities. The events are mostly well known, eg, bribery at Lockheed, ITT and covert actions in Chile, and include 12 from the United States, four from Australia, and one from New Zealand – the Erebus disaster. The facts of each incident are outlined briefly and the effect of the publicity on the company is presented as reported by company executives interviewed by the authors. The causes of the problems are not explored. Most companies reported minimal impact on profitability but each felt a loss of corporate prestige. Most companies also instituted internal reforms in an endeavour to prevent a reoccurrence. The authors rely on the executives' appraisals as to the effectiveness of the reforms.

The authors conclude that adverse publicity was an effective sanction upon the companies involved. They then advocate both informal and formal publicity as a means of social control over large corporations. As an example of the latter, they suggest that as part of a Court or administratively imposed penalty, the authorities should have the power to order the offending company to take out advertisements to explain its wrongdoing.

This book has a contribution to make to the debate about sanctions for white collar crime, especially upon companies who value their reputations. It would suggest that the publicity attached to Press Council decisions, for instance, are an effective means of social control upon the press. However, it is a book to which reference is likely to be infrequent, although senior company officers who may find themselves in the spotlight because of illegal activities will find some useful hints on how other executives in this position have attempted to restore internal morale and goodwill within the community.

# Tauranga's clash of the titans: the 1923 by-election

*Lawrence Barber, Senior Lecturer in History, University of Waikato.*

In February 1923 Tauranga's venerable and popular Member of Parliament, Sir William Herries, passed on to the great senate in the sky.[1] On the day of Herries' funeral few New Zealand politicians expected more than a slight tussle between some unannounced Liberal unknown and a local Reform farmer or businessman to decide the vacant Parliamentary seat. In the 1922 general election, Reform, Herries' party and the government party led by William Fergusson Massey, had won 43 of the 50 polling stations in the Tauranga electorate, and in 1923 Prime Minister Massey had every expectation that Tauranga would again elect a Reform candidate. Massey's expectations were confident, but his need for a Reform victory was urgent, for his government held office by the uncertain support of three independent members. A Reform defeat could well have pushed them into the Liberal camp.

The government party speedily announced its candidate. He was "Charlie" E MacMillan, a popular businessman with a long record in local government who, at twenty stone in weight, took to the hustings with every expectation of catching the public's eye. Macmillan was, from the beginning of the campaign, well supported by the press, especially by the *New Zealand Herald*. On 2 March 1923 the *Herald* dubbed him "a formidable candidate", and on 12 March applauded his support for a "safe and stable administration, with a properly balanced regard to the problems of the day". MacMillan portrayed himself as "a plain simple man, who looks on facts as I find them":[2] as a local man who understood local problems. To assure himself, and the Reform party, of a clear victory, MacMillan needed a simple Reform-Liberal confrontation, without any risk of vote-splitting by independents, mavericks, or Labour candidates.

At the beginning of March 1923 MacMillan had every right to believe that the Fates were conspiring against him. To his horror a former prime minister, a celebrated statesman who had served as deputy to none other than the sanctified Richard John Seddon, declared an interest in the Tauranga seat. Absent from Parliament since his defeat in 1919, Sir Joseph Ward was approached by Liberals from within and without the Tauranga electorate, and was offered the Liberal candidature. Sir Joseph Ward, in his 67th year, believed by many to be a financial genius, was a contender MacMillan and the Reform Party would have preferred not to face.[3]

For over seven days Sir Joseph kept political observers, and the public, on edge, as he carefully decided whether he would or would not bow to public pressure and return to political life. On 7 March Ward finally agreed to nomination, and while the newspapers and his opponents speculated on his future role in a possible Liberal government, and gave him multiple mention in their editorials and speeches, Ward cleverly delayed his arrival at the scene of battle. By the time of his arrival, Wednesday 13 March, the Tauranga electorate was at fever pitch. Crowds gathered to welcome him, eager to see and hear the political giant who had become a myth in his own lifetime.

Yet while Ward waited for his cue fortune began to return to MacMillan. Before Ward's arrival in the electorate it appeared that the Reform candidate would face the worst possible electoral combination — a veteran opposition candidate and the possibility of his own vote being split by a Country Party candidate, and by a maverick Independent Reform candidate. Of the latter two, the Independent was the least dangerous. W D Adnams had little support locally, but sought nomination "with a view to acquiring electioneering practice for a future career as a statesman".[4] He withdrew before nomination day.

The Country Party challenge was a more serious matter. Tauranga electorate was a rural electorate that included Tauranga borough, Te Puke, Matamata, Te Aroha, and Morrinsville, an electorate that encompassed the Bay of Plenty and the north-eastern Waikato country area. The farmers' challenge arose from their dissatisfaction with butter prices, their objection to wage increases by the Arbitration Court, and their disgust with the government's performance during an economic recession. Although the editor of the *Herald*, asked "Is the Farmers' Union out to defeat the Massey government and compel another election?",[5] the Farmers' Union Provincial President, R D Duxfield, toured the Bay of Plenty drumming up support for an independent farmers' political party. Enamoured with the success of Australian Country Party candidates, Duxfield speciously argued that on the basis of *Yearbook* statistics there were 80,000 farmers in New Zealand, and given three votes from each farming family, the farmers possessed 250,000 votes. As only 400,000 electors had voted in the 1922 general election, the farmers, he declared, held the balance of power.[6]

Thomas Lochhead, of Te Puna, agreed to represent the new party at the polls, and his intervention seemed a serious threat to MacMillan's chances. A Te Puna farmer, president of the Northern Bay of Plenty Sub-Provincial Executive of the Farmers' Union, president of the Tauranga Agricultural and Pastoral Association, a County Councillor, and a member of the Tauranga Hospital Board, Lochhead was a candidate likely to draw both rural and town votes in the Bay of Plenty.

However, Lochhead possessed a hidden weakness, an admiration for Sir Joseph

Ward, that took him to a meeting on 5 March, a meeting that unanimously requested Sir Joseph Ward to contest the by-election. At this meeting, Thomas Lochhead overwhelmed by Ward's charm declared his personal support for his hero. His desertion of the Country Party camp, together with Waikato farmer pressure on the Bay of Plenty branches to rally around Reform, ended the farming challenge. With Labour rallying behind Ward and MacMillan's potential rivals withdrawing from the race, Reform's original dream was revived – there was to be a straight fight between the government party and the Liberal opposition.

MacMillan was quick off the mark with his campaign. It began at Katikati on 3 March, and at his Tauranga townhall meeting on 12 March he attracted 500 electors. But if "Charlie" attracted his hundreds, Joseph won his thousands. Ward began strongly in Morrinsville and Te Aroha. He answered the charge that his election would only provoke the government's fall, and a general election, by insisting that in the House he could rally the best brains to form a new government. Against those who charged that he was not a local man he retorted that he was "no passing stranger";

> He would point out the fact that there were finger posts all over the electorate pointing to what had been done during his terms of office.[7]

By Thursday 15 March Ward was at his peak. He packed the Tauranga town hall with a crowd of 1,000 and smiled as the somewhat partisan mayor, B Dive, described him as the best Postmaster-General and Minister of Railways New Zealand ever had – a rather pointed comment in that the Reform candidate was at that time accompanied by Gordon Coates, the current holder of those portfolios.

At Tauranga, Ward played up his previous contribution to the electorate, how he had turned the first sod of the Waihi-Tauranga railway, and had initiated the draining of the Rangitaiki and Hauraki Plains. He declared himself against the excessive taxation imposed by Reform and insisted that Massey was responsible for the nation's huge post-war increase in national debt. The next day Sir Joseph was introduced to 300 secondary school children at Te Puke High School as "New Zealand's greatest statesman".[8] His reputation, mystique, and charm, were winning votes.

Even the anti-Ward *New Zealand Herald* admitted that "his reception everywhere can only be described as that of a conquering hero, rather than that of a candidate for Parliament". At the Theatre Royal in Te Aroha, on Saturday 17 March, he attracted an audience of 1,000. Yet for all his oratory, perhaps because of his oratory, Ward was sowing the seeds of his own defeat. He criticised, but had only vague notions how the Dominion's economic problems could be rectified. He attacked the government for an increase in national debt, but advocated public works policies, and overseas loans, that would have increased that debt even further. Ward insisted that in the House he would bring in a new administration, but failed to agree that he could not unless he replaced the current leader of his own parliamentary party.

While Ward blew his trumpet MacMillan played his electoral concerto in a low key, and one special correspondent in the *Herald* of 17 March, noted that MacMillan was winning some support by this tactic, from "busy country folk who preferred downright commonsense to rhetoric and artificialities".[9] Even so, until nomination day, 19 March, the balance of advantage was with Ward.

From nomination day all changed. Ward, the political Titan, was no longer faced only by an untried local candidate, but by another Titan, by the Prime Minister himself. Although only a few days from his 67th birthday, "Farmer Bill" Massey was at the peak of his political ability and once in the Tuaranga electorate he took to the hustings as a cow takes to clover. At Katikati the local hall was crowded to capacity with additional numbers listening through open windows. At Tauranga he attracted a crowd that surpassed in numbers Ward's record attendance. By 21 March the press agreed that:

> The Prime Minister is now the "man of the hour" throughout the Tauranga electorate, and is likely to be the man of the campaign. His vigor of service on behalf of the Reform candidate had flattened the earlier inflation of liberalism. It is a very moderate estimate of the political feeling in Tauranga today to say that the Liberal stocks had slumped heavily and it will require a very noteworthy effort to restore initial value.[10]

But Massey was not universally revered. He did better in the Bay of Plenty than in the Waikato section of the electorate. When he opened the Matamata agricultural show he was booed by a section of the crowd, and at Morrinsville a rowdy Labour presence fiercely objected to his description of Labourites as "revolutionary socialists".[11] Nevertheless, Massey was winning votes, small town and farmer votes, by portraying Ward as an unsound financial adventurer who was little better than a political opportunist attempting to win his way back into Parliament and the Liberal leadership by way of the Tauranga seat. As for his own candidate, Massey sent him off to small country meetings whilst he himself set about demolishing Ward, and only a few days before the election brought him back to his side, but then declared him "as prominently dependable as Mount Maunganui, which dominates the Bay of Plenty".[12]

Massey's success brought panic to the Liberal camp. Ward's crowds dropped away. At Tauwhare only four electors arrived to hear him and at Te Miro the twenty-four who attended amended the vote of support to merely thank the candidate for his past services to New Zealand. In support of their flagging Ward the Liberal party belatedly sent to Tauranga a "flying squad" of members of Parliament. T M Wilford, the leader of the opposition, W A Veitch, R A Masters, and H Atmore, arrived but received a poor reception from electors and the press. At times the Liberal members appeared to neither endorse some of Ward's promises nor offer much hope of his political promotion. Ward's fortunes continued to decline, and on Saturday 24 March a public meeting at Te Puna split over whether he should be granted a vote of thanks, and the motion was only carried by a bare majority.

Two nights before election day Massey took the Reform case to a village named after Ward himself – Wardville. In Wardville the Prime Minister stated his confidence that the Liberal candidate would be defeated. The *Herald* agreed, but declared itself with a pretentious analogy:

> Even the great Napoleon, after enforced retirement, could not retain his former prestige. Thus, in the less impressive history of the Tauranga by-election campaign, it is thought that the so-called "man of destiny" and New Zealand Liberalism will tomorrow meet his Waterloo.[13]

Both leaders held rallies for their candidates on the eve of polling day. Ward scored over Massey by hiring the Tauranga Town Hall, but Massey and MacMillan spoke to 500 from a shop balcony, and expressed every confidence in a favourable outcome.

By the close of Wednesday 28 March Tauranga's clash of the Titans was over.

Edward de la Barca MacMillan was elected by 4,240 votes to Ward's 3,134. Over 70 percent of the electors voted, and MacMillan was victorious in all but nine of fifty-two polling booths. Only at the Coronation Hall, Tauranga, did Ward win a large booth, there taking 515 votes to MacMillan's 466. The larger centres voted Reform, leaving Ward majorities only in Muirs Gold Reefs, Gordon, Maketu, Oropi, and Tauriko Sawmill. Even Wardville turned against its founding father.

Why did Tauranga do it? Why did Tauranga electorate say "No" to Sir Joseph Ward?

Tauranga's decision to elect a local businessman, untried in national politics, rather than return a former prime minister to politics, shows considerable political acumen on the part of the electors. Legend though he was, Ward had no firm political base in 1923, and his policies were vague and unlikely to win support from his own party. More important to the electors of Tauranga was the continuity of their Reform alliance. Massey and Reform supported North Island small town and small farmer interests, and expected a returning support from these same interests. The election of Ward would have broken a symbiotic association that had worked well during Herries term as local member. More than that, the press had warned the Tauranga electors that they voted as proxies for the nation. MacMillan's defeat and Ward's victory might have brought down the Reform government, and Tauranga's electors preferred a united Reform government, the devil they knew, to a divided Liberal-Labour alliance, the devil they did not know.

As for Sir Joseph Ward, his rejection by Tauranga did not end his career. In 1928 he was prime minister again, as the leader of the United Party government, that faced the beginnings of the great depression. He survived his rival Titan, Bill Massey, by five years, and was forced to resign not after a political defeat, but by infirmity and old age, enemies against which even the Titans have no protection.

1 Sir William Herbert Herries entered Parliament as member for Bay of Plenty in 1896. He served continuously as member for that electorate, and from 1908 the Tauranga electorate until 22 February 1923.
2 *New Zealand Herald*, 13 March 1923.
3 Sir Joseph Ward (1856-1930) was appointed a Minister without Portfolio in the 1891 Ballance government. Ward's brilliance soon won him the Colonial Treasury. He became Prime Minister on Seddon's death in 1906 but resigned after the 1911 electoral defeat of his party. In 1919 Ward lost his Awarua Parliamentary seat at a general election. He was elected member of Parliament for Invercargill in the 1925 general election.
4 *New Zealand Herald*, 3 March 1923.
5 Ibid.
6 *New Zealand Herald*, 3 March 1923.
7 Ibid, 15 March 1923.
8 *New Zealand Herald*, 17 March 1923.
9 Ibid.
10 *New Zealand Herald*, 21 March 1923.
11 Ibid, 23 March 1923.
12 *New Zealand Herald*, 24 March 1923.
13 Ibid, 27 March 1923.

# Property Purchaser's Protection

*This item on guaranteed search notes has been supplied by the Department of Justice. It is published for the information of practitioners. Further inquiries about the practical operation of the system should be directed to the local District Land Registrars.*

The Justice Department has moved to protect property purchasers at a time when, until now, they have been at risk. 1 January sees the introduction of Guaranteed Search Notes, a measure introduced in the Land Transfer Amendment Act (No 2) 1982.

The guaranteed search procedure means the government covers the buyer of a property for claims made against the title of a vendor in the period after settlement of the transaction and before it is registered in the name of the purchaser.

Until the purchaser is registered as the new owner claims may be made against the vendor's title by creditors and others with legal interests which stop the purchaser from acquiring the clear title he has paid for. The guaranteed search protection will last for two months after settlement which is the time allowed to register the property in the name of the purchaser. A fee of $10 will be charged.

"The introduction of guaranteed search notes and the automation of the Land Transfer Journal represents the most significant extension in the security offered to the public by the land transfer system since the inception of State guaranteed registration of title in 1870," said Register-General of Land, Mr B E Hayes.

The Guaranteed Search Notes and automation of the Land Transfer Journal are complementary. Mr Hayes said it was hoped to have the new journal operational in larger offices next year.

Since 1870 the government has compelled purchasers to use its guaranteed registered land titles system. Land Transfer Offices kept a journal of dealings lodged for registration, but not entered on the certificate of title. It was available for inspection by the public. However, in 1973 Land Transfer Offices were unable to cope with keeping the journal up to date because of increased transactions and stopped compiling it.

Since 1973 a page of the schedule of instruments, lodged with each transaction, has been used to form a "journal". But, with about 1,000 transactions being registered each day in Auckland alone, it has become unwieldy and journal searching has all but ceased.

The automated journal with its unregistered documents file will give access to unregistered entries when guaranteed searches are requested. It will be compiled within a short time of documents being received for registration.

"Searchers will be able to find with certainty any unregistered interests against a title and it will let solicitors discharge their obligation to search the journal," said Mr Hayes. "It will provide the platform on which to develop the land transfer system and can be expanded to include word processing, accounting facilities and the automatic transfer of statistics to other agencies," he said.

# Interest on solicitors' trust accounts: a new force in the public interest?

*By Grant Hammond, of Alberta Canada.*

*The author is a former Hamilton practitioner and has been a law professor. He is currently working on a project relating to data protection and computer abuse. In this article he explains the use made of funds generated by interest charges on moneys held in solicitors' trust accounts in the Canadian Province of Alberta. Although the question of interest on trust accounts is not currently a live issue this article helps to explain the public benefits that can flow from it in an appropriate social and political climate.*

In an earlier note in this journal, [1983] NZLJ 152, I described the work of the Institute of Law Research and Reform at the University of Alberta, Canada. In this note I want to sketch the significant impact that law foundations and their principal source of funding — interest on solicitors' trust accounts — have had on law-related matters in North America in the last decade. I deal with one foundation — Alberta — in more detail. Given the formation of the New Zealand Law Foundation (1982) NZLJ 120 and its search for funding this matter may be of some interest to New Zealand lawyers.

**The traditional trust account requirements**

It is impossible to practise law without being entrusted with funds on behalf of clients. In the common law jurisdictions, legal regulation of one kind or another traditionally required these client funds to be placed in a non-interest bearing trust account separate from the lawyers' general or business account. The justification for these requirements was always thought to be that the funds were being held temporarily for use in a particular transaction on the client's behalf. Hence — or so the argument went — it was impracticable to open a separate new trust account for each client or to calculate separate interest on clients' funds after they had been co-mingled. This situation of course does not, today, make much economic sense, neither does it recognise the capabilities of modern computerised sub-accounting facilities. Neither clients nor the general public have benefited from this arrangement.

**North American Reform**

It was this latter insight which promoted Australian and then North American reforms in this area. The new concept is functionally quite simple and best demonstrated by the broad outline of some recent US state plans: clients' funds that are nominal or are to be held for only a short period of time are placed into a Negotiable Order of Withdrawal (NOW) banking account. The interest generated by the account is paid to some not-for-profit organisation for use in the law related activities. These schemes are often referred to in the US as IOLTA plans (Interest on Lawyers' Trust Accounts).

The first North American plan for interest on lawyers' trust accounts went into effect in British Columbia in 1969 and Alberta followed with its own plan soon after. The idea spread from Canada to the US and Florida began the first state programme in that country in September 1981. A California plan came into effect on 1 January 1982. Nearly all American states now have an IOLTA plan in place or under investigation. (There is a complication in the United States in that the activities of the Bar in some states are ultimately controlled by the Supreme Court of that jurisdiction rather than legislation. Some Courts have not been prepared to approve IOLTA plans: see Matthews, (1982) 39 NLADA Briefcase 32).

**The Alberta Legal Profession Act**

The Alberta Law Foundation was established by amendments to the Legal Profession Act and became effective on 1 April 1973. The Act itself spells out the purposes for which the Foundation's money can be used:

Objective 1: conducting research into and recommending reform of law and administration of justice;

Objective 2: establishing, maintaining and operating law libraries;

Objective 3: contributing to the legal education and knowledge of the people of Alberta and providing programmes and facilities therefor;

Objective 4: providing assistance to native peoples' legal programmes, student legal aid programmes and programmes of like nature.

Under s 110 of the Act every firm is required to maintain an interest-bearing trust account and to instruct the bank, trust company or treasury branch which maintains that account to remit the interest earned on it to the Foundation semi-annually each year "and that interest becomes the property of the Foundation".

The Foundation's funds are administered by a Board of Directors consisting of seven members. Three are appointed by the Attorney-General of Alberta, two by the Benchers of the Law Society, two others by those five Directors. The Directors meet regularly to decide on grant applications and policy matters with respect to the general administration of the Foundation's affairs, including the collection and investment of funds. A small permanent staff is maintained to take care of administrative matters and to advise prospective applicants on funding.

The Alberta Legal Profession Act specifically provides that no "arrangement" made between a lawyer and his client to deposit money received from or on behalf of the client in a "separate account for the client at interest" is affected by the Act. The practical position is therefore that unless the lawyer and his client make such an arrangement, under the statute interest on the solicitor's trust account flows to the Foundation.

**The income of the Foundation**

In the financial year ending 31 March, 1982 the Alberta Foundation had gross income of $10,598,845 (all figures in this article are cited in Canadian dollars unless otherwise indicated). Administrative expenses amount to $115,000. The 1982 figure was abnormal due to the staggering jump in interest rates in North America during the relevant financial period. The prime rate (the rate at which banks lend to their best customers) in that year was as high as 22 percent and as a result much higher than normal interest rates were applied to the balances in solicitors' mixed general trust accounts. The 1983 gross income figure will likely be in the order of $6,000,000. The Foundation negotiates an interest rate with each individual bank. In general, this rate is approximately five percent below the prime lending rate. Thus on the current prime (13 percent), the Foundation would receive eight percent.

Since the Foundation was formed it has also been able to set aside by way of investment a sum of $5,000,000 and the interest generated on this sum (which is part of the gross revenue mentioned above) in effect provides a "rainy day fund" which should enable core funding to be carried on if there is a severe economic downturn.

In Canada as a whole the annual sums generated by schemes not unlike the Alberta one generate in excess of $30,000,000. In the United States it has been calculated (on the basis of an average of $4,106 (US) per lawyer in current trust accounts and 431,900 lawyers in private practice) that the annual interest on such an amount at 5.5 percent simple (not compounded) would be in excess of $100,000,000 per annum (US). (See Matthews, *supra*, p40.)

**Expenditure of the Foundation**

Since the inception of the Foundation it has contributed $22,000,000 towards the accomplishment of the stated objectives in the following ratios:

1. research and law reform 22.47 percent;
2. law libraries in the province 11.6 percent;
3. public legal education 41.57 percent;
4. native and student projects 24.36 percent.

The Foundation appears to be proceeding on a basis of distributing about 75 percent of its income and investing the remainder.

**Undertakings assisted**

It is not possible here to detail the considerable number of projects to which the Alberta Foundation has contributed and their diversity. They cover such matters as law research and reform, an Institute for the Administration of Justice and an Institute of Resources Law in Alberta. The Foundation contributes to the Canadian Law Information Council (in Ottawa) which runs a variety of projects designed to improve the quality and timely delivery of legal information of all types to the profession, governments, the Judiciary, the law societies and the general public. The Foundation helps support a law teaching clinic, various legal history projects designed to preserve legal records, an environmental law association, high school debating and speech associations, all sorts of publications for specialist organisations needing information on legal and related matters, law in schools projects and the like.

**Resistance to IOLTA schemes**

Initial resistance to the idea of interest on solicitors' trust accounts in North America seems to have come from the Bar itself rather than governments. There were all sorts of concerns prior to the inception of such plans over possible ethical problems, possible extra paper work and expenses for law firms, and the sheer "nuisance" of having to amend exisiting legislation relating to the profession and to change existing arrangements. Some lawyers thought they would have less personal "leverage" with their bankers. (The non-payment of interest on trust accounts has always "sweetened" the relationship between a lawyer and his banker. In effect, the Alberta solution is a compromise. Because bankers retain five percent off prime there is still, if not sugar, then at least saccharine for the lawyer-banker relationship.)

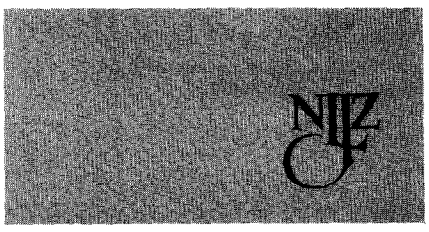
Once professional inertia or dissapproval had been overcome it was necessary to persuade governments that the funds were likely to be put to good use and get amending legislation passed. In one sense the timing of IOLTA programs in North America was fortuitous. In the late 1960s and early 1970s computer sub-accounting was not nearly as refined as it now is. However there is not as yet any evidence that I am aware of that North American lawyers are now automatically diverting funds which would otherwise flow to the Foundation back to individual clients. Indeed the Alberta Act would seem to require a specific "arrangment made between a member and his client" for this to be authorised. My impression is (though I have presently no data to support it) that what is happening is what one could expect to happen. In the case of large transactions (such as commercial conveyancing, resource agreements and the like) a solicitor, his client and bankers may well make special arrangements. Interest on routine transactions runs to the Foundation.

One final point should be noted. Although interest on solicitors' trust accounts has not been used in Alberta to help finance the seemingly bottomless well of legal aid there is clear evidence of interest in a number of American jurisdictions in extending the IOLTA concept into that dimension. In both British Columbia and Ontario IOLTA Money is used to some extent to help finance legal aid.

**Conclusion**

There is no question but that, imaginatively applied, IOLTA funds can be a significant force in all sorts of useful law related activities. Indeed, reading North American debates on the subject, I get the impression that some administrations fear the "clout" which these schemes can confer on organisations outside the governmental framework and which may subsequently make the administration's life miserable. (The theory is, apparently, "don't fund your enemies".) That kind of political concern has, I think, been shown to be unfounded. A more realistic view would be that administrations strapped for cash have been to some extent "bailed out" by IOLTA plans, and the political heat which would otherwise have been inflicted on such administrations for not supporting necessary and useful causes has been diminished. In short, IOLTA plans have, by and large, established their credentials.

Of course, the difficult question remains for New Zealand: assuming first, that it is thought undesirable that the banks should continue to enjoy a windfall, and second, that adequate computer sub-accounting mechanisms are in fact available to return interest to individual clients, should the legislature prefer the client or a public foundation as the recipient of the interest? Such an election involves philosophical issues as well as inviting standard cost/benefit analytic techniques. What does seem rather obvious however, is that the legislature should make a choice between those solutions, rather than leaving the matter rest on the footing of "no interest at all".



# International Commission of Jurists New Zealand Section

The Annual General Meeting of the New Zealand Section of the International Commission of Jurists was held on 1 December 1983. The usual formal business was held including the election of Officers and Council. The constitution provides for a Council of up to 15 members. It was considered that two places should be held open in the hope of obtaining some Auckland members who would be willing to serve on the Council. The new Officers and Council are as follows:

President: Sir Guy Powles
Secretary: J E Hodder
Treasurer: A D Ford
Council: T J Broadmore,
P A Black,
I D R Cameron,
M R Camp,
R Chapman,
Helen Cull,
J M Dawson,
P J Downey,
A Lewis,
S A M Perry,
A Satyanand,
G L Turkington,
D J White.

The Chairman of the Council, Mr M R Camp reported on activities during the previous two years. Submissions had been made to Parliament on the Official Information Bill seeking, unsuccessfully, a power of review by the Courts of a Ministerial decision not to release particular information. On the Bills concerning the Clyde Dam and Samoan Citizenship issues the division of views in the Council was such that no consensus could be reached. Considerable work was done, with the aid of a grant from the J R McKenzie Trust, on the topic of *Law in a Multi-Cultural Society* and this is continuing.

An ICJ meeting in Sicily in May 1982 on the independence of the legal profession had been attended by Mr P J Downey. He had discussed the issues likely to arise with the Council before he went. The Secretary-General in Geneva has raised the possibility of a regional seminar in the South Pacific area on *Development and the Rule of Law*. This proposal is still under consideration and the President and Secretary have both had correspondence with the Secretary-General on the subject.

The meeting had a wide-ranging discussion on its future activities. Various suggestions were made for activities in addition to those currently being undertaken. In particular consideration will be given to the constitutional issues raised in a paper presented to the meeting by Mr G Palmer, the deputy-leader of the Opposition. Parliamentary business meant that, at the last minute (almost literally), Mr Palmer was unable to attend, but his paper was read to the meeting. It dealt with his views on the reform of Parliament in its Standing Orders and committee procedures, the role of the Legislative Department and a possible Bill of Rights.

# WORDS

*By P Haig*

**The superfluous "that"**

We believe that for the reasons given in the earlier report that the existence of the defect has been proved.

The annoying fault exemplified above has become particularly common in recent years. Look through one of your own files of correspondence and I guarantee you will find one or two examples. One way of guarding against it is to put commas at the beginning and end of the phrase following the first "that". Adopting this course in the above example produces this satisfactory outcome:

We believe that, for the reasons given in the earlier report, the existence of the defect has been proved.

**"Oversee", etc**

The horrid usage flourishes. Two passages from a recent Planning Tribunal report exemplify judicial fondness for this dangerous little linguistic family, viz:

(1) ". . . provision for the . . . Council to *overview* the prospecting."

This is the first time I have come across "overview" used as a verb, but no doubt that is coming.

(2) ". . . provision for the . . . Council to have any *oversight* of the prospecting activities."

The increasing use of "oversight" for "supervision" is particularly unfortunate in view of the accepted primary meaning of "oversight" as inadvertent, eg, "this failure was the result of an oversight by the Council".

One does not often plead for a Latin-derived form in preference to the Anglo-Saxon, but this is surely a special case. *Supervise* and *supervision* are only marginally longer than *oversee* and *oversight*, and are far less ambiguous.