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Judging the world

The appointment of a new Chief Justice, Mr Justice Eichelbaum and a new Chief District Court Judge, namely Judge Silvia Cartwright, focuses attention again on the Judiciary, its role and function within the legal profession and society in general.

Over the past few years there has been a whole host of books looking with varying degrees of critical attitude, at the Judiciary. It goes back to Devlin, himself of course a Law Lord, then Kirby himself now a Judge as President of the Court of Appeal of New South Wales, then Pannick, and more recently a book not yet to hand by Simon Lee entitled *Judging the Judges.* A review of this latter can be found in the *Times Literary Supplement* for 11 November 1988. And, of course there was the typically American journalism of Woodward's book *The Brethren* (1979) on the Supreme Court of the United States. All this of course leaves out such earlier books as Henry Cecil's *The English Judge* (1970) and the passing consideration of the Judiciary in books like *Lawyers and the Courts* (1967) by Abel-Smith and Stevens, *All Jangle and Riot* (1986) by Hamilton, and the more recent *The Legal Profession in England and Wales* (1988) by Abel.

Obviously the Judiciary is moving centre stage after having been almost in the wings for a long time. In part this must be because society is becoming more litigious and the Courts more activist as enterprising Counsel plead ever more innovative grounds for judicial solutions to social issues. It always needs to be remembered that Judges can only deal with the cases that come before them for determination. Innovation or development in or through the legal system must therefore be seen as an interaction between Bench and Bar.

Given the present situation it is therefore not surprising to find another book about the Judiciary, *Judging the World* (1988) Butterworths, (NZ$80.00) by Garry Sturgess and Philip Chubb. The sub-title for the book is *Law and Politics in the World's Leading Courts.* The authors had the interesting idea of interviewing a large number of Judges, some 42 in all, from widely different jurisdictions, although the balance is mainly common law. Merely by way of an indication, the Judges, presently sitting or retired who were interviewed include Lords Denning, Wilberforce, Scarman and Donaldson; from the United States, Burger, Rehnquist, Brennan and Scalia, from Australia, Mason, Gibbs, Stephen, Lionel Murphy and Kirby, from New Zealand Cooke, and so on with Judges from Canada, Ireland, India, West Germany, the International Court of Justice, the Court of the European Communities, the European Court of Human Rights, the European Commission of Human Rights and the Inter-American Court of Human Rights.

These interviews constitute the last part of the book. They vary in quality as much as they do in the type of issues they deal with. Sir Robin Cooke, for instance, is interrogated about his views on a Bill of Rights, on judicial activism, on the place of the Court in the constitutional scheme and specifically on the *New Zealand Maori Council* case. Lionel Murphy's interview is interesting because of course he starts off provocatively by saying the Australian judicial system is a very conservative one. He also referred to his own experience in having his telephone bugged when he was a Judge of the High Court of Australia. Justice Michael Kirby talks about the social restraints on Judges, even to not being able to go to the hotels, by which presumably he means not going into the public bar of the local pub at Parramatta on a Saturday afternoon rather than not attending a function at the Wentworth. More seriously and more to the point he speaks about the accountability of Judges who, he points out, make all their decisions in public, which is not something that occurs in most fields of activity, and certainly not in the bureaucracy.

The most interesting set of interviews in many ways were those of the Judges of the Supreme Court of the United States. Former Chief Justice Warren Burger is clear and forthright in his view that the United States Constitution would not have survived if it had not been for judicial review and the Bill of Rights. Justice Rehnquist, who was for a time Assistant Attorney-General makes the interesting comment that in a collegiate Court it is highly desirable to have a few people with experience in administration, in a situation, that is, where the legal concern has not been primarily the problem of a client. On the question of judicial activism he remarks that it is essential to the idea of a written constitution that puts some limits on government, that due regard be paid to those parts of the constitution that authorise governments to make decisions.

Two interviews of particular merit are those of Justice Brennan, who was one of the liberals of the famous Warren Court but now finds himself more often among the dissenters, and of Justice Scalia, a recent appointee who is widely regarded as somewhat conservative, a strict constructionist although he personally rejects that particular label. Justice Brennan thinks the Warren Court was activist because of the nature of American society at the time and the type of cases therefore that came before it. He remains committed to the same general approach. Justice Scalia on the other hand puts his emphasis on the idea that Courts are essentially undemocratic. He quickly adds that this is not a criticism because that is what they are meant to be, to mark the bounds beyond which even a democratic majority cannot go. He sees the essential difference between the judicial activists and those favouring judicial restraint as an argument over the degree of democratic self-governance that a society is going to have through elected representatives. As a comment it does seem strange that the judicial conservatives have become the populists while the judicial liberals can almost be called elitist. How often do ideological labels contradict the reality of political, or in context judicial decisions? The Judges mentioned and

the others interviewed in the book, do not of course say revolutionary things. The value of the interviews is more in the differences of emphasis that they show. The interviews are more likely to start arguments than to conclude them. What they do show however is the degree of judicial responsibility across the political spectrum. No single reply to a question strikes home as so telling as to end all discussion. But they all show an acute awareness of the complexity of the issue of judicial decision making and of the relationship, indeed the inter-relationship, with political realities.

The book, as indicated above is in two parts, and the interviews constitute the second half. The first half, some 250 pages, is the authors' comments on some prime examples of the involvement of the Courts in different countries in issues with political implications. They deal for instance, in the chapter called "The King and the Law" with the question of race relations in New Zealand and the recent so-called, Waitangi decision. Then there is a chapter discussing particularly the Charter of Rights in Canada and looking at the implications of a possible Bill of Rights in New Zealand or Australia. Those chapters are a commentary, sometimes critical, by the authors of what they have drawn from the interviews. They also put the judicial comments in the context of the circumstances of the particular Judge.

The book inevitably suffers in the interview section from a great deal of unevenness in the depth with which the individual Judges deal with the particular questions they are asked. The first half of the book shows that the authors have a careful (one is tempted to say judicial) and analytical approach. The book fulfils the description the authors give of it in their preface;

> *Judging the World* seeks to explore the jagged line of intersection between law and politics in the world's leading courts. In a democracy, the tasks of politicians and judges are supposed to be quite distinct. Politicians, elected by the people at regular intervals, are supposed to make the law. Judges, often appointed for life, are supposed to interpret the law and apply it. The myth that this division of powers was maintained faithfully and rigidly persisted for many years, even though it never represented the truth. Now, however, it is rare for judges to deny that they too make the law. But the questions that arise from this admission remain highly contentious, especially among judges themselves.
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> This book describes how judges in seventeen major courts throughout the world address, among others, these issues: the extent to which judges make law; how they make it – by what rules and to what ends; the extent to which their lawmaking involves them in activity that is inherently political; how they differ from politicians; how independent from the political process they really are; how they are appointed; how suitable they are as a group to be making decisions that have such impact on the lives of ordinary citizens; and how accountable they are. The book also looks at what happens when the authority of governments and parliaments is challenged by courts, when collisions occur.

Judging the World is a book that is stimulating to read. It is as politically significant as it is in the legal field. It is likely to be referred to often in articles and later books, but it stands on its own as a unique examination of how Judges see their own activity, and thereby it illuminates a whole area of jurisprudence.

P J Downey

Books

Summary Judgment Procedure

By Andrew Beck
Butterworths, 1988, 113pp. Price $44.00 ISBN: 0 409 7885 38

Reviewed by the Hon Mr Justice Barker, Chairman of the Rules Committee

The High Court Rules have been in operation for some three years. One major benefit of the new Rules was the introduction of a summary judgment procedure. Prior to 1986, the only procedural device for preventing spurious defences and fast tracking obviously meritorious claims was the "bill writ" procedure. Its principal limitation was that it was available only for proceedings founded on "bills of exchange" for which expression there was a broad definition. The new rules made summary judgment available, not just in claims arising out of bills of exchange, but in a whole variety of cases.

Summary judgment procedure can be found in most common law jurisdictions. Our Rules Revision Committee, in recommending the present rules, did not borrow from any other jurisdiction's summary judgment rule in any unselective way; it settled for a uniquely New Zealand form of procedure, described by the author of the work under review as "something of a hybrid between its English counterpart and a full blown trial on motion". As a result overseas precedent is of limited assistance and unreported High Court judgments assume great significance in settling practice in this developing area of litigation.

Practitioners have taken to summary judgment with enthusiasm. When the Masters of the High Court were appointed in 1987, summary judgment was one of the specific areas of jurisdiction entrusted to them. The recent increase in litigation caused by economic conditions including the sharemarket collapse, has impacted

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Case and Comment

The Wellington City Council v Dominion Budget Rent-a-Car Ltd (in liquidation) [1988] BCL 598.

Observers of the lease/licence controversy will find this decision interesting. It will be recalled that the House of Lords in *Street v Mountford* [1985] 1 AC 809 declined to follow thirty years of English authority, holding that exclusive possession is of "first" or "prime" importance, in contrast to the significance of the wider intention of the parties to be inferred from the lease, and that unless the grant of exclusive possession is referable to a legal relationship other than tenancy, the relationship is one of lease rather than licence. Having made careful reference to *Street v Mountford*, Eichelbaum J found himself bound to follow the ruling of the Court of Appeal in *Baikie v Fullerton-Smith* [1961] NZLR 901 which held that the question turns upon the intention of the parties rather than whether exclusive possession was granted. Eichelbaum J was also required to decide whether the licence could be assigned without consent and, if the relationship was one of lease, the status of an assigned term following its assignment without consent.

These problems arose as underlying issues in litigation with the Wellington City Council (the council) based upon an agreement described as a deed of licence conferring rights to booths at the Wellington Airport. The deed conferred rights of occupation upon Dominion Budget Rent-A-Car Ltd (Dominion) in respect of the booths to be used for the purpose of Dominion's car rental and travel agency. In 1983 Dominion went into receivership. By letter dated 9 December 1983 the receiver's solicitors sought the consent of the council to the assignment of the licence to a company which subsequently changed its name to Budget Rent-A-Car Ltd (Budget). At first the council declined to give consent or, at least, gave its consent on terms unacceptable to Budget. The council sought rectification of the deed so that it included a provision that the licence fee was not to be less than $150,000 pa. The defendants counterclaimed alleging breach of either an implied term or a collateral contract that, apart from Budget (or Dominion), only one other vehicle rental business would be entitled to occupy space at the airport terminal for the purpose of carrying on a vehicle rental business. Eichelbaum J found that the council's claim for rectification failed, and that the defendants had proved both heads of counterclaim, ie the implied term and the collateral contract. As Budget sued for damages arising after the assignment, these findings raised the question of Budget's right to sue, since the council had not given its consent. This in turn raised the question of whether the deed of licence created a lease or a licence,

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dramatically on the workload of the three Masters. All three Masters have been extremely busy in dealing with numerous summary judgment applications.

I set out this background to demonstrate just how timely is a handbook on summary judgment for judiciary and practitioners alike. The author offers adequate background material, noting the differences between English and New Zealand authorities; he deals helpfully with jurisdictional limitations, considers the procedure from the points of view of both plaintiff and defendant before covering the mode of disposal of the application. Mr Beck gives helpful references to the relatively few reported cases; most importantly, he gathers together numerous unreported judgments; these document all the vagaries of this new procedural animal.

Summary judgment procedure has been so successful and is in such constant use that this book is an essential reference work for every litigator. One hopes that the District Court Rules will be altered to permit summary judgment in District Courts. Already the trend has been noted whereby practitioners apply for summary judgment in the High Court for claims under $12,000 which should be filed in a District Court. They are prepared to accept lower awards of costs in exchange for the efficacy of the procedure on an evasive debtor. Such a person has now to go on oath to state his defence instead of buying time by filing a notice of intention to defend. One imagines that Mr Beck's book will be of assistance in District Courts if and when the rules there are changed.

The author seems to have dealt with every difficulty likely to be encountered in practice. His style is definitive and easy to follow. Pitfalls for the unwary are clearly signalled. Many who practise in this area will be new practitioners. They are well advised to assimilate this text before drafting their first sets of summary judgment papers.

Just as the book was published, the High Court Amendment Rules (No 2) (1988 SR 1988/269) were promulgated. These rules effect a number of important changes to the summary judgment procedure. The changes have caused the author to prepare a supplement which has to be read along with the principal work. The amending rules meet some of the criticisms made in the text; they were issued by the Rules Committee in the hope of making summary judgment procedure more efficient. I predict that this work will prove such an indispensable part of the litigator's bookshelf that a further edition incorporating the rule changes will appear shortly.

I recommend this book as an essential work for all practitioners. □

and the various consequences which flowed from this categorisation. It should be added that in another action set down concurrently with the present action the council consented to the continuing term of the assignment from the date of the consent, but this consent presumably dated from the hearing date so that it did not retrospectively cover the period for which Budget sought damages. This note deals only with the lease/licence controversy and the effect of the lack of consent to the assignment if the deed was found to create either a lease or a licence.

Lease/Licence

Lord Templeman chose to commence his speech in *Street v Mountford,* in which the remaining Law Lords (Lords Scarman, Keith of Kinkel, Bridge of Harwich and Brightman) concurred, by emphasising that a term of years came to be seen as creating a legal estate (p 814) and stated

> There is no doubt that the traditional distinction between a tenancy and a licence of land lay in the grant of land for a term at a rent with exclusive possession.

Subsequently (p 823) he nominated exclusive possession to be "of first importance" in determining whether an occupier is a tenant, but added that it was not "decisive" because an occupier who enjoys exclusive possession is not necessarily a tenant. His approach, however, involves more than the mere allocation of emphasis within the criteria for determining whether a relationship is one of contractual tenancy or licence; Lord Templeman declared the only intention which is relevant to be the "intention demonstrated by the agreement to grant exclusive possession for a term at a rent" (p 826). His actual words were (p 826):

> My Lords, the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy. Legal relationships to which the grant of exclusive possession might be referable and which would or might negative the grant of an estate or interest in the land include occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupancy referable to the holding of an office.

Adopting and applying "the logic and language" of Windeyer J in *Radaich v Smith* (1959) 101 CLR 209, Lord Templeman asks, first, whether a right of exclusive possession for a term has been created and, if so, what is the party's intention in granting exclusive possession. Essentially, rather than commencing with the agreement read as a whole, the inquiry focuses upon whether there is a grant of exclusive possession for a term of years, then moves back to ascertain the intention of the parties in creating such a relationship. Critics object that this puts the cart before the horse, ie that the general contract is of greater significance than the grant of an estate in land. In the wider scheme of things, however, the Templeman/Windeyer approach does preserve the fundamental distinction between a lease, being a demise of land, and a licence.

Street v Mountford is one of those decisions of high authority, the long-term effect of which is likely to depend upon its reception and application by subsequent tribunals. Is this exercise in judicial fundamentalism, which involves a substantial change of direction in English law over the last thirty years, destined to be applied with enthusiasm: or merely treated as a high-water mark in a trend possibly favouring exclusive possession as a criterion in the lease/licence controversy; or to be restricted in application to its own facts and the interpretation of the Rent Acts (UK)? It is in this context that the decision of Eichelbaum J becomes very interesting.

Eichelbaum J pointed out that the party's description of the document is not conclusive. He referred to the words of McMullin J in *Daalman v Oosterdijk* [1973] 1 NZLR 717 that the existence of a grant of exclusive possession is an indication of "first significance" or "prime importance" and suggested that these words appear to be "in accordance" with the modern authorities, citing the passage already referred to in *Street v Mountford* (p 27). As already stated, however, *Street v Mountford* involved more than an apportionment of significance to various criteria arising in the determination of whether a relationship is one of lease or licence. Eichelbaum J then referred to the tests propounded by the Court of Appeal in *Baikie v Fullerton-Smith* [1961] NZLR 901, which involved an arrangement, found to be a licence, whereby a tenant was permitted to occupy a greenhouse following termination of a previous tenancy agreement for non-payment of rent, pending execution of a new agreement. Eichelbaum J concurred with the comments of Thorp J in *White v Belk* [1979] 1 NZLR 121 who pointed out that the decision of the High Court of Australia in *Radaich v Smith* (supra), including the judgment of Windeyer J relied upon by Lord Templeman, did not appear to have been referred to the New Zealand Court of Appeal. The Court of Appeal did, however, rely upon the opinion of the Privy Council in *Isaac v Hotel de Paris Ltd* [1960] 1 WLR 239, [1960] 1 All ER 348, an appeal from Trinidad. Eichelbaum J concluded his general review of the authorities by observing that the decision of *Street v Mountford* may have caused the two streams of English and Australian authority to converage, although he concluded that he was bound to follow *Baikie v Fullerton-Smith.*

His Honour then turned to the deed of licence itself. He enumerated the factors which assist in determining whether the parties intend to create a tenancy or licence, referring to a "helpful list" in an article by Waite "Distinguishing between Tenancies and Licences", (1980) 130 New LJ 939. He found that the deed of licence contained most of the provisions generally located in leases, and stated that if

the "perceived insignia" were applied "in a mechanical way" the conclusion that the deed created a lease "would seem almost overwhelming" (p 30). The covenants included a term (of three years), and covenants to keep the premises in good repair, not to make alterations without prior consent, and to permit entry for inspection. There was also a prohibition against assignment or sub-letting and a right of re-entry for breach. He found the effect of the clauses was to confer on the licensee an exclusive right of possession of the booths. He then proceeded to say that such a clause by clause analysis "gives a deceptive impression"; and that to conclude that the contract was a lease was "to miss the wood for the trees" (p 31). It was the obtaining of the concession to operate the business at the airport that was critical, the right to operate the booth was "an important but . . . not absolutely essential aspect of the arrangement" (p 31). The "primary provisions" of the contract were the right to operate the car business at the airport, rather than the occupation of the premises.

Eichelbaum J drew comfort by analogy from the "front of the house" cases, such as *John Fuller & Sons Ltd v Brooks* [1950] NZLR 94, CA, which related to a confectionery stall in a theatre. In that case Finlay J, with whose judgment O'Leary CJ and Hay J agreed, said the "cardinal feature of the contract was the right to provide refreshments . . ." and "the right of occupation . . . was merely incidental and collateral . . ." (p 105). In conclusion Eichelbaum J said:

> These citations support the view that where the contract relates to broader subject matter than occupation rights of premises or land, the Court is required to identify the main purpose or substance of the transaction, and, if appropriate, regard rights cf exclusive occupation which may arise incidentally as subsidiary thereto (p 33-34).

Street v Mountford, of course, involved a right to occupy two rooms subject to termination, the question being whether the arrangements came within the Rent Acts (UK). At no point in his speech did Lord Templeman consider complications such as the "front of the house" or "concessionary" cases, and Lord Templeman expressly stated that the relationships to which the right of exclusive possession might be referable include occupancy under a contract for the sale of land, occupancy pursuant to a contract of employment, or occupancy referable to the holding of an office. Eichelbaum J did not need to address the question of the extent to which the test stated by him, drawn from the words of Finlay J in *John Fuller & Sons Ltd v Brooks*, was consistent with the approach of Lord Templeman, but the "New Zealand test" is different, and can be profitably contrasted with Lord Templeman's, particularly in the context of the "front of the house" type of case. Eichelbaum J accordingly concluded that the deed created a licence not a lease. In a sense the "front of the house" type of case points up the difference between the two lines of authority, and the question remains as to which will ultimately hold sway.

Effect of assignment without consent if deed found to create a lease

Eichelbaum J went on to consider the question of the effect of the assignment if the deed had created a lease. Clause 15 of the deed provided:

> That the Licensee shall not during the currency of this licence assign, mortgage or charge any of the rights granted hereunder or underlet or part with possession of all or any part of the premises without the prior written consent of the Council.

Applying dicta in *Gary Denning Ltd v Wickers* [1985] 1 NZLR 567, CA, Eichelbaum J held that this clause was not so worded as to bring the agreement automatically to an end following assignment without consent (as in *Strong v State Advances Corporation* [1950] NZLR 492); so that, even though no consent was given, Budget obtained a valid assignment of the deed upon settlement. Of course, breach of such a prohibition may entitle the aggrieved lessor to sue for damages or forfeit for breach, but nevertheless the assignment operates to vest the remainder of the term in the assignee.

Effect of assignment without consent if the deed created a licence

Having decided that the deed created a licence, Eichelbaum J went on to consider the validity of the assignment, to which, it will be recalled, the council had not consented. It was submitted on behalf of the council that the licence included certain personal characteristics and was not assignable. The prima facie rule is that rights under ordinary commercial contracts are assignable unless they contain some personal element. Eichelbaum J found that there were no grounds for concluding that the particular personal skills of Dominion, or any element of confidence in that company, as distinct from the confidence reposed in rental car operators as a class, were a feature of the contract. He then re-stated the three situations listed by Meagher Gummow & Le Hane, *Equity Doctrines and Remedies* (2 ed 1984) at p 194 as arising where a contract is assigned without consent, in the light of the Contractual Remedies Act 1979. His comments may be paraphrased as follows:

(a) The clause against assignment may be so drafted that its breach does not give rise to a right of cancellation, and does not affect the validity of the assignment, but permits an action for damages.

(b) The provision against assignment may be an essential term, so that a breach, while not automatically invalidating the assignment, gives rise to a right to cancel.

(c) The provision may be drafted so that a purported assignment confers no rights on the assignee, or, upon breach, ipso facto terminates the principal contact.

Citing cases such as *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262, per Croom-Johnson J, *Attwood & Reid Ltd v Stephens*

[1932] NZLR 1332, per Ostler J, and *Hodder & Tolley Ltd v Cornes* [1923] NZLR 876, per Salmond J, His Honour found that the contract did not contain any personal element, to the extent that it could not be assigned, nor did it come within (c) above, so that the purported assignment of the licence was effective against the council. Eichelbaum J agreed with Salmond and Ostler JJ that the position is analogous to an assignment of a lease without consent in breach of the covenant against assignment. Budget was accordingly entitled to sue the council.

Conclusion
This is a useful decision involving the status of a lease or licence following assignment without consent. It is particularly interesting, however, in that it represents something of a development in the licence/lease controversy in this country. Eichelbaum J found himself bound by *Baikie v Fullerton-Smith* and was unable to apply *Street v Mountford*. Until the position is tested on appeal to the Court of Appeal, or to the Privy Council, *Street v Mountford* cannot be treated as directly authoritative in this country.

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Costs in Guardianship Act cases — recalcitrance has its price

The ninth judgment of Judge BD Inglis QC in *Wheeler v Wheeler* (Family Court, Wellington (in Chambers); No FP 085/911/82; 22 July 1988) is noted because of what His Honour said about the public expenditure in the case and about the contributions that the parties or either of them should be required to make towards that expenditure.

1 *A resume of the background*
The litigation between the parties had been, to say the least, protracted and extensive. The live issue at the moment was what access the mother (who, over the years, had had seven counsel) should have to her younger child, a boy, now in the father's care. (There had, indeed, also been collateral litigation: see *Tickner v Wheeler* (1985) 3 NZFLR 782; *W v SSC* (1986) 4 NZFLR 321). It had become clear to His Honour that the mother had taken no notice of anything the Family Court, or, indeed, the High Court, had said and that the boy's refusal of contact with his mother (and his elder sister) had "been largely a response to her quite ruthless attempts to sabotage his security in his father's home." It had also become obvious that any meetings with his mother and sister had been, and would inevitably be, used by the mother in an attempt to manipulate the boy into returning to her home permanently and cut him off from his father — contrary to the boy's welfare and interests.

2 *The public expenditure; and contribution*
His Honour proceeded on the basis that the whole of the costly dispute had had "as its mainspring" the mother's "intense desire to weld herself into a closed family unit from which the father would be absolutely excluded". That desire for exclusive possession of the children was never in their best interests, as she had repeatedly been reminded by the Court. Her protests about her wish to co-operate over access had never been any more than manipulative tactics, and she had used every chance and every means to sabotage the children's relationship with their father, and was plainly enough still trying to do this with the boy.

Events showed that the father was acting in the children's interests in pursuing access as he did. Indeed it was his own application to the Court to terminate his access which led to the Family Court's decision on 13 December 1985 to place the boy with his father until the Court's further order. Up to the point which that decision became necessary the father had been put to substantial and needless expense — needless, because if the mother's basic attitude had not made each access transfer a nightmare for the children, litigation would not have been necessary.

It appeared from counsel's memoranda that the mother had almost throughout been supported by legal aid. Though the father was in receipt of legal aid for some of the time, he had had to finance much of the litigation himself. His Honour remarked that it was not for him to draw attention to the injustice which can sometimes be produced when one party in receipt of legal aid is enabled to wear down the other party, but that it should be noted that the mother, though well able to work since the separation in 1982, had throughout been supported by a domestic purposes benefit, a matter which attracted comment from Judge Carruthers in dealing with the father's successful objection to an assessment for liable parent contribution: (1986) 4 NZFLR 321. Judge Inglis referred also to His Honour's finding that the father's financial situation had changed drastically for the worse as a result of the litigation and because of "the tension and strain of these last years" (at 322), and that because of the litigation he had "incurred substantial and long term debts" and "his health is shattered and his earning capacity considerably reduced" (at 325).

Judge Inglis explained that the main items of public expenditure in the present case had related to the fees and disbursements of counsel appointed to represent the children in terms of s 30 of the Guardianship Act 1968 and the fees of various experts whose assessments had been obtained in terms of s 29A. According to figures extracted by the Registrar down to March 1987 the total amount expended as at that date was $37,322.57. For present purposes it was necessary to consider this expenditure under three broad heads: (a) separate representation of the children; (b) specialist identification of the problems affecting the children and assessment of their needs; (c) attempts to put in place suitable access or visiting arrangements and monitoring those arrangements. All three fell under either s 30 or s 29A.

Before considering those particular heads, His Honour summarised the statutory provisions mentioned. By s 30(2) the Court was obliged, in the circumstances of this case, to appoint counsel to represent the children. By subs (4) the fees and expenses of such counsel were to be paid from the consolidated fund; but that was subject to subs (7), which provides:

> . . . the Court may if it thinks proper order any party to the

> proceedings to refund to the Crown such amount as the Court specifies in respect of any [such] fees and expenses . . . and the amount ordered to be refunded shall be a debt due to the Crown by that party and shall be recoverable accordingly in any Court of competent jurisdiction.

By s 29A(1) the Court may, "if it is satisfied that it is necessary for the proper disposition of the application" (of which there can be no doubt in the present case) request a medical, psychiatric or psychological report. Subs (6) provides:

> Where any person prepares a report pursuant to a request under subsection (1) of this section, the fees and expenses of that person shall be paid by such party or parties to the proceedings as the Court shall order or, if the Court so decides, shall be paid out of money appropriated by Parliament for the purpose.

It was to be noted that, in the context of s 30, unless an order is made to the contrary, the expenses fall on the consolidated fund. But in the context of s 29A, unless an order is made but the expenses are to be paid from the consolidated fund, the parties are liable. These differences in wording and emphasis, His Honour considered, must have been deliberate, for both sections in their present form were derived from the Guardianship Amendment Act 1980.

In *Giles v Giles* [1985] 1 NZLR 760 the Court of Appeal considered s 38 of the Matrimonial Property Act 1976, which is similar in structure to s 30 of the Guardianship Act 1968, and which enables the Court to appoint a referee "to make an inquiry into the matters of fact in issue between the parties, and to report thereon to the Court" (subs(1)). By subs (4) it is provided that the fees and expenses of the referee

> . . . shall be paid out of the Consolidated Revenue Account from money from time to time appropriated for that purpose by Parliament: provided that, if the Court thinks proper, it may order any party to refund to the Crown such amount as the Court specifies in respect of those fees and expenses, and that amount shall be recoverable in any Court of competent jurisdiction as a debt to the Crown.

In the Court's judgment, delivered by Richardson J, the provisions of s 38 were seen as a specific application in the matrimonial property field of the Court's more general power to delegate the task of inquiry into factual issues; the person to whom the inquiry is entrusted is appointed by the Court in other that the Court by means of the information obtained through him may exercise its judicial functions. The Court went on to say (at 767):

> Viewed in that way it is understandable why subs (4) deals in two separate steps with fees and expenses of any person other than the Registrar who receives such an appointment. Since he is appointed by the Court to assist it in the discharge of its functions the referee must be paid from the public purse. The subsection than goes on to provide that the Court may order any party to refund to the Crown such amount as the Court specifies. It does so only if it thinks it proper to do so and in such a case it may order recovery of part only or all of the sum expended by the Crown. There is no presumption that the parties will meet the expenses of the referees. On the contrary, in as much as the inquiry is part of the judicial process and the power to order a refund is exercisable only if the Court thinks proper, there must be a positive reason advanced for calling on the particular parties to pay or contribute to the costs involved.

At first sight, Judge Inglis said, it might seem that this passage explained how ss 30 and 29A of the Guardianship Act were to be interpreted, so that (in regard to s 30) there was no presumption that the parties would meet the fees and expenses of counsel appointed to represent the children, and (in regard to s 29A) there was no presumption that they would not meet the fees and expenses of the experts. His Honour thought it to be explicit in the Court of Appeal's judgment that a referee appointed under s 38 of the Matrimonial Property Act was acting as the Court's delegate in inquiring into factual issues between the parties; earlier the Court had expressed some doubt whether the referee may be cross-examined (see at 764). But obviously, Judge Inglis continued, counsel appointed in terms of s 30 of the Guardianship Act to represent children could not have the status of a referee; and an expert requested to report in terms of s 29A provided no more than an expert opinion, upon which the expert might be cross-examined if called as a witness by the Court (subs(8)): his opinion could not be binding on the Court.

These obvious differences apart, the basic distinction lay in the different nature of the inquiries. A s 38 inquiry in terms of the Matrimonial Property Act was an inquiry into ascertainable fact. A case under the Guardianship Act was an inquiry into which of a range of options would best serve the welfare of the child. The policy of s 30 of that Act was to ensure that the child was represented independently of the partisan interests of either of the parents, to ensure that the child's own voice was heard and his or her independent interests and needs appropriately recognised. In terms of s 29A the inquiry was directed to medical, psychiatric or psychological factors which have a bearing on the child's welfare. It was unnecessary to refer to the cases of the highest authority which made it clear that the Court's function in a Guardianship Act was at least in part inquisitorial, a function dictated by the need to treat the child's welfare as the first and paramount consideration. The Court was required to get as near to the truth as it could.

To the extent that the appointment of counsel to represent a child and the obtaining by the Court of expert medical, psychiatric or psychologcial opinion were directed to the Court's inquiry into the welfare of the child, such steps were taken in the public interest and not merely to enable the parties more effectively to resolve a dispute affecting them alone. A matrimonial property inquiry was different in nature in two respects: first, the inquiry by the referee may be directed only to "matters of fact

in issue between the parties" (Matrimonial Property Act, s 38(1)); second, the inquiry and the referee's function are not directed to the protection and enhancement of the interests of a child, not a party, whose future is in issue.

In the case of counsel appointed to represent a child there was ground for saying that there was a "strong presumption" that his or her fees and expenses would be paid from the public purse, especially in a situation where (as here) the Court was obliged to make such an appointment, for the reason for the appointment was the public interest in ensuring that the child was independently represented. In the case of a reporting expert, the Court's opinion was that it would be wrong to approach liability for the expert's fees and expenses on the basis that there was necessarily a presumption one way or the other. The incidence of liability for payment must depend on the nature of the inquiry and the circumstances. For example, an assessment of the degree of psychological bonding was very different from resolution of the issue whether the child did or did not suffer from a specific medical condition. It appeared to His Honour that the application of s 29A(6) must depend very much on the circumstances of the individual case, and that the provision did little more than to require the Court to consider whether the parties, or the public purse, should pay.

The justification for payment from the public purse of the fees and expenses of counsel appointed to represent the children or those of an expert requested by the Court to assess the children, depended on the public interest that these measures be taken so that the Court could be fully and independently informed on matters affecting the welfare of the child. It followed that the justification for requiring the parties or either of them to pay any part of those expenses must be found in something that the parties have done or have omitted to do which resulted in those expenses or part of them being unnecessarily incurred. If that was right, s 30(6) and s 29A(6) were aimed essentially at ensuring that the Crown was not required to meet expenses which the parties could by reasonable measures have avoided. At the same time "reasonableness", within the context of a Guardianship Act dispute, could be a treacherous concept. That was because the experience of the Family Court showed that many people suffering from the unhealed wounds of a disintegrated relationship would often be incapable of calm and objective reasoning or action in coping with its consequences. That was precisely why the Family Court in a Guardianship Act case needed input from independent sources to enable it to concentrate on its paramount objective of ensuring that the welfare of the child was protected. Notwithstanding the clear need to remember that the parties or either of them might be labouring under the disadvantage of impaired judgment, there came a stage at which a party's attitude crossed the threshold at which compassion could no longer protect it from being regarded, by any standard, as unreasonable.

It was at that point, His Honour indicated, that the question must arise whether there should be a contribution by that party towards expenses which would otherwise have been borne by the Crown. If such a contribution was ordered, it was in no sense a punishment of that party for being unreasonable. It was simply to require that party to accept responsibility for the expense which had resulted from his or her decisions or actions.

Against that background of principle, the Court went on to consider the heads of expenditures in the present case, bearing in mind its unusual features.

(a) *Separate representation of the children*

In considering whether the parties or either of them should be required to contribute to the fees and expenses of counsel appointed to represent the children it was necessary to bear in mind that this litigation fell into three phases: (i) enforcement of the father's access rights at a stage prior to August 1984; (ii) determination of issues of custody and access in August 1984 and February 1985, and (iii) measures that became necessary after February 1985 in order to protect and enhance the welfare of the children and, more particularly, of the boy. The end of phase (ii) represented the stage at which the real difficulties affecting the children were definitely identified. It then became a matter of attempting to overcome those difficulties so as to minimise their destructive effect on the children's welfare.

His Honour held that, for the reasons already given, it could not be right to require the parties or either of them to contribute to the fees and expenses of counsel for the children down to the end of phase (ii). Down to that stage the inquiry had been directed at isolating the cause and nature of the problems which were producing serious distress and trauma in the children on access transfers. While there were indications in the rulings of other Judges in the Family Court during phase (i) that there was strong suspicion that the cause of the children's distress was their mother's own determination to sabotage their relationship with their father by any means in her power, other factors affecting the children could not of course be excluded. The result of phase (ii) of the inquiry demonstrated beyond doubt that it was indeed the mother's attitude and manipulation which was the sole cause of the difficulty. With some reluctance His Honour concluded that she was not entirely unreasonable in pursuing her side of lititgation which led to the interim orders of August 1984 and the orders of February 1985. On balance His Honour took the view that the expenditure on counsel for the children down to the end of phase (ii) was in the public interest in assisting to establish a basis of fact upon which the children's best interests could be assessed and could not confidently be said to have been increased unreasonably by the mother's own attitude.

A different view, however, had to be taken of the situation following the end of phase (ii). At that stage the mother could have been left in no possible doubt where the children's best interests lay and what was required of her in order to preserve and enhance the children's welfare. Nor could she have been left in any doubt that her attitude and actions up to then had damaged the children, and that, if she persisted in her attitude, the children would be further damaged. There was no need to refer to the expert evidence which had been received by the

Court indicating concern if not alarm for the children's emotional health. Notwithstanding all that, the mother persisted in her determination to isolate the children from their father, knowing by then that such isolation and the methods by which she continued to attempt to bring it about were totally contrary to the children's best interests. In fairness to her, however, it was necessary to add that she achieved some transitory modification of her attitude following the hearing in August 1984 and again, with the consulting psychologist's assistance, following the transfer of the boy's custody in December 1985. But neither of those transitory phases lasted for long.

Since February 1985 the task of counsel appointed to represent the children had been directed principally at attempting to protect the children from the mother's manipulation and her unreasonable and harmful notions of where the children's best interests lay. "It *would be hard", said Judge Inglis,* "to find a clearer case for requiring the mother to contribute to the fees and expenses of counsel for the children incurred during that last phase of this litigation". Included in this must be the attempts made by counsel for the children to arrange appropriate access between the boy and his mother and between the boy and his elder sister (who was in the mother's care). These attempts had been defeated by what can only be described as the mother's determination to use any access occasions as stepping-stones towards repossessing the boy as a permanent member of her family unit and isolating him from his father.

There could be no question of requiring the father to contribute. Throughout he had acted reasonably and responsibly.

(b) *Expert reports under s 29A*
The expenditure on specialist identification of the problems affecting the children and assessment of their needs fell within phases (i) and (ii). For the reasons already given, it would be inappropriate to require either party to meet these expenses.

(c) *The devising and monitoring of access arrangements*
This aspect fell within phase (iii) of the litigation. The Court had sufficiently dealt with the role of counsel for the children during this phase, but it was necessary to consider whether there should be a contribution to the quite substantial expense of the intervention of the consulting psychologist.

It would be easy to say that the mother should meet a substantial proportion of these expenses, since his efforts had been defeated by her basic disinclination to co-operate with him. However, that would be to overlook the objective of his intervention. His intervention was authorised by the Court in an endeavour to overcome, for the children's benefit, the extreme difficulties created by the mother's determination to sabotage the children's relationship with their father, on the basis that it was clearly in the sister's interests to maintain contact with her father and in the boy's interests to maintain contact with his mother, and to assist both children to live with, and cope with, the mother's hostility *towards the father.* The consulting psychologist's intervention was imposed by the Court upon the parties solely for the children's benefit. Though it spoke volumes for the mother's strength of purpose that even an expert as skilled as he was in the end unable to make any progress, it could not be just to require the mother to accept responsibility for his expenses.

3 *Amount of contribution*
The Court determined that the mother should be required to contribute towards the fees and expenses of counsel appointed to represent the children during the stage of litigation that began in February 1985. It remained, therefore, to assess the amount of that contribution. Some, but not much, weight had to be placed on the fact that the mother had been supported in this litigation for much of its course by legal aid, but that had apparently been granted on the basis of her declared income which, as Judge Carruthers noted in *W v Social Security Commission* (above, at 324-5) appeared to have been self-limited. Her capital position was apparently not considered, but this Court, from having dealt with the parties' matrimonial property proceedings (see *Wheeler v Wheeler* (1984) 2 NZFLR 385) had some appreciation of it. In any event it would be for the Crown, acting under s 30(7) of the Guardianship Act, to determine whether or to what extent to enforce payment of the contribution which the Court proposed to order.

According to the Registrar's figures the total amount expended on the fees of counsel for the children during the relevant period, but only down to March 1987, amounted to $15,464.42. (The Court considered that it should make allowance for the fact that part of this expenditure might relate to the mother's unsuccessful wardship proceedings in the High Court, and that part at least might include fees in respect of the February 1985 hearing.)

A further allowance should be made for fees payable to counsel for the children in respect of attendances since March 1987 but not yet charged.

From the Registrar's figures it would be seen that the fees of the most recent appointee to represent the children (from 26 September 1985) amounted to $6,355.75. In all the circumstances, and bearing in mind that the continued representation of the children, and particularly the boy, after February 1985 was essential as events had shown only too clearly, His Honour considered it reasonable to require the mother, in terms of s 30(7) of the Guardianship Act, to contribute $4,750.

4 *Party and party costs*
The Court approached the issue of party and party costs initially without reference to the fact that the mother had received legal aid.

The principles upon which party and party costs were to be considered hardly required discussion. Obviously the principles were different from those already discussed in regard to contributions under ss 29A and 30 of the Guardianship Act. Section 27B of that Act enabled the Court to "make such order as to costs as it thinks fit". Since a Guardianship Act inquiry was ordinarily regarded as an inquiry into the best interests of the child, the usual practice was to make no order for costs, on the basis that the parents may properly be required to share the burden of an investigation into the child's future welfare. Part of that burden was relieved by the payment from

public funds of at least part of the costs of that investigation under the provisions already discussed.

In this case, however, it had been shown beyond any doubt that all the difficulties which had led to this continuing litigation had been created by the mother's adamant refusal to accept that the father had any part in the children's lives and her manipulation of the children and others to ensure on her part there would have been no need for any of this litigation and the children would have been spared much misery.

It was no answer to say, as was suggested by a social worker at one stage of the proceedings, that the problem would have been resolved if the father had not insisted on seeing the children. That was a facile attempt to justify the mother's unilateral decision that they should not see him if she could prevent it, and her hypocrisy in pretending that she was trying to co-operate for the children's wellbeing. It had been plain for some time now that the father's participation in the children's upbringing was essential to provide them with emotional balance. His approach to this litigation had been concentrated on concern for the children's welfare. His approach to this litigation had been concentrated on concern for the children's welfare.

As already stated, an award of costs against the mother was not a punishment for intransigence or for blindness (which had to be regarded as wilful) to the children's true interests. The case was held to be one in which she must be required to accept responsibility for the unnecessary trouble she had caused.

Counsel who had appeared for the father at most stages of the proceedings had recorded in his written submissions that, despite the fact that the father's solicitors had reduced their fees by between one-third and one-half of the amount which would normally have been charged, he had still been unable to meet the legal costs involved. Counsel placed no blame on him for this but noted that there is still more than $6,000 outstanding in fees.

Counsel further said that, as to legal representation, the solicitors' advice to the father was that, if it was absolutely necessary, they would continue to provide such representation in Court even though the father could not afford to pay further fees.

The circumstances of this case were, mercifully, quite unusual. The father could not expect to be indemnified for his solicitor- client costs, but in the circumstances it was appropriate to fix costs in his favour in the sum of $5,000.

For the greater part of the time the mother was the beneficiary of legal aid. It was to be noted that she was granted legal aid for the purpose of her wardship proceedings in the High Court which were stayed as an abuse of process. His Honour said he had disregarded that segment of the parties' proceedings in fixing the above sum. That sum was fixed having regard to s 17(2)(e) of the Legal Aid Act 1969 and, in terms of the first proviso to that section, he was prepared to find that the circumstances were exceptional. For the sake of completeness he found, to the extent necessary in the absence of knowledge of the amount of the mother's contributions, and, for the purposes of the second proviso, that $5,000 was the order for costs which would have been made against her with respect to the proceedings if s 17(2)(e) had not excluded her liability (if indeed it did). It might be that the District Legal Aid Committee will wish to consider the position in terms of s 33.

5 *Orders and directions*
The following orders and directions were accordingly made:

(1) The consulting psychologist was to be thanked for his efforts in attempting to secure an access or visiting regime for the benefit of both children. It was not his fault he failed. No good purpose would be served continuing his engagement, and it would now cease. His fees and expenses would be paid from the public purse without contribution from either party.

(2) The appointment of counsel to represent the children was terminated in respect of the elder sister, but was to continue in respect of the boy until further order.

(3) The fees and expenses to date of counsel appointed to represent the children would be paid from the public purse, but the mother was ordered, pursuant to s 30(7) of the Guardianship Act 1968, to refund to the Crown the sum of $4,750.

(4) The fees and expenses of any person requested pursuant to s 29A of the Guardianship Act 1968 to prepare reports on the children were to be paid from the public purse.

(5) The Court's right to order or require contributions from either party in respect of fees and expenses incurred pursuant to s 29A or s 30 of the Guardianship Act 1968 in proceedings commenced or continued after the date of the delivery of His Honour's judgment was expressly reserved.

(6) The mother was ordered to pay the sum of $5,000 towards the costs of the father in these proceedings in this Court (with the findings in terms of the Legal Aid Act 1969 already recorded).

6 *Further proceedings*
In her memorandum counsel for the children had said bluntly that the only possible recommendation she could make was that the boy should remain with his father. The only issue likely to arise in the future concerned the mother's access to the boy. The boy had made his own wishes perfectly clear. The tone of the letters which the mother had persisted in writing to him left no room for hope that any access or visiting formula would be found which was at all likely to be acceptable to him. In these circumstances she might see the need, in any further proceedings, to satisfy the Court that her intervention was not vexatious and an abuse of process.

One can only say: let this case be a lesson to recalcitrant parents — recalcitrance does not pay.

P R H Webb
University of Auckland

Chief Justice:

Interview with Mr Justice Eichelbaum on 12 January 1989

I understand, Judge, that you were born overseas. Where was that?

I was born in what was then Germany. The particular place in East Prussia, has, since the Second World War, been swallowed up by Russia, but I am German born.

Do you still speak the language?

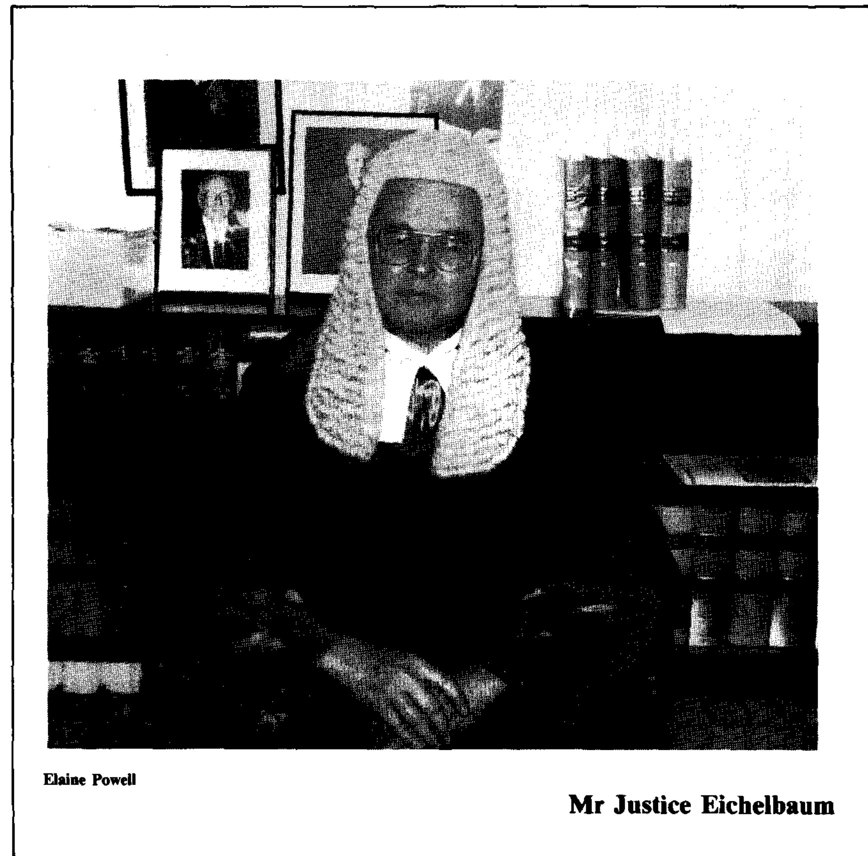
Yes.

How old were you when you came out here?

Seven.

So you basically had all your education here in New Zealand?

I had been to school in Germany for a year.



Elaine Powell

Mr Justice Eichelbaum

Where did you go to school when you came here?

I first went to Wadestown. When in 1939 my parents shifted out to the Hutt the rest of my schooling was in the Hutt Valley, first at Eastern Hutt Primary School and then at Hutt Valley High School.

Did you come out with your parents?

Yes. They were refugees in 1938.

Are you related to Siegfried Eichelbaum who was active in University affairs in the 1930s and 1940s?

Yes. In the absence of other uncles I always referred to him as Uncle Siegfried, but in fact he was my father's cousin. He was actually born in San Francisco, but came out to New Zealand when he was very young.

Siegfried Eichelbaum, I think, never practised law but did have a LLB degree?

He worked as a law clerk for Skerrett & Wylie in 1907 or thereabouts, and completed a law degree but you are correct in saying he was never in practice. When his father died he went into his father's business and did not return to the law.

He was quite a distinguished figure in Wellington?

Yes. He was on the Senate of the old University of New Zealand, and for many years on the Council of Victoria University College. With his friend F A de la Mare he was joint editor of the *Old Clay Patch*, that well known compilation of early Victoria literary works. He was one of that band who actually helped dig out the old clay patch itself.

You mentioned Skerrett; of course he later became Chief Justice.

Skerrett & Wylie amalgamated with Chapman & Tripp. Sir Charles Skerrett was the firm's first appointment to the Bench, in 1926.

Now I understand Siegfried Eichelbaum was related by marriage to the Supreme Court Judge, Sir Frederick Revans Chapman?

His wife Vera was the daughter of Sir Frederick, who was the first New Zealand-born Supreme Court Judge.

Was it because Siegfried Eichelbaum was already in New Zealand that your family came out here in 1938?

Well, you will understand that I was not much consulted about that decision. I can remember being very worried about it, because as any six-year-old could see when he studied a globe of the word (my father had one) it was obvious that people in New Zealand walked about upside down. But I am sure that the presence of a branch of the family here played a decisive part in my parents' move. I should add that it also eased the problems usually faced by immigrants. Nevertheless, as with many refugees, because it was soon wartime, and on account of the language difficulties, my parents struggled somewhat to make a fresh start. My father, who had been a lawyer in Germany, got his first job in Wright Stephenson's woolstore near the Wellington railway yards. He liked to say that he soon achieved a high position, about five bales high. Eventually he held positions as legal officer in various Government departments but it was a good number of years before he was able to achieve that.

There is of course one other judicial character in New Zealand history who had a somewhat similar background to yourself in the sense of coming from a non-English speaking place, and that is Mr Justice Alpers. Were you ever conscious of him as you were taking up the law and did you identify with him in your mind in any way?

Not at the stage when I took up the law. At some point I suppose, like all New Zealand lawyers, I read his marvellous book, *Cheerful Yesterdays*, and certainly it's flattering to be referred to in the same breath as Mr Justice Alpers. It simply means that my feat in coming here as a non-English speaking youngster and eventually reaching the ranks of the judiciary is not unique.

After your education at Hutt Valley High School, which university did you go to?

Victoria.

What years were you at university?

I was at Victoria from 1949 to 1954.

When did you get married?

I was married to my wife Vida in 1956. We are still married and have three sons.

How old are they now?

They are presently 32, 30 and 27.

Have any of them taken an interest in the law?

The oldest has a law degree and is about to resume his legal career after having worked in other fields for some years.

While you were doing law at Victoria University, who were some of the lecturers and professors there at that time?

There were various well-known people there and I always felt I was very fortunate in my choice of the faculty. I think in those days Victoria was certainly regarded as the leading law faculty in the country. There was Professor Campbell and Professor McGechan, and later, Professor Aikman and, among the more junior people at that time, Doctor Barton. There was a host of able part-time lecturers, mainly from the profession as was the custom in those days. I remember Sir John Marshall was one of the part-time lecturers. Lindsay Papps was another and Norman Morrison for whom I worked at Chapman Tripp & Co was a third I recall.

You yourself were subsequently in that role weren't you?

Yes, a remarkable number of people over the years have come up to me and attributed either the extent of their knowledge of procedure or, more often, the lack of it, to the fact that I lectured them. I don't always immediately recall them, no doubt partly because of the fact that you can't always recognise the faces, but certainly a large number of practitioners passed through and become well known, like yourself. I think I lectured for some six years before I finally found getting up in time to be at Victoria at 8.00am on a cold winter's morning to deliver a lecture was too much.

The modern generation don't know what life was really like! Were you also working during the time you were doing your university studies?

Yes, I followed what was a fairly customary route in those days. I had one year full-time and then I started to work at the beginning of 1950 for Chapman Tripp & Co.

So your first job really was in a law office then?

My first full-time job. I'd done the usual things in the university holidays for a number of years including some weeks — although I don't know that I've ever publicly admitted this before — working in the Justice Department. I don't know what assistance that might be to me in the future!

They probably have a file on you somewhere. Did you do any overseas university courses of any sort?

No, I did not do any study overseas.

During this period we are talking about, what sort of sporting activities did you engage in?

At school I played all the usual

sports. After school, my main interest and my only playing interest was tennis which is something that I have really kept up most of my life.

And you did quite well, didn't you?

Well, it was a long time ago.

But you were a representative tennis player?

Yes I was. I represented Hutt Valley for a number of years.

And you've taken an active interest in the organisational part of the sport at one time?

Yes, I did. After I'd ceased my most active playing days, I was on management committees for a number of years.

I suppose you started at Chapman Tripp as a law clerk doing the basics in the office?

Yes, it was very much the tradition to start at the bottom. I think I started at 18 and I was given jobs that were appropriate to my age and experience which, as I recall, consisted largely of putting away thousands of files which were all indexed by hand in those days and may still be for all I know. And of course, filing documents in the Supreme Court as it then was and in the Magistrate's Court, and serving them on various firms around town. That may sound a very mundane activity and no doubt it was, but one did get to know one's fellow law clerks, the other law offices around town, and you did have the opportunity of picking up a remarkable amount about documentation which I think probably has stood me in good stead.

Did you do any work on the conveyancing side?

It wasn't the custom in those days in the major law firms, or certainly not at Chapman Tripp, to rotate the law clerks. I might say that that is a feature most law offices are pretty careful about today, but in those days one tended to stay in the same department one started off in and consequently, my conveyancing experience was quite slight. Where one did eventually get some conveyancing experience at a slightly different level was when things went wrong and the conveyancing department came along with the litigation that resulted — or the files that had somehow gone awry and they needed some advice as to what to do next from a common law point of view.

What was the nature of the common law work that you started with? Did you have to do debt collecting?

I should say first of all that Chapman Tripp had a very strong common law department and I was very fortunate in that respect. I might say that one of the most junior, although already distinguished members of it, was the now President of the Court of Appeal, Sir Robin Cooke. He was then a fairly recently qualified Solicitor there and I was privileged to work under him for I think a year before he went overseas on the NZU Travelling Scholarship. There were several very well-known names in litigation circles: Mr W P Shorland who later became a Judge and for whom I was fortunate to be able to work for several years as a clerk; Ian Macarthur, Sir Ian as he later was, also a Judge; and Norman Morrison who assuredly would have gone on the Bench had he not died tragically at an early age. I really couldn't have been more fortunate than I was in the team for whom I worked in those days and under whom I trained. As far as the nature of the work went, I think it was fairly typical of any common law department or litigation department as they are called these days. One started off with debt collecting and very small files.

And going down to what was then the Magistrate's Court and putting in pleas of mitigation on speeding charges, and such like?

Yes, it actually used to be worthwhile to do that in those days, and a variety of small appearances, criminal and civil, in the Magistrate's Court, and gradually, I suppose over the years, working up to more major work until eventually the practice was predominantly or entirely in the Supreme Court as it then was.

The nature of the work — was it very much involved with personal injury cases, negligence claims?

The predominant factor in Chapman Tripp's common law practice as with any of the large firms in the 1950s and 1960s was personal injury work, negligence, insurance claims, workers' compensation. I suppose that must have occupied a good half of the total working time and capacity of Chapman Tripp's common law department, and I am sure it was the same in many others, so that when eventually I became a partner and was engaged full-time in Supreme Court work, that was the bulk of the work that I did. Apart from that, and I might say that that was a fairly relentless grind because, as you will well remember because we did the same sort of work. The writs kept flowing in if one was doing mainly defendant's work as Chapman Tripp were, there was a new writ every day and just before the start of each quarterly session there was a good deal more than one writ a day. Statements of defence would be flying around in all directions and it was the usual panic, crisis and confusion for about a month until you got rid of the 20 or 30 writs that somehow had got set down for that particular session and you then built up to the next one. It tended to dominate the work that one did in those days. I think to the exclusion of, can I put it this way, intrinsically more important work. I don't mean to say that personal injury wasn't very important to the plaintiffs and of course the insurers who defended it regarded it as significant to their living, but in intrinsic worth, if it can be put that way, of course there wasn't really the intellectual challenge in it that there was in many other branches of the law.

Did you do much in the way of what would now be called commercial litigation? Was there much of it around at that time?

It was a field that I suppose developed more in the 1950s, 1960s. I felt that while there was a certain amount of commercial work and litigation work around in the 1950s when I first started, it was something that very much developed over the next 20 years until towards the end of my period in practice of course, I was spending a good deal of time on it and so were many other senior lawyers in Wellington. The development of the business community, the spread of takeover activity, these were things that increased gradually over that period of years and brought a lot of very interesting litigation with them.

When you became a QC in 1978, did the nature of the work you were doing change dramatically, or was it only a development?

I don't think the nature of the legal work that I was doing changed dramatically. I suppose qualitatively it did. It was an opportunity perhaps to get rid of some of the work at the lesser level.

The ACC came along at about the same time.

Well, that was another factor. I had already been out of personal injury work very largely, although I do recall that I took maybe a dozen or 20 personal injury files with me when I went out into practice on my own account. But no doubt at that point there was some upward movement in the quality of the work. However, where the dramatic change occurred as far as I was concerned was at that stage in 1978. I was, and had for some years, been heavily involved in administrative work at Chapman Tripp. In so far as the organisation and administration of the common law department itself was concerned I had been the senior common law partner for some years, but there was also administration work in respect of the firm as a whole. I was one of a small committee of management responsible for the overall management of the three offices that the firm then had and, all in all, that side of it took up a significant amount of time. I might say that by then I was already heavily involved with Law Society activity and sometimes I wondered just what hours of the day were left over to actually do the legal work that we were speaking about earlier. So that a significant result of deciding to practise as a barrister sole was that I found I had more time for legal work.

Talking about Chapman Tripp, you aren't of course the first Chief Justice to have come out of that firm in that I think Chief Justice Skerrett was also from Chapman Tripp wasn't he?

Yes, that's true. I actually worked with people who had, in their earlier days, worked with Skerrett; and in fact the legendary G G G Watson was still occupying a room and carrying on a barrister's practice at Chapman Tripp when I first joined and I was fortunate to have some slight connection with him too. Of course he had been one of Skerrett's juniors or junior partners in the 1920s, another being Philip Cooke, Sir Robin Cooke's father, who later became a Judge and there was still a great deal of the atmosphere of those halcyon days in the 1950s.

On that train of thought, I really should mention the doyen of them all because for seven years, on an almost daily basis I saw L O H Tripp whose connection with the firm went back practically to its foundation. He was then in his nineties and a very old man indeed in the eyes of an 18-year-old but he had all his faculties still about him. He was a remarkable and very interesting gentleman. It was said of him in *Portrait of a Profession* that he retired from the active practice of the law at a fairly early age but continued to watch with pride as his younger partners either went on the bench, killed themselves with overwork, or both.

Well I suppose there will be some who will be saying that your appointment as Chief Justice helps redress the balance in Wellington between the stranglehold that at one stage Bell Gully were thought to have on the office. There was a period in the 30s and 40s and then later in the 60s when the Chief Justices had come from Bell Gully. I'm thinking of Myers, O'Leary and then Wild.

I was just trying to do some mental arithmetic as you were speaking and I think that out of the last seven Chief Justices, five have come from Chapman Tripp and Bell Gully (who have pride of place with three, I hasten to add) which is a remarkable record.

You have already mentioned your involvement with the Law Society. You had a very long period of involvement I know, finishing up as New Zealand President, but when did you first become involved at district level?

That was in 1968 when my very good friend and partner, Norman Morrison, died while a Councillor, and the Wellington District Council elected me to fill the vacancy in that year.

Then eventually you became President of the Wellington District Law Society?

No, I was never President of the Wellington Law Society. I in fact retired from the District Council when I was Treasurer in 1975. The following year, by some quirk of fate, Wellington decided to nominate me as the Wellington Vice-President of the New Zealand Law Society, and from 1976 onwards I held office in various capacities in the New Zealand Law Society. I was Vice-President for three years, President-elect for one year, and finally President for two years, and of course I was a member of the Council of the New Zealand Law Society and of the Executive Committee throughout that period.

And during that period you would have taken part in the Committee work of the New Zealand Law Society — I think you were on the Disciplinary Committee, for instance, for a time.

I was on the Disciplinary Committee for, I think, six years commencing in the early 1970s. It was 1973 to 1979.

How did you find your involvement with the Law Society — interesting, stimulating, depressing?

I suppose all those elements applied in part at various times. The Disciplinary Committee could actually be depressing to pick up that word, but no, overall it was thoroughly stimulating. It was a period of my life that I greatly enjoyed. I particularly valued the contacts which I eventually made, I think literally from one end of the country to the other as an officer of the New Zealand Law Society and particularly as President. I enjoyed the involvement with other District Law Societies. The District Law Societies, as you well know, are an extremely independent bunch of bodies. The New Zealand Law Society in many ways is a unique body in the sense that it sits there as the nationwide body but is composed of these numerous autonomous District Societies, some of which, Auckland, Wellington, Canterbury, in particular, and Hamilton, with a very large membership, and with their own decided views, not always identical ones on all the matters that come before the New Zealand Society.

It's almost more like a federation.

Yes, it has that element; and yet it had the great advantage, and I do think this is one of the great strengths of the organisation of the profession in New Zealand, that when it really counted, we were nearly always able to speak with one voice. In fact, I can't really recall an important occasion where it was otherwise. And I think this gives the profession an enormous influence here which I have not always found present in some of the other sister Commonwealth countries that we had something to do with in the course of Law Society activities.

Were you involved to any great extent in international legal organisations?

Yes. During my time and before it, there was a very good relationship with the Australian Law Societies which are organised quite differently from ours owing to the federal system there and also owing to the rigid separate Bars which exist in several of the States, but nevertheless we had very good contacts with them. There were annual conferences, meetings in which New Zealand was invited to take part and although as a country and as a legal population, Australia is much larger than we are, we were able to relate very well to the Law Societies in the Australian States if you regarded it as a New Zealand to State relationship. We found that at that level we had a lot in common and I know that the contacts with the Australian States, particularly the ones on the eastern sea board, have been very valuable to the New Zealand Law Society. In addition, I had a modest involvement with LAWASIA as you will remember.

You sat on the Council at one time.

I did on one occasion, yes. And there was the usual invitation from the American Bar Association which is of course a mighty body with figures besides which ours pale into insignificance, but it certainly was a great experience to be part of that Conference on one occasion. I have been to an IBA Conference and no doubt there were various other international contacts which don't immediately spring to mind.

Do you think this sort of international contact is important for the New Zealand profession to keep up?

I certainly do. I think that we badly need the sort of input we can get from exchanging views with people doing the same sort of work and meeting the same sort of problems overseas. In many cases, not by any means in all cases, when there was some major problem here, one was not surprised to find that someone somewhere had already struck it overseas and had something constructive to offer.

They had either successfully met it, or else it had turned into a disaster, I suppose.

Either way, one could always learn from them. I won't say that was so in every case because from time to time New Zealand is at the cutting edge, as they say, of progress in the law and I think that applies to innovations that have been introduced by the Law Society here, so it is a two-way process, and the Australians in particular always seemed to be very glad to have our input as well as allowing us to import some of their ideas.

Since you have been on the Bench, have you found that there is a useful and valuable international exchange of ideas, and meetings between Judges?

Yes. I think the comments that I've already made at the professional level apply equally to the Judiciary. My own opportunities for overseas travel on a judicial level have almost entirely been restricted to Australia, but personally I have got a lot of value out of the trips I've made there. I actually have been involved quite heavily with the Australians over the last couple of years because I have maintained a liaison on behalf of the New Zealand Judiciary with a body of fairly recent origins called the Australian Institute of Judicial Administration (AIJA) which is an association of Judges, Court Administrators, academics and the practising profession.

Is Mr Justice Dennis Mahoney involved in that?

Yes, Dennis Mahoney, a Judge of Appeal from New South Wales was, until just the other day, the Chairman of the AIJA and I might say, has played a major part in cementing relationships between our Judiciary and the Australian Judges. He has now been succeeded by Mr Justice Glen Williams, of the Supreme Court of Queensland. It is a body that, as its name suggests, is principally interested in judicial administration and in furthering the partnership between the Judges, the profession and those concerned with administration, and the legal academics also with a view to getting the input from all of them that today is really regarded as essential for the proper and efficient working of the Court system.

That actually takes us on perhaps to the question that is often mooted, about Court restructuring, greater

efficiency, and that sort of thing. Do you see that this is either a need or an area that can be developed further?

You have really mentioned two aspects which I think it's desirable to keep separate when one focuses on the subject. Structural changes, and I'd like if I may to say something about those in a moment, and procedural ones. As far as structural changes are concerned, in the immediate future, the chief likely catalyst for changes of that kind will be the proposed report of the Law Commission. Now I say proposed because as of today nothing official has been issued. It may well be that by the time this interview is published, that will have changed, but at the moment, and I think I should emphasise this, I have not seen anything other than an unofficial summary of likely proposals. That is, apart from various snippets of information and speculation which may or may not turn out to be well-founded.

More commonly called gossip.

I do feel that a fundamental factor one has to keep firmly in sight when discussing Court structure is that we are talking about what is feasible in a New Zealand context. It is not a search, it cannot be a search for some ideal by absolute standards. It is trite but we are a small country. That is not to say that we have to think small in every respect, but what should be provided must be limited by our ability to afford it and to service it. Not only do we have a small population overall and limited resources of a material kind, our people resources are limited. For example, no doubt it is ideal to have two rights of appeal available in every case but if, as I think is inevitable, we lose the Privy Council appeal, then in order to retain the double right of appeal in High Court cases, we would have to create an extra layer of Judges and, given our small legal profession of which again only a small proportion practises regularly in the Courts, I just do not see where those resources are to come from.

I suspect however that in this area of structural alterations, my role as Chief Justice — perhaps uncharacteristically for me personally — will turn out to be verging on restraint rather than inciting or abetting wholesale amendments because, quite simply, my own opinion is that there is not a lot wrong with our basic Court structure. I see no need to turn it upside down. The basic structure of a lower Court, and I use that term for want of a more accurate expression and not in any derogatory sense, a High or Supreme Court and an Appellate level is a universally recognised tried and proven system. Of course there are many local variations and refinements but in broad principle, you will find countless examples of it and I for one am unpersuaded that there are any sufficient grounds for abandoning it. In particular, I believe that there is a public expectation, a reasonable and proper public expectation, that the most serious cases, civil and criminal, will be dealt with in a superior Court by a Judge of that Court.

Again, I say that without the slightest disrespect for the Judges of the District Court and if I can just continue in that vein for a moment, the 1980 move to increase that Court's criminal jurisdiction has been entirely successful. The standard of the output of the District Court has been high, commensurate with the quality of the appointees. Both the criminal and the civil jurisdiction of the District Court should be substantially increased further. In fact, the working party of High Court Judges of which I was a member, recommended that expansion as long ago as 1985. But that is quite a different approach from removing all or virtually all the originating jurisdiction to the first Court level and turning the present High Court largely into an appellate forum as has been suggested in some quarters.

What is your view on that suggestion?

I am very firmly of the view that what the person in the street and the legal practitioner are most concerned about so far as dispute resolution is concerned, whether civil or criminal, is the availability of the best forum which can reasonably be provided for the disposal of the case at first instance. I believe that that necessarily means that for the most serious criminal cases, the most difficult or important civil litigation, that requires a tribunal possessing the full procedures and processes available to a superior Court, having the facilities that are or should be present there, the time that can be scheduled there, the ability to focus for long periods on a single case if necessary and presided over by a Judge having the invaluable background of ample personal experience in conducting that type of case in long years in practice before the Courts. I simply do not see any acceptable substitute for that system. It gives effect to another principle of resource management I regard as critical. Every facet of Court business should be dealt with by Judges and tribunals best suited and most qualified to do that work.

Might there be some lack of interest from senior members of the Bar?

If one tries to envisage a single Court covering all originating jurisdiction, I just do not see how one is going to get the top people from the Bar, those who at present preside over the sort of heavy work that I was speaking of, or the heaviest work — I'm not implying that there is no heavy work in the District Court, there certainly is. But those who preside over the heaviest work, civil or criminal, at the moment are those who have had top experience at the Bar in that type of case or in analogous work and frankly, I do not believe those people are going to be persuaded to accept appointment to what would be a giant Court of originating jurisdiction all at one level.

I have spoken about one particular aspect of restructuring and I have really been referring to something that has been the subject of a good deal of speculation and may come to nothing. There are other aspects which undoubtedly will be addressed by the Law Commission's report which will arouse little controversy. There is, I believe, almost universal acceptance of the view that a better system of appeals from Judge alone work in the District Court than the present one to one appeal is required. Ways will simply have to be found around

the practical difficulty of assembling plural Courts. There is room for further debate here I think whether a Court of two or more should be available as a matter of right in every case. For myself, I am left with the view that there is quite a substantial body of District Court appeal work that, although undoubtedly important to the people involved, when viewed objectively simply does not warrant the problems that would arise if you had to assemble a succession of Courts of two or three Judges in places like Wanganui or Timaru, to deal with some relatively minor appeals, and some of them are very minor.

It would be a matter of finding some method of deciding which raised important questions of law presumably?

I wouldn't myself limit it to questions of law. After all, I suppose the majority of appeals from the District Court involve matters of fact or matters of discretion like sentencing. And some of those are important matters indeed and would warrant a plural Court, but not, in my tentative view at any rate, in every case. One other topic on the subject of structure, and it is an important one, is that there has been a great deal of discussion about a more streamlined procedure for dealing with routine criminal appeals in jury trials, that is trials either in the District Court or in the High Court, both of which appeals as you know, presently go to the Court of Appeal. There has been a good deal of agreement that a better procedure should be available in order to relieve the pressure on the Court of Appeal and leave it freer to concentrate its resources on some of the more important and difficult work that it has to do.

Are you suggesting divisions of the Court of Appeal?

There was a unanimous view of the Judges of the Court of Appeal and the High Court some years ago, and so far as I know that still pertains, that there should be a division of the Court of Appeal, a criminal division, to deal with the routine cases. It could be a peripatetic Court. It could certainly be staffed in part by Judges ordinarily sitting on the High Court but would be presided over by a permanent member of the Court of Appeal and that seemed to me and still seems to me to be the best solution. I've gone on at some length about structural changes and would it now be convenient to talk about procedural matters?

Yes, that would seem to follow.

Now, I don't mean procedure in the narrow sense of Court Rules.

No, rather in terms of efficiency in dealing with judicial business.

Yes, of which the Court Rules is an important part but not the only part. As will be fairly well known, I have long taken a particular interest in those aspects.

You have been very active for along time on the Rules Committee for instance, haven't you?

I think the Rules Committee has found it difficult to get rid of me. In fact I resigned from it in December at the end of a term of membership which I think commenced in 1969 and the Rules Committee may be dismayed to find that come February I am again a member.

You must at least have your full 20 years and more!

I was also a member of the Rules Revision Committee which produced the High Court Rules which were enacted in 1985. During the holidays I happended to run across a paper which I presented to the Triennial Legal Conference in Rotorua in 1983 and I was pleasantly surprised to see how many matters then raised, in some cases in a tentative way, had made some progress since then or, in some cases, had even come to fruition. Not, I hasten to add, that I claim any particular credit for that but certainly procedural matters are on the move.

I could refer to the concept of the increased jurisdiction of the District Court. In respect of that, I said in 1983 that it was a little early to make any definitive pronouncements but now, six years on, one can say without hesitation that it has been an unqualified success. Then there is the coming into force of the new High Court Rules which again, I venture to say, have proved a success. There has been the general acceptance of the notion that it is appropriate for Judges to become involved in case flow and case management. Then there is the willingness of the Justice Department and the Minister to take an interest in the introduction of technology into the Courts.

One other important subject I should mention under this heading is that the judiciary, the profession and the public have to be very grateful to the present Minister of Justice for the energetic way in which he tackled the problem of a replacement programme for our Court buildings which had slipped behind to an alarming extent and which, as of 1983, was rightly the subject of a great deal of criticism. That programme which has reached completion in several of the Courts in the Wellington area, Napier and Palmerston North is already making a considerable difference to the ability of the Judges to move the flow of work and I think importantly, a difference to the environment in which they work.

Do you think this is also important from the point of view of the public in terms of the place to which they come in order to get justice? Is there some significance in this?

I think that there is considerable significance in this. I suppose there is room for the view that with many public facilities, the public in the past have been inured to expecting a certain standard and I mean by that, not a very high one. But I think today really, the public expect a degree of efficiency of their public institutions and if they don't receive it, are prepared to be much more vocal about it than may have been the case when I first started in the law.

I think it is important to provide proper facilities for the public. Anyone who works in the Wellington High Court and has done so over the past 30 years as I have can't help but be conscious that the facilities that we provide for the general public are deplorable. Not

only that. As is well known, the building is a positive hazard. One really feels apprehensive, and it happens often enough, when we have say 150 people here on a Monday when a jury week is commencing crowded together in very sub-standard conditions and with the waiting rooms and other public facilities of a like standard. Well, we are fortunate in that working drawings are now proceeding for a new Wellington High Court and the High Court buildings in Auckland and in Christchurch are also under construction or reconstruction as the case may be, so really a lot of progress has been made in this field in recent years.

What about technology in the smaller sense — word processors, and other such equipment?

Again, I think one has to temper any discussion about technology by reference to the problem of the practical limits of availability of resources. Like the average New Zealand family contemplating the purchase of a car, it is not a question of the best available but the most suitable for the price that we can afford. At the risk of being trite about this, because of our size, many of our public facilities necessarily suffer by comparison with those available in larger centres of population and more affluent societies. Let me say, however, that even measured by absolute standards, the quality of the justice system available in this country in my opinion is extremely high.

But what about technological developments?

So far as new technology is concerned, really what the various preliminary remarks I've been making lead up to, is that there is no point in reciting an extravagant wish list of advanced technology. It is easily enough done because from our reading of what is available overseas or what many of us have seen in person, we all know what in theory is available; but it is really a matter of isolating the most cost effective measures, ranking them in their best priorities and urging the following of a programme which will keep the Court system reasonably abreast of modern developments. I do believe that we are some distance behind that relatively modest target at the moment. To an extent, I think it would be fair to say that the Judiciary itself has contributed to that state of affairs. Pressed as most Courts are by seemingly endless lists, it often seems more important to get on with reducing the backlog than taking time out to investigate possibly more effective work methods. I do not think that the Judiciary is yet getting full advantage out of even old hat technology like dictaphones.

What other changes do you see?

Another analogous subject is the use of clerks. I am not advocating that clerks should be employed as extensively in the preparation of judgments as seems to be the case for example in the USA Supreme Court but, on the other hand, there must be a happy medium and the situation in Wellington where, until the end of last year, one clerk was shared between the seven High Court and the six Court of Appeal Judges, seemed to me to be some distance below it.

Another hobby-horse I might mention here is the subject of evidence recording. It is a good example of the question of best use of available resources. Very sophisticated methods are now available; for example, in theory one could have all evidence recorded on video and available to whoever needed it by way of playback facilities but the expense of doing that would be quite prohibitive. Again, it's a question of balance. I think that any lay people who have not had any previous connection with the Courts, and many overseas lawyers first coming into one of our Courtrooms, are immediately struck by our almost unique method of recording the evidence in the High Court; namely, direct on to the typewriter. Now, without in any way detracting from the very efficient way that the Judges' Associates do that, the fact is that short of writing it out yourself by hand, one could hardly think of a more ponderous way of doing it than recording the evidence as it is spoken direct on to a typewriter and not the very latest of typewriters at that either.

But for cross-examination purposes it's very useful.

Of course you are exactly in the same position as I am in that you have spent the whole of your working life with that system and you are taken by the advantages. So am I. But after all we have got to reflect that in practically every other country in the world that I know of, counsel don't have that very useful facility of having the notes of evidence put before them every ten minutes or so.

So you think it's all right for counsel to have to write them all out by hand!

Well, one should say touché, but it is also a very useful facility for the Judge. In fact I conducted a little survey among some of the Judges of their work habits in this respect and it was quite interesting to have a range of comments going from, at the one end of the scale, those who made no use of the notes of evidence whatsoever and who relied on their own notes and their memory. . .

Like one Judge who had the ability to take it down in shorthand!

Yes there was indeed, and I think that was because he had himself been a Judge's Associate. But I know very few Judges who actually have that ability. Other Judges, I found, used the notes of evidence meticulously and notated them, underlined them, marked them in coloured pencils and so on, and regarded the ability to create an annotated record as they went along as an important part of their working routine. I really think that all it proves is that there are different ways of doing it and whatever method is available, the Judge and for that matter, counsel, will adapt to using the particular technique in the best way possible. What has concerned me over a period of years is that in the end, the pace of the proceedings does tend to be rather dominated by the typewriter. Depending on the type of case, the speed of counsel and the ability of the Associate. No doubt this varies from occasion to occasion, but nevertheless, the ultimate factor that

governs the speed when evidence is being taken, is the speed at which it is possible to get the evidence down. So I have long felt that there is scope for use of a more advanced technology here. Perhaps I should welcome the opportunity of saying this publicly on this occasion because the Justice Department has been hearing from me about this for a period of years and it's not going to stop.

What views do you have on one of the old standard questions like Court dress?

Court dress is a sensitive and potentially divisive subject and I would as soon not say much about it today. On a previous occasion, I am on record as offering the view that the mode of dress adopted in the Superior Courts was one factor inhibiting the Courts from being seen as more relevant to modern society. I do not resile from that. I respect the view that wigs and gowns play a part in preserving the detachment, the solemnity and the anonymity desirable in dealing with the emotional and aggressive atmosphere which quite often these days pervades criminal trials. I would not wish to push the question of dispensing with any part of formal Court dress in criminal trials at the moment. On the other hand, where counsel are engaged in a legal argument about *Clayton's* case or the takeover rules, I find it very difficult to see the justification for dressing up as we do at the moment. The Court of Appeal some two to three years ago instituted what it described at the time as a trial period when the Judges would sit without wigs and wearing a simple gown. Counsel's dress of course has remained the same. I must say that I have heard no adverse comment whatsoever about that experiment, if that is the right word. Indeed, it is remarkable how little comment one has heard about it at all and I rather take that as showing a general approbation of what occurred.

But the District Court has become a little more formal.

In the District Court there was some debate about this subject when the Court for the first time started sitting in indictable cases, hearing criminal jury trials, and the question arose, how should counsel be attired, how should the Judges be attired? Well, the decision made at that time, and I played some part in this because I was the President of the Law Society and was consulted about it, was that counsel would continue to appear in traditional attire in the District Court and previously the Magistrate's Court, that is without wigs or gowns. The Judges, for their part, decided that the appropriate dress on the Bench would be a simple robe, and again I have heard no criticism of that. Nor have I heard any comment to the effect that there is any loss of dignity or any of the other elements in respect of which the wearing of wigs and gowns is said to be significant.

Do you consider that is really the end of the issue?

I think that this is a matter which requires further discussion. For my own part, I would rather see steps taken incrementally than some dramatic change all at once. The step taken by the Court of Appeal can be regarded as a first one in the direction of an outlook more in keeping with the end years of the 20th century. I can sum up by saying that while fully acknowledging that the subject is a sensitive one and an area where the fullest consultation and discussion is required, it should not be allowed to be put aside or buried and will need further consideration over a period.

It does raise the question though, doesn't it, as to the degree of casualness of dress that might be adopted in terms of the dress of male counsel and who knows what interesting attire in the case of female counsel?

When we're on to that sort of topic I suppose we are really talking about the stage where one is considering dispensing with gowns and for my part, I rather think that is some distance into the future.

It already exists in the District Court.

Yes it does. And I'm not aware of any specific problems of the kind that you have mentioned.

Since you became a Judge in 1982, have you had to deal with a great variety of cases and travel around the country? What nature of judicial work have you found yourself involved in, and what have you found most interesting?

So far as the nature of the work is concerned, because we really don't specialise to any marked degree I have simply taken a usual and normal part in the work of the High Court in Wellington. This means sitting for a significant proportion of the time in criminal trials, maybe a quarter to a third of the time, something like that; doing the usual variety of civil work where really it is just a matter of what is in the list for that particular week and how it is apportioned, and doing the normal share of circuit work which for Wellington Judges over the past six years that I have been here, has been quite a major part of the normal routine of a High Court Judge. We do, as you know, a regular circuit involving the lower half of the North Island as well as Nelson and Blenheim and, in addition, we sit from time to time in other places such as in my case Auckland, Hamilton, New Plymouth and one or two others, Dunedin of course. So in that space of time I have seen the Courts in most places in New Zealand. I have met the Bar in most places. One of the pleasant features has been that through my Law Society connections, I had a network of friendships throughout the country among the legal profession. In many cases I have been able to keep that up through the circuit travelling. I am looking forward to a continuation and, I imagine, probably an expansion of that aspect as Chief Justice as I will regard it as part of my role to be seen in the circuit towns and in the other towns where Judges sit.

Have you always been stationed permanently in Wellington and done the other places on circuit?

Yes I have, although at the very start when I was first appointed I did spend a period of some weeks continuously sitting in Auckland.

How do you see the office of Chief Justice in relation to the other Judges?

The traditional and of course constitutionally correct view of the Chief Justice's position viz-a-viz the other Judges of the High Court is that summed up in the phrase *primus inter pares*. He is simply a High Court Judge appointed to the position of Chief Justice but in other respects, holding the same powers and fulfilling the same functions as the other Judges.

That would be the Judiciary in relation to the public, but what about in relation to the Judges themselves?

Well, in relation to the Judges themselves, the Chief Justice has of course an administrative role for which he is responsible and which under the present system of organisation, is delegated so far as the district organisation is concerned, to the Executive Judges at the four main centres. He has the role naturally of providing overall leadership on behalf of the Judiciary in relation to its public appearances, in relation to ceremonial occasions, and importantly, in regard to representing the Judiciary and speaking on behalf of it, conducting negotiations and so on in regard to the Government Departments.

And do you think that the office has some particular significance regarding relationships between the profession and the Judiciary? I'm thinking, hypothetically, of the occasional awkwardness which might come up if counsel feel that one of the Judges is not treating them as reasonably as they might hope or expect.

If that ever happened, no doubt that would be the right way to handle it. To the best of my knowledge it is many years indeed since there has been any call for that sort of contact with the organised profession, and I devoutly hope that there will be no such call on my services during my period of office.

Put it a different way. Would you think that the office carries with it some degree of responsibility for being the liaison between the Judiciary as a whole and the organised profession?

That's exactly the way I would see it, and it's an aspect of the position that I look forward to because of course I will be dealing with people at New Zealand Law Society level who I know very well and who are fulfilling a role with which I am very familiar.

And naturally of course, they aren't doing it in the way you'd have done it if you were there. I'm not necessarily asking for a comment!

Well I suppose everyone who has done a job and looks back on his term of office and sees others doing it asks himself from time to time, what would I do in this situation? But as I think everyone would agree, the office of President of the New Zealand Law Society has been in admirable hands. All those who have held office since I did, including the current President, Graham Cowley, have been very good friends of mine on a personal level. As I said earlier, I am looking forward to that aspect because I think it gives me the opportunity of continuing with a network of acquaintanceships, friendships which I have pretty well throughout the country, contacts I very much value and which I think will be of great value and support to me in my new role.

In a way you touched on this question before when we were talking about the Court structure, possible restructuring and so on, and that is the question of the Court of Appeal. Now as Chief Justice you are ex officio a member of the Court of Appeal.

That is the position. . . .

But it has not been the practice for the Chief Justice to sit regularly as a member in that Court, has it?

No, it has not. I think one could fairly say that it is many years since any Chief Justice sat regularly in that Court if indeed any Chief Justice has done so on a truly regular basis since the permanent Court was established in 1958, thirty years ago. I don't envisage that there will be any change in that position in my term of office.

The question of restructuring of course is a different issue and might raise other issues at a later date. As far as the relationship between the Judiciary and the Government administration is concerned, does the Chief Justice have a role on behalf of the Judiciary in relation to the Justice Department which, after all, provides the basic services for judicial activity?

I suppose I should start off by saying that as at the date of this interview, some of these matters I know less about than others and the way that you phrased that question I think this is something I yet have to experience properly. What I can say under this heading is first of all, and I think I am partly answering your question, undoubtedly the Chief Justice has a role to play in dealings on behalf of the Judiciary with the Justice Department and the Minister in charge. One very important development in this area which I can say something about is the development of what is called the Courts Consultative Committee (CCC). At present this is constituted on an informal but official basis and in the long run it may be the subject of formal legislation.

Something like a judicial commission?

Some people have made the comment that perhaps it is the judicial commission under a different guise but the concept of a judicial commission has not been fully favoured in New Zealand. In fact there was very strong opposition from some quarters although the Law Society, as I recall, was in favour of it.

How would you describe the CCC?

I think the Consultative Committee should be seen as a different concept. It is concerned first and

foremost as an administrative body whereas the Judicial Commission properly so called, as first proposed had much wider functions, some of which were controversial. The CCC is presided over by the Chief Justice and has representatives of the Judiciary at all levels, the Justice Department, the profession, the Solicitor-General and the public, and I have to say having been a member of it and Deputy Chairman since its inception in 1986, I have been pleased with the way it has developed. I think I am entitled to say pleased because, again, this is something that arose out of the recommendations of the working party of High Court Judges of which I was a member and I think it was regarded as an innovative and potentially controversial notion, but it really embodies the concept of the administration of the Courts as a partnership.

How does it work out in practice?

It is not on the one hand, something that is simply provided by the Justice Department, nor on the other hand is it something where the will of the Judiciary just ought to hold sway. The truth is that the users and the providers, and the users of course include the public as well as the legal profession, all have a joint interest in the administration of the Courts and all have a great deal to contribute. The idea of once every six weeks or so having a high powered committee of users meeting around the table and considering topics ranging from the important to the mundane but all to do with the workings of the Courts, I think is working out very well in practice.

Can you give any particular example?

An important project that the CCC has now embarked on is the very large and expansive programme, ambitious programme really, of the introduction of technology at all levels, but basically the computerisation of the Court systems. This has the potential for quite enormous impact on the way that the profession and the Courts work, because ultimately, and it's a good way ahead, but ultimately we are really looking at the concept of an electronic Court where filing is no longer done by the traditional way that we were speaking of earlier of carrying pieces of paper along Featherston Street.

Law clerks are all going to have to become keyboard literate.

Exactly. And the input will be done from the solicitor's own office. This is very exciting. It won't come to total fruition during my term of office but the first steps are being taken and a sub-committee of the CCC has been set up which is to be responsible for the oversight of the project and for the gathering together of ideas from users and the providers and hammering out a list of priorities to get this underway. One very important aspect of it, and again something of a hobby-horse of mine in the past, is that the actual information available by way of comprehensive statistics as to what the Courts have done in the past and what is in the pipeline at the moment, has been on a very rudimentary level. In fact I'm really putting that with a great deal of restraint, and it's absolutely essential in that particular field that we get into the electronic age so that the Chief Justice or the Executive Judges or the principal Judges of the District Court are able to find out at a moment's notice and at the touch of a keyboard, how much work is coming into the system, what the trends are in various classes of work, so that they know in three months' time or six months' time when that work actually starts to hit the Courtroom, that they're ready for it. At the moment, unfortunately, and I don't think it's confined to the law by any means, but one finds out about potential disasters when they happen. One finds out that there are only five jury courtrooms available in a particular centre when there should perhaps be ten. These resources take time to find, to commission, to construct, and it is absolutely critical that one is forewarned and that one knows which way the graph is going, that one knows that in a particular circuit town one is going to require twice the amount of accommodation that is planned, or whatever.

Well, is this consultative committee though the only means by which a Chief Justice would be involved in dealings with the administration, with Government?

By no means, but it is going to be a very useful and workable funnel into which quite a number of problems that relate to the Court system as a whole can be channelled. No, it's by no means the only dealings that the Chief Justice will have to have with the Minister and with the Department. One aspect of organisation of Court administration in New Zealand is that of course the Justice Department has many other responsibilities — the Courts are only one part — and indeed are basically dealt with by a Courts Division of the Justice Department. When one gets to the top layers of the officers in the Department, Courts may be only one part of that particular officer's responsibility. Furthermore the budget of the Department as a whole has to be spread over many areas.

To some extent the Department has to deal with the results of the Court system in the sense of building prisons.

Well, quite, and that takes a significant proportion of the budget, and staffing the prisons too. I mention this because I think the Judiciary tend to look to the Justice Department as if it is the natural source of provision for all the answers to their problems, without always appreciating that the Department has to spread its butter over a number of slices of bread.

Even just its intention. . . .

Oh, quite, and I must say one notion which I have picked up overseas, specifically in South Australia, which appeals to me and which I would like to see considered further, is that of a separate Courts Division, the sole function of which would be to attend to the needs within the Court system.

The administrative and other needs of that sort.

Yes, and with an officer in charge who had no other responsibilities.

One of the things that follows on from what we've been talking about is the question of the workload of the Judges and I wanted to ask you two questions related to the Bill of Rights; the first being the question of workload, and the second being the issue which is sometimes raised about politicisation of the Judiciary. As far as the Bill of Rights is concerned, is there any concern by you, or the other Judges, that there will be a very substantial increase in judicial work?

I have no doubt that a Bill of Rights would lead to an increase in the workload, possibly not of the proportions that one sometimes hears expressed or feared because there are other ways of bringing those issues before the Courts as shrewd counsel are appreciating more and more. We are already having before the Courts problems of a kind that I suppose 20 years ago were simply not regarded as justiciable. It's not quite as if a brand new segment of work was being thrust on us. Having said that however, undoubtedly there would be an increase in workload.

Past experience would seem to indicate something by way of an increase.

Well I suppose one would have to say, what's new? After all, every year or every five years if you look at the type of work that is coming through the Courts, you will see a difference in patterns, and it happens quickly these days. It's not a matter of looking at maybe a 20-year period where there was very little change as I suspect might have been the situation between the two wars, but having said that, I can immediately think of an example that disproves that if you think of the type of work that arose in the depression years.

Quite, insolvency, mortgage legislation. . . .

So each period of economic growth, economic recession, political change, brings with it a change in workload and almost invariably, an increase. So periodically, and the periods are now shrinking, one has to have the sort of discussion that we have been having. How can we move some of the work out of the High Court?

Well of course it was thought that when the ACC was set up and all the personal injury cases disappeared that there would be a tremendous difference in the Court workload, but in fact the contrary seems to have occurred and it's grown in other ways.

Yes, that is an excellent example. In fact I remember preparing a paper some years ago now where I thought I should start by asking, what does the High Court do these days? And I started off by listing the things that it no longer did and of course at the top of the list was personal injury, there were no more plaintiffs. There were no more petitioners, all the divorce had been taken away, all those lists on Fridays of 50 divorces — gone. All the petty criminals had been taken away. So, I said, what does a High Court Judge do for goodness sake because the Judges who had served let us say in the 1950s would say, these fellows have got it made. They don't hear undefended divorces. All the petty crime which used to clog the lists has been taken away in one fell swoop and all those hundreds and hundreds of personal injury writs, admittedly not that many of them went to trial, but they all had to be given fixtures otherwise you didn't get rid of them. So what does a High Court Judge do?

At the same time you look at the front page of the *New Zealand Law Reports* and you see that the list of Judges gets longer every year, so what are they doing? And the answer is there are new types of work, the enormous growth in administrative law, the discovery by the legal profession ever since *American Cyanamid* that it wasn't so difficult to get an interim injunction, the fact that although petty crime was removed, all the major crime increased so that within a couple of years you were back to almost where you started from in the way of numbers, so that come 1988 there was this long debate on how to reduce the workload of the High Court.

In fact that working party I've mentioned previously in our chat was really set up in 1985 to see what could be done to alleviate the burden. Now the significance is that that was only five years after the most far reaching changes ever made to the structure of the Court system in New Zealand since its earliest days. An interval of only five years and there was the need for a further enquiry, and of course the Law Commission has had to spend a good deal of time looking at that aspect. What I am saying by way of a very roundabout answer to the question you asked me some minutes ago is this, that if the workload does increase as the result of a Bill of Rights, so what? It's just another aspect of a continuing problem and if that particular work has to be dealt with in the Courts, and of course it would be work of prime importance, room will have to be found for it.

So you see the work continuing to grow?

Perhaps I could just say this in closing on this topic, I do not believe that the answer is to continue to increase the size of that list of Judges we were talking about. I really feel that a halt has got to be called. We have a population of three million. We have five thousand lawyers, of whom only some hundreds practise full-time in the Courts, and that is the total population from which our Judiciary is drawn. We have a hundred District Court Judges and we are now up in the thirties in the High Court and the Court of Appeal. Now that number is just not capable of continued expansion when the population, both the general population and the legal population, is almost static. The legal population has shown some growth; it's gone up from 4,000 to 5,000. The general population is showing very little growth. We cannot sustain a continuous growth in the size of our judicial population.

Well, to get on to the other aspect of the Bill of Rights, do you see any great problem in relation to the accusation that is sometimes made about politicisation of the Judiciary

because of the nature of cases that might come before the Courts for determination?

I think there are dangers there and I have no readymade solutions. The Courts deal with political cases from time to time now, but it is relatively rare that a Court decision is the subject of legitimate political debate. I think that if the Courts had to deal with cases under a written constitution, it really is inevitable that the outcome of those cases will be the subject of political debate. I don't see how that can be avoided. That is not desirable because it does politicise the Judiciary, it leads to the danger of focusing on the views of particular Judges and leaves them open to potential attack. There are risks about it.

On the other hand, would it be true to say that the Judges must deal with the cases that come before them, and if in fact Parliament enacts laws that raise questions of this nature, then it is the function and indeed the duty of the Courts to deal with the cases as they come up?

That must be so, and I have not heard any view expressed on the part of the Judiciary to suggest that it would in any way shrink from that duty if Parliament saw fit to entrust it to the Judges. The public debate rather has focused on the question of whether it is desirable that a particularly small group of the population should be given that power.

But in the first instance wouldn't it be a political decision made by Parliament to give the Court this responsibility, and then it is for the Judiciary to act within whatever parameters are established by the statute presumably?

Absolutely.

That leads on to perhaps a slightly different question and that is the question of not just video evidence in Court but of television cameras in Court. Now, reporting is one thing in the print media which we've perhaps become accustomed to, but do you have any views on the question of television cameras in Court — the question of Court as theatre, as they say?

I do think that television stands on quite a different footing from print reporting. It is possible, by way of print reporting, to give a summary of what is happening in a case that is sufficiently important to warrant being covered by the papers. The standard of print reporting I think in New Zealand has given rise to very little complaint so far as Court proceedings are concerned. Television of course is an entirely different form of media. It is much more difficult for it to summarise. It does purport to summarise but in the space of a very few short sentences to the extent that it shows live excerpts, as no doubt would be the case of cameras were allowed into Court. What television journalists would want to display would be something interesting but not necessarily something that went to the heart of the case or even was representative of what had taken place in an overall way on that particular day. I see enormous difficulties about television reporting of Court cases and yet, at the risk of giving a, "on the one hand, on the other hand" type of answer, I've got to say that television is today's media. It's a most important part of the media of today and I really don't see how, in the last decade of the twentieth century, any particular institution can pretend very convincingly that it doesn't exist.

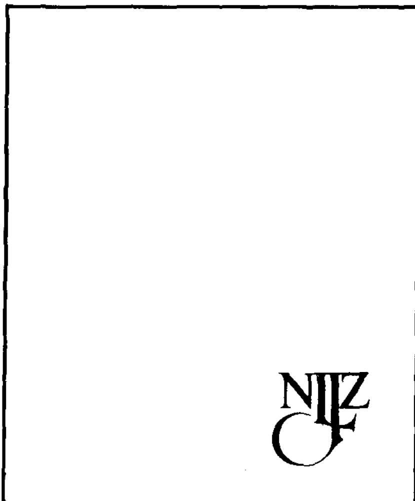
Well of course we've got the example of what went on in the immediate past Presidential election with the daily sound bite when two or three sentences of what each of the candidates had said during the course of that day was what made the television news. In conclusion, how do you feel about the responsibility that has been placed on you and the way in which you will approach it?

Let me say first of all that that is a rather sobering question to come to when we have had a delightfully informal and chatty sort of interview, but of course you are quite right to ask it because it is an entirely serious position and the challenges, if one allowed oneself to dwell too much on them, really are quite daunting.

I think the administrative aspects of the work which are very largely unseen, certainly by the general public and I think in part even unseen by the Judiciary, have increased enormously. I really say that more as a matter of impression rather than as of today's date with any real knowledge, but I think I will probably find that the administrative burden is heavy.

The Chief Justice is expected to sit and I think that is entirely right and proper. He should be visible and he should be seen sitting in cases of some substance and I think probably, particularly in the more major criminal cases. He is expected to be seen, not just in Wellington, but throughout the country. His fellow Judges rightfully expect that he should from time to time visit the other centres where Judges are stationed permanently, where I think in some instances they may occasionally feel that what is happening in the administrative and Governmental regions in Wellington is a little bit remote and may be passing them by. The Chief Justice should show a presence and keep in touch with them regularly.

So all in all, the scope of the job is considerable. The Chief Justice needs to be seen giving a lead where that is needed, speaking on behalf of the Judiciary when occasion demands and of course presiding on a number of ceremonial occasions. So it makes one feel somewhat daunted, and more than a little humble, that one should have been chosen for the position. I can only conclude on the note that I think I have an understanding of what is required and will do my humble best to fulfil it. □



Police weapons (I):

Soft-nose bullets

By Kevin Dawkins, Senior Lecturer in Law, University of Otago

The Police Armed Offenders Squad has been with us for many years now. Mr Kevin Dawkins considers the implications of the types of weapons and ammunition used by the Police. He examines the whole issue critically, and concludes that few would dispute the major premise of the Roper Report that in certain circumstances a Police bullet must be capable of immediately incapacitating someone who is a danger to others. That is of course the justification for use of the so-called soft-nose bullets. A second article to be published next month looks beyond the Roper Report to Police General Instructions, Armed Offender Squad training and other related issues.

Introduction

Police weaponry first attracted civil libertarian interest in New Zealand towards the end of 1980 when it was revealed that semi-jacketed soft-nose bullets had been issued to Armed Offender Squads (AOS). The critics claimed that these bullets produced the same effects as "dum dum" ammunition, causing much more severe wounds than the fully-jacketed solid-nose bullets previously used by AOS. They also maintained that the decision to use soft-nose ammunition meant that the Police had abandoned the "policy" of shooting to incapacitate an offender without causing death or serious injury. Nonetheless, following a Police report on the reasons for the change in ammunition policy, the critics were met with the reply that "[AOS] will continue to use soft-nose bullets with the consent of a hard-nosed Minister": Hon M B R Couch, Minister of Police, The *Dominion*, 4 November 1980.

The criticism resurfaced in 1983 after a suspected armed offender was fatally wounded by a soft-nose bullet fired from a .357 Magnum revolver during an AOS operation. Civil libertarians complained that the combination of soft-nose ammunition and the high velocity of the Magnum revolver added a new dimension of lethality to Police weaponry, especially when measured against the solid-nose bullets then in general issue for the standard .38 Police Special revolver. However the independent examiner appointed to review the circumstances of the shooting concluded that the consequences would not have been materially different even if the fatal bullet had been solid-nosed and fired from a weapon of smaller calibre and less power: *Report for the Honourable M B R Couch MP, Minister of Police, from C M Nicholson Esq QC Re: Paul Chase Shooting* (30 September 1983) (the *Nicholson Report*) at 74.

A further independent examination followed in 1985 after an armed offender was fatally shot by a soft-nose .222 rifle round: *Report of P G S Penlington Esq QC as Independent Examiner into the Shooting of Kevin David Fox and Donna Terese Fox at Gore on 6 June 1985* (March 1986) (the *Penlington Report).* In early 1986 another offender was killed by a Police bullet fired from a .38 Police Special revolver. Although the last incident involved the use of fully-jacketed solid-nose ammunition, the examiner received several submissions from groups opposed to Police use of soft-nose ammunition: *Report of Robert Fisher QC to K O Thompson Esq, Commissioner of Police Re Shooting of Benjamin Wharerau at Dargaville on 14 March 1986* (17 November 1986) (the *Fisher Report*) at 245-246. These submissions may have been prompted by a further change in ammunition policy in late 1985 when the Police decided to adopt soft-nose bullets for general operational use in the .38 Police Special revolver. However the examiner declined to reach any conclusions about Police use of soft-nose ammunition because in June 1986 the Minister of Police had announced that Sir Clinton Roper was to conduct an independent review of Police ammunition.

Sir Clinton's terms of reference were to examine (i) the use, suitability and type of "jacketed soft-point" bullets currently on issue to the Police (though he was not called on to review or make recommendations about the composition or quantity of the propellant used in the ammunition other than in general terms); and (ii) such other incidental matters, relevant to the primary reference, which should be brought to the Minister's attention. The review was delayed for some time pending the completion of the inquiry into violent offending chaired by Sir Clinton: *Report of the Ministerial Committee of Inquiry into Violence* (March 1987). When it was finally presented to the Minister in August 1987 Sir Clinton's central conclusion was that "the Police Department's decision to use jacketed soft-point bullets is unquestionably the correct one". (*Report of the Hon Sir Clinton*

Roper into the Ammunition Currently on Issue to the Police and Matters Incidental Thereto (August 1987) (the *Roper Report*) at 45.)

My main purpose in this paper is to review the *Roper Report.* While I do not intend to challenge Sir Clinton's main findings and conclusions, I do have some criticisms of Police weapons policy and practice as it is revealed in the *Report* and elsewhere. I will also consider some broader issues relating to Police use of firearms that are not addressed in the *Report.* This was due to the fairly narrow terms of reference of the review and Sir Clinton's own view that his task was "purely and simply a 'bullet' inquiry". (*Roper Report* at 2.) Nonetheless, several of these matters had been investigated in the independent examinations of recent Police shootings and are inseparably related to the general question of Police weapons policy.

Police weapons and ammunition

None of the submissions received from the public questioned the suitability or acceptability of the firearms currently issued to the Police, though this matter could fairly have come within the terms of reference of the review. For this reason and because the Police seemed "well satisfied" with their current weapons, the review was confined to Police ammunition. Even so, the *Report* does include a brief history of Police weaponry that can be supplemented by further information disclosed in the independent examination of the 1983 shooting: (*Roper Report* at 3-4 and 17-21; *Nicholson Report* at 70-72.)

1 Smith and Wesson .38 Police Special Revolver

The Smith and Wesson .38 Police Special Revolver has been available to the Police since at least 1953. As a standard handgun it may be carried in the course of general duty where there is reasonable apprehension of serious danger to the public or Police, as well as in specified circumstances involving, for example, CIB patrols, Team Policing units, Airport Police, VIP escorts, bank guards and individuals on special assignment: General Instruction F60(1) and (2) issued pursuant to the Police Act 1958, s 30. The .38 revolver is also now issued to the Police Diplomatic Protection Squad and to dog handlers. Two models are used: the standard four inch barrelled revolver and a two inch version for escort and protection duties. In 1985 the Police decided that only semi-jacketed soft-nose ammunition was to be used operationally in the .38 revolver. As a result of that change in policy, semi-jacketed soft-nose .38 ammunition was issued to all Police districts in 1986.

2 Smith and Wesson .357 Magnum revolver

Until 1977 all members of AOS were issued with .38 Police Special revolvers and fully-jacketed solid-nose ammunition. However in 1976 it was decided to equip members of the new Anti-Terrorist Squads with a more powerful handgun than the .38 Police Special, which had been procured with secretion rather than special operations in mind. Although a 9mm pistol was initially favoured, the Smith and Wesson .357 Combat Magnum revolver was eventually selected as the most suitable replacement.

The new four inch barrel Magnum revolvers were issued to the Anti-Terrorist Squads in 1977 together with 158 grains Smith and Wesson semi-jacketed soft-nose ammunition. But because members of the Anti-Terrorist Squads were also members of AOS, for some time after mid-1977 two different revolvers and kinds of ammunition were in issue for Police armed offender operations: (i) the .357 Magnum and semi-jacketed soft-nose ammunition for members of AOS who were also in the Anti-Terrorist Squads; and (ii) the .38 Police Special and fully-jacketed solid-nose ammunition for all other members of AOS. While it was possible to use the .38 ammunition in both revolvers, in 1978 special squad members with .357 Magnum revolvers were directed to use only .357 semi-jacketed soft-nose bullets unless there were "very good reasons to the contrary": *Nicholson Report* at 70. Finally, the weapons of both special squads were standardised in 1981 when .357 Magnum revolvers and semi-jacketed soft-nose ammunition were made available to all members of AOS.

3 Sako-Vixen .222 rifle

From 1953 the Police were issued with .303 rifles using fully-jacketed solid-nose military ammunition. The .303 rifle was replaced by the BRNO .223 rifle in 1972, though fully-jacketed solid-nose ammunition was retained for both general and special issue. In 1979 the BRNO was in turn replaced by the Sako-Vixen .222 rifle, apparently because the latter was considered to be more reliable. At the same time the Police decided to use semi-jacketed soft-nose ammunition and chose a 50 grain .222 bullet that has now been replaced by a 58 grain round of the same design and construction. Both the .222 rifle and semi-jacketed soft-nose ammunition are currently available to AOS and non-specialist Police.

4 Parker-Hale 7.62mm rifle

The Roper Report lists the Sako-Vixen .222 rifle as the only offensive shoulder weapon in current issue to the Police. However on two reported occasions AOS have also carried or used Parker-Hale 7.62mm (.308) rifles: (i) in May 1979 an armed offender was fatally shot with a fully-jacketed solid-nose 7.62mm bullet; and (ii) some members of the AOS involved in the 1983 Chase shooting were also armed with Parker-Hale rifles. (*Roper Report* at 8; *Nicholson Report* at 23 and appendix 1, B4.)

The use of these rifles by AOS can probably be explained on the ground that they were originally issued to the Anti-Terrorist Squads which are made up of specialist Police who are also active members of AOS. Consequently, in the cities where Anti-Terrorist Squads have been established (Auckland, Wellington and Christchurch), Parker-Hale rifles and other anti-terrorist weapons are held in addition to AOS firearms, and have apparently been "borrowed" for some armed offender operations. This clearly runs counter to the policy statement by the Commissioner of Police in 1979 that the "special weapons" used by the Anti-Terrorist Squads "would not be acceptable for carriage and use in conventional policing situations". (*Nicholson Report* at 111; see further below.)

Police shootings

Eight people have been killed by Police bullets since the formation of the AOS in 1964. Five of these deaths were caused by fully-jacketed solid-nose bullets — a .303 rifle round in April 1970, .223 rifle ammunition in October 1975 and January 1976, a 7.62mm rifle bullet in May 1979, and a .38 Police Special revolver round in March 1986. The remaining three fatalities resulted from the use of semi-jacketed soft-nose bullets fired from a .38 Police Special revolver in December 1982, a .357 Magnum revolver in April 1983 and a .222 rifle in June 1985.

Over the same period there have also been three non-fatal Police shootings. The bullets used in these incidents were a semi-jacketed soft-nose .357 Magnum round in January 1983, a fully-jacketed solid-nose .38 Police Special bullet in May 1985 and an unjacketed solid-lead .38 Police Special round in April 1986 (Rather inexplicably, the *Roper Report* does not mention a non-fatal shooting with a .38 Police Special bullet at Kurow in 1983).

So, out of a total of eleven "official" incidents, rifles of one calibre or another were used in five cases, the .357 Magnum revolver in two and the .38 Police Special revolver in four. Fully-jacketed solid-nose bullets were fired in six of the incidents, semi-jacketed soft-nose ammunition in four and an unjacketed solid-lead round on one occasion.

In chronological sequence the full record of Police shootings is as follows: *Roper Report* at 5-15.

1 *April 1970, Wellington* — The offender had two hostages under his control and was armed with a sawn-off shotgun, a .303 rifle and a .38 revolver. He was fatally shot with a .303 rifle bullet fired by an AOS member when he pointed his shotgun at a Police dog handler and threatened to fire.

2 *October 1975, Christchurch* — The offender was killed by a .223 rifle shot fired by a former AOS member as he was seen to push a knife into the back of his seven-year-old daughter.

3 *January 1976, Taumarunui* — Following a gang confrontation the offender fired several shots from a .308 rifle, including one at a Police dog handler. He was then fatally shot with an AOS .223 rifle bullet.

4 *May 1979, Auckland* — The offender had threatened to kill his wife and fired a rifle shot in the direction of Police appealing to him by loud hailer. He was shot dead with a 7.62mm bullet from a Parker-Hale rifle as he prepared to fire again.

5 *December 1982, Wainuiomata* — The Police had tried to apprehend the offender who was suspected of murder. He was fatally shot with a .38 Police Special bullet fired by a Police dog handler in self-defence.

6 *January 1983, Auckland* — The offender was wounded with an AOS .357 Magnum revolver bullet when he pointed a shotgun to the head of a hostage.

7 *April 1983, Petone* — An AOS member fatally shot the suspected offender with a .357 Magnum bullet after he was mistakenly believed to be armed with a shotgun.

8 *June 1985, Gore* — The offender had held his wife in a car and killed her by discharging a shotgun into her neck at point blank range. He was fatally shot with a .222 rifle bullet fired by a non-specialist constable as he swung the shotgun to Police nearby and threatened to shoot.

9 *May 1985, Port Levy* — After being called on to surrender, the offender had struggled with a constable and threatened to shoot him with a .22 rifle. He was wounded by a .38 Police Special revolver bullet fired in self-defence.

10 *March 1986, Dargaville* — The offender had taken a hostage after an armed robbery and was carrying a cut-down .22 rifle. Following a struggle with two constables he was fatally wounded with a .38 Police Special revolver round.

11 *April 1986, Rotoiti* — After committing an armed robbery the offender drove off in a Traffic Officer's car with the officer as hostage. He later shot and killed the Traffic Officer and was himself wounded with a .38 Police Special revolver bullet fired by a former AOS member when he refused to lay down his rifle and threatened Police.

Semi-jacketed soft-nose ammunition

1 Ballistic characteristics

The central issue in the debate about Police use of semi-jacketed soft-nose ammunition is the amount of kinetic energy (the energy of movement) that bullets of this type transfer to the human target. As the Roper Report points out, the severity of a bullet wound is directly related to the amount of kinetic energy released by the bullet and absorbed by the human body after impact. In short, the greater the loss of energy the more serious the wound.

A bullet's effectiveness as a wounding agent will initially depend on the amount of kinetic energy it can retain from the muzzle to the point of impact. In this respect the semi-jacketed soft-nose bullets in current Police issue clearly surpass the performance of their semi-jacketed solid-nose counterparts. At a target distance of three to five metres, the 158 grains Smith and Wesson soft-nose round originally issued to AOS for the .357 Magnum revolver has an impact speed of approximately 380-400 metres per second (m sec) and corresponding energy of 500 foot pounds (ft lbs).[1] (It should be noted, however, that because the Police procure their ammunition under a tendering system, these figures may vary considerably depending on the manufacture of the bullets held in issue at different times. Other factory loadings of the same type of Magnum cartridge can achieve impact velocities and energies as high as 500 m sec and 800 ft lbs.)

By contrast, a typical fully-jacketed solid-nose .38 Police Special round of the kind used by the Police until 1986 has an impact velocity of about 200 m sec over a distance of three to five metres, with no more than 200 ft lbs of energy at the same point of impact: fn1. Even the new semi-jacketed soft-nose .38 bullet now in standard issue will reach its target with significantly less impact speed and energy than the .357 Magnum round. With a reported muzzle velocity of 260 m sec (*Roper Report* at 39), the .38 round will have approximately 250-300 ft lbs of available energy within the normal range of use of Police handguns.

However the primary determinant of a bullet's wounding capability is the amount of impact energy it can actually *deposit* in its target. At this point the bullet's design and construction characteristics become singularly important. Thus the object of the partial jacketing and soft-nose configuration of the present Police ammunition is to induce bullet deformation as quickly as possible after impact so that the bullet "brakes" and is forced to exchange considerably more energy than a more penetrative fully-jacketed solid-nose round. For example, unlike a standard solid-nose .38 Police Special bullet which is completely encased in a jacket or envelope of copper or cupro-nickel alloy, the .357 Magnum round used by AOS is only partly jacketed, leaving the lead core of the bullet exposed at the

nose. When performing efficiently, the jacket of the Magnum bullet will peel back on penetration so that the extruded core "mushrooms" and thereby retards the bullet's momentum. And if the bullet stops and lodges within the target it will have much more "shock" or "stopping power" than a standard .38 round which will often pass through the target carrying considerable residual energy with it.

With a semi-jacketed soft-nose .38 Police Special bullet, an impact speed of 190-195 m sec has been reported as necessary to produce even the slightest degree of deformation by the time the bullet has penetrated fifteen centimetres into soft tissue: Wilber, *Ballistic Science for the Law Enforcement Officer* (Charles C Thomas, Springfield, Illinois, 1977) 148. At impact velocities just over 395 m sec the bullet will expand the mushroom to the point where it is pushed out to a disc-like shape; and if the same .38 bullet is fired from a .357 Magnum revolver capable of generating velocities up to 450 m sec "the effect is overwhelming". (ibid at 148-149.)

In the light of these conclusions and other evaluations of soft- and hollow-nose .38 ammunition,[2] the .357 Magnum bullet used by AOS will exhibit almost total deformation by the time it reaches most of the vital structures of the human body. It will be much more efficient in converting its greater impact energy into deposited energy than a fully-jacketed solid-nose .38 Police Special bullet, and it is far more likely to expend all its disabling energy in the target than the solid-nose .38 bullet. Where the .357 Magnum bullet does in fact transfer all its energy to the target — and this characteristic is often emphasised in defence of Police use of soft-nose ammunition — it will exchange as much as five times more energy than a fully-jacketed solid-nose .38 round. The semi-jacketed soft-nose .38 Police Special bullet will also be less penetrative than equivalent fully-jacketed ammunition, often depositing twice as much energy.

2 Wounding effects

When it was first revealed that the Police had adopted semi-jacketed soft-nose ammunition for the Sako-Vixen .222 rifles and .357 Magnum revolvers, an article in The *Evening Post* of 31 October 1980 headed "Police Go Soft on Ammo — Say It's Safer" claimed that soft-nose bullets cause "savage" wounds instead of punching a "neat hole" like a solid-nose round: *Roper Report* at 22. The particular phase of wound production referred to in the article is the *permanent wound tract*. Whereas a fully-jacketed solid-nose bullet will ordinarily punch a "neat hole" and produce a tubular wound tract approximately equal in dimension to the bullet's original calibre, the mushrooming or expanding area of presentation of a semi-jacketed soft-nose round will open up a permanent wound resembling a cone with its apex at the point of bullet entry. Characteristically, therefore, the ammunition now used in Police revolvers and rifles will leave a funnel-shaped wound tract in its wake and the area of permanent damage will be more extensive than the tunnel wound recording the passage of comparable fully-jacketed solid-nose bullets.

But there is also another phase of the wounding mechanism, called *temporary cavitation*,[3] that is less well known. Unlike the permanent wound tract, which is clearly evident after bullet transit, temporary cavitation occurs within the space of a few milliseconds of bullet passage and is not readily apparent afterwards. During this phase, which is caused by the radial velocity and shock waves imparted to tissue by a high-velocity bullet, the temporary cavity can reach thirty times the size of bullet diameter, forming a sub-atmospheric pressure that in turn creates a suction for debris and bacteria. As this is occurring bone may be fractured though some distance from the path of the bullet; muscle fibres, nerves and blood vessels adjacent to the shot channel may be severely damaged; and tissue cells can become secondary missiles that spread outwards with their own disruptive energy. Finally, after a series of pulsations as different tissues react to and absorb the released energy of the bullet, the temporary cavity will collapse to about the size of the permanent wound tract, leaving a surrounding zone of devitalised tissue.

It is generally agreed that this so-called "explosive" phase of wound production is principally caused by high impact velocity, though its effects are greater where a soft- or hollow-nose bullet expands after impact. So bullets fired from the high-velocity Sako-Vixen .222 rifle will cause widespread temporary cavitation in addition to extensive permanent wound damage. Conversely, at the other end of the velocity scale, wounds inflicted by the fully-jacketed solid-nose rounds formerly used in the .38 Police Special revolver will be largely localised with no appreciable transmission of energy to areas remote from the permanent wound tract. However the blast and shock effects of temporary cavitation will certainly aggravate wounds caused by .357 Magnum bullets and, to a lesser extent, the new .38 Police Special ammunition.

3 Other factors

Aside from its ballistic properties, several other variables affect a bullet's wounding effectiveness. In particular, the location of bullet impact and the direction of bullet passage will often be at least as important as the ballistic characteristics of the ammunition used. This point is illustrated by the Chase shooting in 1983 where the pathologist concluded that the site of entry and direction of the fatal shot were more important causative factors contributing to the victim's death than either the design or construction of the bullet or the fact that it was fired from a .357 Magnum revolver. In the pathologist's opinion, the result would have been essentially the same had the fatal bullet been fully-jacketed and fired from a weapon of smaller calibre and less power. (*Nicholson Report* at 73 and 74.)

Another point frequently overlooked by critics of Police weaponry is that the use of semi-jacketed soft-nose ammunition may in fact reduce the risk of a fatality. For example, on the basis of expert medical opinion the examiner of the Dargaville shooting in March 1986 concluded that, had soft-nose ammunition been used, the offender may have survived: *Fisher Report* at 243-244 (though some Police experts apparently disagree: *Roper Report* at 36). Of the three fully-jacketed solid-nose .38 rounds that struck the offender, the second inflicted the fatal wound. The first shot hit him in the forearm without having any significant disabling effect while the third bullet struck him in the hip. But if the first shot had been a semi-jacketed soft-nose round, its substantially greater impact and traumatising effect would have incapacitated, overbalanced or at least distracted the offender in a way that may have allowed the Police to apprehend him without firing a further shot: *Fisher Report* at 244. In fact soft-nose bullets should have been used following the change in .38 ammunition policy in late 1985. Through administrative oversight, however, the new ammunition was not

available at the Dargaville Police Station in early 1986: see further below.

Two other recent incidents also show that a non-fatal incapacitating bullet may make further potentially fatal shots unnecessary. In May 1985 an offender armed with a .22 rifle was shot in the thigh with a fully-jacketed solid-nose .38 Police Special round but remained on his feet and continued to struggle with a Police officer until eventually subdued by a blow to the head with a gun butt: *Roper Report* at 12-13 and 35. Under the circumstances the Police may well have been justified in firing again — possibly with fatal consequences. In all likelihood, however, a soft-nose bullet would have immediately immobilised the offender. On the other hand, the offender who was wounded by a soft-nose .357 Magnum round in January 1983 when he held a shotgun to the head of a hostage was incapacitated without discharging his weapon. Had a fully-jacketed bullet been used on that occasion "there is every chance there would have been complete penetration with little transference of kinetic energy, or incapacitating effect": *Roper Report* at 35. This would have placed the hostage at greater risk and may have forced the Police to shoot the offender again.

Justification for Police use of semi-jacketed soft-nose ammunition

The *Roper Report* concludes that "putting aside moral and ethical considerations" the Police are unquestionably justified in using semi-jacketed soft-nose ammunition: at 32. While the *Report* takes some account of the risk of secondary injury caused by ricocheting and over-penetration of fully-jacketed solid-nose bullets, the main argument in support of this conclusion is that Police ammunition must have adequate incapacitating or "stopping power".[4] In Sir Clinton's opinion

> [a]n expanding projectile is the most efficient incapacitator and it would be unthinkable to arm the Police with anything less. (at 38.)

1 "Stopping power"

There can be no argument with Sir Clinton's general conclusion on this ground. In the first place, it is essential that Police marksmen using the Sako-Vixen .222 rifle achieve a "first shot" hit with sufficient immobilising energy to render an offender immediately incapable of further assault or threat. Morever, given the circumstances in which the Police resort to the use of rifles, the refinement of shooting to wound has no realistic application — the objective is "the instantaneous and complete elimination of the armed offender's capacity to kill or seriously injure others". (Moodie, "Police Armed Offender Squads — Public Protectors or Instruments of Death?" [1976] NZLJ 83 at 83-84.) This fundamental requirement is pointedly illustrated by the five incidents where offenders have been killed by Police rifle bullets (supra). Although in all but the most recent case of these shootings in June 1985 the threat to life was eliminated when the offenders were killed by fully-jacketed solid-nose bullets, in each case the Police would surely have been justified in using soft-nose ammunition with its much greater "knockdown" or "stopping" probability.

So far as revolver ammunition is concerned, it is also important to appreciate the operational limitations of handguns. Normally the offender will be armed and able to return fire from close range if not immediately incapacitated by a Police bullet. In addition, accurate shot placement to a vital area such as the head is rarely open. Revolvers and pistols tend to lose accuracy beyond relatively close range and, even at short target distance, they are often fired on the principle of "instinctive" shooting where the weapon is pointed at the centre of mass of the target rather than aimed along its sights. (*Nicholson Report* at 25-26.)

Under these conditions it would indeed be "unthinkable" to arm the Police with revolver ammunition lacking in "stopping power". Yet the record, both here and overseas,[5] leaves little room for doubting that fully-jacketed solid-nose .38 Police Special bullets are ineffective as "manstoppers". Significantly, many cases have been documented in the United States where police officers have been shot by the return fire of offenders hit by one or more fully-jacketed .38 rounds. The inadequacy of this kind of ammunition was also exposed locally by the Dargaville incident of March 1986 where the two constables involved in that shooting expressed "amazement" at its lack of "stopping power". (*Fisher Report* at 242.) While the first shot appeared to have no effect whatever on the offender, even the two subsequent bullets "produced no dramatic results". (*Roper Report* at 14 and 36; see also supra.) And again, in the two incidents of May 1985 and April 1986 non-expanding .38 rounds failed to subdue offenders who continued to present a threat to Police.

The *Roper Report* finds that the soft-nose ammunition currently used in the Sako-Vixen .222 rifle and .357 Magnum revolver is "all that is required" for incapacitation purposes. (at 39.) However, in Sir Clinton's opinion the new soft-nose round now in standard issue for the .38 revolver is inadequate — the .38 bullet "just does not produce the kinetic energy necessary to incapacitate" and "serious consideration should be given to using a 110 grain jacketed soft-point bullet" (ibid at 39 and 45.) This conclusion cannot be accepted without reservation. For one thing, Sir Clinton's finding that the present .38 ammunition is inadequate is based in part on a minimum incapacitation standard (approximately 700 ft lbs) which is far too high. As Sir Clinton himself acknowledges, no existing .38 bullet could reach that standard (and one would have to say the same of many forms of the .357 Magnum cartridge). Nonetheless, many American police departments have successfully adopted .38 ammunition that develops no more than half the suggested minimum energy.

Secondly, the evidence inclining Sir Clinton to the view that the new .38 ammunition is inadequate was presumably available to the Police when they decided to change ammunition in late 1985. That decision was influenced by two 1985 reports from the Australian National Police Research Unit recommending a semi-jacketed hollow-nose bullet of 95 grains as the most effective incapacitating form of the .38 cartridge. In the result, however, the New Zealand Police chose a heavier and less powerful round for operational use in the .38 Police Special revolver. But within a few months of the change in ammunition policy — in the aftermath of the Dargaville shooting of March 1986 — several local Police and Army firearms experts were advocating a further change to a lighter hollow-nose .38 bullet. (*Fisher Report* at 244-245.) At the same time, the *Roper Report* indicates that "other members of the Police" were not enthusiastic about adopting hollow-nose ammunition. (at 39.)

These events lead one to wonder about how the Police and their advisers reached the decision on the current issue .38 ammunition. While it would

be idle to speculate on the particular factors which shaped that decision, at least it can be said that the time for determining ammunition requirements and conducting ballistic tests is before and not after changes in policy. Furthermore, even after the change in policy the Police were not consistent in their use of ammunition. In the two shootings of March and April 1986 fully-jacketed solid-nose and unjacketed solid-lead bullets were used in contravention of the 1985 directive that only semi-jacketed soft-nose ammunition was to be loaded in the .38 Police Special revolver for operational purposes. (*Fisher Report* at 247; *Roper Report* at 14.) The March 1986 incident also uncovered cumbersome Police administrative procedures that failed to ensure both the prompt distribution of the new ammunition and the transmission of vital information explaining the reasons for the change in policy. As it happened, the Dargaville Police could not have complied with the 1985 directive because the new ammunition was not available in their area — five months after the change in policy. Moreover, the two constables involved in that shooting were plainly unaware of the limitations of fully-jacketed bullets. Rather than choosing solid-lead ammunition, which was also available to them, they elected to use fully-jacketed bullets because of their superior penetrating ability — the very reason underlying the 1985 decision to discontinue their use. For the future, it is to be hoped that the Police will act on the examiner's recommendation and ensure that any change in firearms or ammunition policy is accompanied by sufficient information to make the change meaningful at an operational level. (*Fisher Report* at 250.)

2 Ricochet and over-penetration

The *Roper Report* accepts that the ricochet hazard caused by bullets striking hard surfaces is very high with fully-jacketed ammunition while almost non-existent with semi-jacketed soft-nose bullets. Nonetheless, the ricochet defence of Police use of soft-nose ammunition has probably been overstated. Once it is accepted, as a matter of primary justification, that the Police must be armed with expanding bullets capable of immediate incapacitation, the minimisation of the risk of secondary injury by ricochet becomes a consequential advantage. Aside from this, most armed offender incidents in this country do not involve the use of firearms in circumstances where members of the public are at close quarters. This is in sharp contrast to the American experience where bystanders have often been struck by ricocheting fully-jacketed police bullets during "shoot-outs" in urban areas.

Much the same considerations apply to post-exit injury where a Police bullet passes completely through the primary target. As previous incidents have shown, the possibility of secondary injury to members of the public by over-penetrative fully-jacketed ammunition cannot be discounted. In the first fatal shooting by an AOS in April 1970 the fully-jacketed solid-nose .303 rifle round exited the offender's body and carried on until it struck a telegraph pole. And more recently, one of the fully-jacketed .38 Police Special bullets in the 1986 Dargaville shooting passed through the offender's arm and crossed a parking lot and driveway before striking a concrete block wall some distance away. In the words of the examiner, "the shot created a potential danger to the public after it exited from its target". (*Fisher Report* at 265.)

3 Non-lethal weapons

A recurrent argument against Police use of soft-nose ammunition, and the use of firearms generally, is the claim that various non-lethal means are available for dealing with armed offenders. This matter was raised before the Roper Review in the submission of the Council for Civil Liberties. While accepting that semi-jacketed ammunition has superior "stopping power" and carries no risk of incidental injury by over-penetration, the Council recommended the use of tranquillising darts to avoid the more serious wounds caused by expanding bullets.

Tranquilliser guns have been used by police overseas with mixed success. There is also a precedent for their use in New Zealand. In March 1980 a member of the Auckland AOS fired one of these darts to subdue a psychiatric patient on home leave who had kept the Police at bay with a knife for several hours. (The *Otago Daily Times*, 13 March 1980.) Assuming that no hostage was involved, the use of a tranquillising dart on that occasion was a commendably proportionate response. But such darts could never replace firearms as the "first line" means of resolving most armed offender incidents. Even if a dart were available that could achieve immediate incapacitation — and it seems there is not — "it must be questionable whether it would be a viable proposition in the unpredictable circumstances in which Police are called on to shoot an offender" (*Roper Report* at 44.)

Tear gas has been suggested as another alternative. In fact the AOS are already equipped with various CS (tear gas) weapons. In addition to hand-thrown CS grenades, these squads are armed with Federal guns for discharging CS barricade projectiles as well as Remington 870 Magnum shotguns with fire barricade-penetrating liquid CS cartridges. However, because it is "blind" in its effects and cannot induce immediate incapacitation, tear gas must also be disqualified as a replacement for firearms.

Rubber bullets, stun guns and stun grenades also have limited application. Together with other non-lethal weapons, they provide a range of alternative means for dealing with armed offenders in circumstances where resort to lethal force is either unnecessary or undesirable. But the development and use of non-lethal weapons should not be predicted on the assumption that they will replace firearms. It would be unreasonable to expect the Police to surrender their current armament for weapons that lack the accuracy, reliability and "stopping power" required for both general and special purposes.

The relevance of international legal prohibitions

Critics of Police weaponry have sometimes sought to advance their case by appealing to humanitarian limitations imposed by international law on the means and methods of warfare. In essence, the claim is that since international law prohibits the use of soft-nose bullets against enemies of the state in time of war, there can be no justification for the Police using this type of ammunition against fellow citizens for the purposes of domestic law enforcement. The authority usually cited in support of this objection is the Geneva Convention. (*Roper Report* at 27.)

In fact two international legal proscriptions are implied by this claim: (i) the general injunction against the military use of weapons and projectiles that cause "unnecessary suffering"; and (ii) the specific prohibition on the use of expanding bullets in war. The general injunction was first formulated in the 1899 and 1907 Hague Conventions on the Laws and Customs

of War on Land. As most recently expressed in the 1977 Protocol I Additional to the 1949 Geneva Conventions, it is directed at the use of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering". (Art 35(2).)

The 1899 Hague Declaration Concerning Expanding Bullets is more specific and prohibits the use of ammunition by reference to certain wounding characteristics and bullet configurations. Under the terms of the Declaration the contracting parties agreed to abstain from the use of bullets "which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions". This instrument was adopted in direct response to the introduction of a military bullet first manufactured at the British ordinance factory at Dum Dum near Calcutta. The new bullet was a semi-jacketed .303 rifle round with an exposed lead nose and was originally used by the British army at the end of the 19th century after the standard fully-jacketed .303 issue proved to be unsuccessful against rebel tribesmen on the Indian frontier. From all accounts the "dum dum" was an extremely destructive projectile which caused much more extensive and serious wounds than the standard military bullet of the day.
use. However the short answer to the critics' reliance on these prohibitions is that neither applies to the domestic police function. In their original treaty form they imposed limitations on the conduct of "war" while today they form part of the body of international humanitarian law applicable in "armed conflict". Moreover, as the *Roper Report* observes, the task of an army at war is entirely different from that of the Police confronted by an armed offender who poses an immediate threat to life. While a disabling wound requiring medical attention will suffice on the battlefield, "instant incapacitation is called for in the case of the threatening offender, who, although suffering from a disabling wound, may still remain a deadly threat". (at 31.)

Indeed, to the extent that the principles underlying the international prohibitions have any relevance at all to domestic law enforcement, they confirm rather than deny the grounds for Police use of soft-nose ammunition. In modern practice the prevailing test in applying the prohibitions is "proportionality to military advantage."[6] This test involves a balancing of the degree of injury or suffering caused by a particular weapon against both its military utility and the military necessity occasioning its use. Among the humanitarian considerations to be weighed are the painfulness and severity of wounds, mortality rates, the incidence of permanent damage or disfigurement and the availability of adequate medical and surgical treatment under battlefield conditions. On the other side of the equation, necessity includes any military exigency so long as a weapon is used against a legitimate target in circumstances where a definite gain accrues to the user. In addition, the assessment of military utility may take into account not only a weapon's capacity to inflict casualties but also the availability of alternative weapons, its contribution to troop security and morale, and logistical factors such as the ability to supply the weapon where and when it is needed. In the final analysis, a weapon will be illegitimate only where its wounding effects are manifestly disproportionate to the anticipated military advantage resulting from its use.

Applying this proportionality test to the ammunition currently used by the Police, it must first be acknowledged that semi-jacketed soft-nose bullets generally inflict greater "injury" or "suffering" than non-expanding ammunition. In terms of necessity and utility, however, the wound effects of soft-nose bullets are either "superfluous" or "unnecessary". The operational necessities that determine Police weapons policies dictate the use of ammunition capable of immediately incapacitating an armed officer while, at the same time, minimising the risk of secondary injury to the public and providing the police with adequate means of self-protection. Furthermore, in the absence of equally effective non-lethal weapons, the special utility of soft-nose ammunition outweighs the probability that it will produce more serious wounds than fully-jacketed solid-nose bullets. Thus any greater "injury" or "suffering" caused by soft-nose bullets is not manifestly disproportionate to the overall advantage that legitimately accrues to the Police as a result of their use. ☐

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1 Dobbyn et al, *An Evaluation of Police Handgun Ammunition : Summary Report* (Law Enforcement Standards Program, National Institute of Law Enforcement and Criminal Justice, United States Department of Justice, Washington, 1975) table 5-V; Gag "A Survey : Handgun Cartridges for Police Use" (1982) 30 Law and Order 50 at 55; Gates, "Handgun Cartridges : How Do They Really Measure Up?" in *Handloader's Digest* (9 ed 1981) 142 at 144.

2 See eg Harrell, "Hollowpoint Ammunition Injuries : Experience in a Police Group" (1979) 19 *Journal of Trauma* 115; Sellier, "Effectiveness of Small Calibre Ammunition" in *Proceedings of the Third International Symposium on Wound Ballistics*, Acta Chirurgica Scandaniavica, Supplement, 489 (1979).

3 The nature of temporary cavitation is considered by Berlin et al, "Various Technical Parameters Influencing Wound Production" in *Proceedings of the Third International Symposium on Wound Ballistics*, supra n2 at 103; De Muth and Smith, "High-Velocity Bullet Wounds of Muscle and Bone : The Basis of Rational Early Treatment" (1966) 6 *Journal of Trauma* 744; Feuchtwanger, "High Velocity Missile Injuries : A Review" (1982) 75 *Journal of the Royal Society of Medicine* 966; Moffatt, "Influence of Missile Type and Velocity" (1973) 66 *Proceedings of the Royal Society of Medicine* 291.

4 In recent years the Police have consistently defended their use of soft-nose ammunition on this ground: see the statements attributed to Chief Superintendent M Churches, Head of Criminal Investigation, Police National Headquarters, *The New Zealand Herald*, 4 November 1980, *The Evening Post*, 4 November 1980, *The New Zealand Times*, 24 April 1983, and to Detective Chief Inspector B Scott, Head of Investigative Services, Police National Headquarters, *The New Zealand Herald*, 1 November 1980. See also Gollins, "Stopping Power Heart of Ammunition Debate" *The New Zealand Times*, 10 June 1983; Rosenberg, "Why do the Police Need Guns?" (1983) *New Outlook* vol 2 no 1, p15.

5 See Ayoob, "Police and Weapons : Policy and Hardware for the 1980s" (1980) 28 *Law and Order* 44; Bristow, "Which Cartridge for Police" (1962) *Journal of Criminal Law, Criminology and Police Science* 249; De Muth, "Ballistic Characteristics of 'Magnum' Sidearm Bullets" (1974) 14 *Journal of Trauma* 227; Dia Maio et al, "Ammunition for Police : A Comparison of the Wounding Effects of Commercially Available Cartridges" (1973) 1 *Journal of Police Science and Administration* 269; Williams, "In Search of the Perfect Police Handgun" (1981) 29 *Law and Order* 72.

6 See Cassese, "Weapons Causing Unnecessary Suffering : Are They Prohibited?" (1975) 58 *Rivista di Diritto Internazionale* 12, and by the same author "Means of Warfare : The Traditional and the New Law" in Cassese (ed), *The New Humanitarian Law of Armed Conflict* (1979) 61; Robblee, "The Legitimacy of Modern Conventional Weaponry" (1976) 71 *Military Law Review* 95.

Intellectual Property

By John McGrath, QC, of Wellington

The following address was given by John McGrath QC in launching two books concerning intellectual property in Wellington on 31 January 1989. A full academic review of the books is expected to be published in the next issue of the New Zealand Law Journal. *The two books which are both published by Butterworths are:*

The Law of Intellectual Property in New Zealand
By Andrew Brown and Anthony Grant
Price $143.00 ISBN/0-409-787981

New Zealand Intellectual Property Reports (1967-1987)
Editor, Andrew Brown
Price $209.00 ISBN/0-409-787361
(The two books are available as a set for $324.50.)

It is pleasing if slightly unconvincing to hear that at all stages a book of this substance was written with complete accord and harmony between the authors themselves and with their publisher. A more natural portrayal of the relationship was given by Lord Abinger CJ in his address to the jury when trying a case of assault:

> I really think that this assault was carried out to a very inconsiderate length, and that if an author is to go and give a beating to a publisher who has offended him, two or three blows with a horsewhip ought to be quite enough to satisfy his irritated feelings.

Butterworths have kindly invited me to introduce the two books you see before you:

The Law of Intellectual Property in New Zealand; the new textbook by Andrew Brown and Anthony Grant; and

·Volume 1 of the *New Zealand Intellectual Property Reports*, which is a collection of hitherto unreported decisions in particular of the High Court and the Commissioners of Patents and Trade Marks.

The subject matter the books cover includes the law of Trade Marks, Passing Off, Fair Trading Act (deceptive and misleading conduct provisions), Copyright, Registered Designs and Trade Secrets (part of the law of obligations as to confidence).

I suggest that in New Zealand in 1989 there are two main reasons why an up-to-date and comprehensive text on the New Zealand law in this subject is needed, First, although based on statute, the law in this area is extremely complex. The traditional intellectual property statutes lack any consistent theme and themselves have been developed piecemeal, usually reflecting the common law at a particular point without regard to a coherent scheme. So the law of copyright for example establishes different forms of protection for creativity depending on whether it is expressed in books, films, music or sound recordings. Given this complexity those of us who are not experts and even some of those who are, need a clear, well-written textbook to direct us to the primary sources and to help us elucidate such principles as can be drawn from them.

Traditionally the view in New Zealand has been that the leading English texts have been sufficient as references for the New Zealand judicial officers, practitioners, and administrators working in this field. This is reflected in the English parentage of our major statutes. Even ten years ago I suggest the prevailing view was that the texts covering English case law were adequate to expound the provisions of the New Zealand statutes. This brings me to the second reason why a New Zealand textbook on the law of intellectual property is to be welcomed.

New Zealand law in this area is increasingly becoming at variance with that of Great Britain. There are several reasons as the President of the Court of Appeal says in his foreword to *The Law of Intellectual Property in New Zealand.* The trend for New Zealand case law to become increasingly distinctive is beginning to make its mark in the field of intellectual property. English law and New Zealand statute law are moreover increasingly moving apart from each other following reforms enacted in England which have not been taken up by the New Zealand Parliament. The increasing influence of European law in the British statutes on intellectual property widens this gap.

One result of this development is that the current editions of standard English textbooks increasingly focus on developments in the law not pertinent to New Zealand. In the area of extension of patent term for example, an area of considerable present interest in New Zealand, one must look to the 12th edition of *Terrell* and the 4th edition of *Blanco White* for guidance rather than the current editions, because major legislative changes that were made to the Patents Act in Great Britain in 1977 have not been followed in New Zealand.

The third reason why the publication of a work on the New Zealand law of intellectual property is appropriate is of course the exploding amount of local case law on the subject, itself reflecting the increased importance that the commercial community is attaching to the protection of the rights concerned.

For all these reasons the publication of this textbook with its current full discussion of the New Zealand law is timely and it serves a real need. Not surprisingly this has already been recognised and some two hundred copies have been sold in advance of publication.

The textbook itself is a substantial work of over 700 pages which enables the authors to give comprehensive treatment to each of the specialised subjects. Each subject is introduced with a discussion of the legislative history and development of the particular right protected followed by a summary of its purpose and function.

The text then examines the conditions that must in each case be satisfied to secure the protection of that right, the scope of that protection, and areas generally that can be called infringement and remedies.

The textbook is also well set out, lucidly written, and in fact very readable.

There are helpful discussions of areas where the authors perceive the law to be inadequate or as yet untested against modern developments, most notably in areas where advancing technology sits uncomfortably with the words of a statute first framed before such technology was contemplated. The adequacy of present copyright protection for photocopying and computer programmes in particular is analysed. The authors thus provide a thoughtful treatment of modern issues one expects to find in a University Law Review or other authoritative article as well as pragmatic advice on the law as it is given to a practitioner approaching a particular problem or application for the first time. Another interesting discussion is that on defences against copyright infringement proceedings and in particular the suggestion that there is a new emerging defence of public interest.

You have mentioned today, Mr Kirk, your concern on behalf of Butterworths as legal publishers that the sale of the Government Printing Office to private interests may entail assignment of Crown copyright in statutes. Clearly a public interest lies in the wide dissemination of the commands of the Crown in Parliament through publication of statutes. The defence discussed in these paragraphs of the textbook may perhaps assist companies such as your own to prevent curtailment of such publication.

With this text on *The Law of Intellectual Property in New Zealand* the publishers have put out an accompanying volume of all the important New Zealand decisions on the subject hitherto unreported. They include decisions not only of the Court of Appeal and High Courts but a number of those of the Commissioners of Patents and Trade Marks. I am assured that no decision of any importance has been missed, although it has been necessary, in some of the cases in which the judgments have run to a great length, to abridge the reports. This volume is a useful adjunct to the principal text — indeed an essential supplement to it.

The law of intellectual property in the past has been seen by many as having much difficulty and even considerable mystery surrounding it. Some have felt the degree of mystery such that it should be left to specialists. This book will open up the field to wider participation by advisers and equally important to a better appreciation of the subject by lay people. Thus it will contribute significantly to the wider understanding of an important branch of New Zealand law.

I congratulate the authors and publishers in their work and, at the request of Sir Alexander Turner, who I understand has been closely involved in the preparation of the works, I now declare the two books well and truly launched.

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Recent Admissions

Barristers and Solicitors

Batchelor PJ	Wellington	18 November 1988	Gilbert EM	Wellington	18 November 1988
Bell BW	Wellington	15 December 1988	Gilbertson BD	Wellington	18 November 1988
Bollinger MG	Wellington	18 November 1988	Grace MS	Wellington	15 December 1988
Bridgman MA	Wellington	18 November 1988	Hall CB	Wellington	18 November 1988
Campbell KB	Wellington	18 November 1988	Hayward JM	Wellington	18 November 1988
Cotterrell AC	Wellington	18 November 1988	Holt LM	Wellington	15 December 1988
Crookston JC	Wellington	18 November 1988	Hunter MD	Wellington	18 November 1988
Cross TM	Wellington	15 December 1988	Jones SF	Wellington	18 November 1988
Daniell RJ	Wellington	18 November 1988	Kirk CP	Wellington	18 November 1988
Dennett JE	Wellington	15 December 1988	Lederman T	Wellington	18 November 1988
Edwards GT	Wellington	15 December 1988	Leen SJ	Wellington	18 November 1988
Elder CL	Wellington	18 November 1988	Lynch VJ	Wellington	15 December 1988
Emerson JS	Wellington	15 December 1988	McHalick VJ	Wellington	18 November 1988
Farrar MS	Wellington	15 December 1988	McLean GW	Wellington	15 December 1988
Feeley AJJ	Wellington	18 November 1988	Martin PM	Wellington	18 November 1988
Fifi L	Wellington	18 November 1988	Murphy DL	Wellington	18 November 1988
Fletcher, RL	Wellington	15 December 1988	Norris EJ	Wellington	18 November 1988
Frame A	Wellington	6 December 1988	'Othman R	Wellington	15 December 1988
Gaines SF	Wellington	18 November 1988	Prasad NC	Wellington	15 December 1988
Garside LM	Wellington	15 December 1988	Raymond RW	Wellington	18 November 1988

Australia's "Thin Capitalisation" rules:

How they affect foreign investors in Australia

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The purpose of this article is to outline recent amendments to the Income Tax Assessment Act, 1936, of Australia ("Tax Act") which restrict the tax effectiveness of "thin capitalisation" of investments in Australian businesses by foreign investors, and to highlight various issues relevant to existing or intending foreign investors in Australia.

What is thin capitalisation?

Thin capitalisation is the excessive gearing of, broadly, the foreign debt to foreign equity ratio ("being defined in the new provisions in the Tax Act ("Rules"), and referred to in this article as the "foreign equity product") of an investment in an Australian business by a "foreign investor" or "foreign controller", as defined in the Tax Act (in this article referred to as "foreign interest"). The interest payments, in respect of this excessive debt, incurred in the conduct of that business are tax deductible to the Australian business but not subject to Australian tax ("except 10% withholding tax") in the hands of the foreign interest.

The Rules are directed at negating the tax effectiveness of this excessive gearing of foreign interests' investment in Australian businesses. This is achieved by the disallowance of the tax deductibility of interest paid to a foreign interest against assessable income of the Australian business beyond the permitted foreign equity product for that business.

Background

The Federal Government has, in the last four years, implemented certain measures to de-regulate the Australian economy and in particular has relaxed its foreign investment policy ("policy") which it regulates through:

1. the Foreign Takeovers Act, 1975, ("FTA") which is concerned with investment proposals involving acquisitions of company shares, business assets and the control of management of companies and businesses; and
2. the Government's Foreign Investment Policy Guidelines ("FIPGs") which are concerned with those investment proposals falling outside the scope of the FTA and which are examinable under the FIPGs.

The objective of the policy has been to protect the Federal Government's revenue base through the imposition of a foreign debt to foreign equity ratio as a condition of approval of most foreign investment proposals so as to maintain an appropriate balance between the debt of the Australian business owed to foreign interests, and the equity of foreign interests in that business. Investment returns on debt and equity are treated differently under the Tax Act so that returns on equity (dividends) are not generally deductible for tax purposes and are generally, from a non-resident recipient's viewpoint, liable to Australian tax at rates which exceed the rates applicable to interest payments (dividend withholding tax being at the rate of 30%, or 15% if the recipient is a resident of a jurisdiction with which Australia has a double taxation agreement, except where the dividend is franked dividend under Australia's company imputation tax regime) whereas returns on debt (interest) are usually an allowable deduction to the paying company (and therefore reduces the Australian taxable income of the payer) and in the case of a non-resident recipient of that interest taxable only to the extent of a 10% withholding tax.

The FIPGs have no statutory force as such and consist of Ministerial statements and have been indirectly supported by a range of regulatory controls including the Banking (Foreign Exchange) Regulations. As part of the Federal Government's deregulation of the economy the application of those regulations has been reduced to a tax screening function. Previously they were used to regulate most foreign exchange transactions. Consequently, the Federal Government's ability to monitor observance of, and to enforce, any foreign debt/foreign equity ratio imposed under the FIPGs on a foreign investment proposal has been diminished. In fact it would

seem that compliance with the foreign debt to foreign equity ratio under the FIPGs was rarely monitored.

To meet that deficiency, the Federal Government on 30 April, 1987 announced its intention to amend the Tax Act by the introduction of the Rules which are relatively restrictive and complex. The Rules received royal assent on 18 December 1987 and will generally apply from 1 July 1987.

The Rules supersede the practice of the Foreign Investment Review Board of imposing a foreign debt/foreign equity ratio on foreign investment proposals by imposing a maximum statutory foreign equity product of generally 3:1 in relation to, broadly, the non-arm's length funding of investments in Australia by foreign interests. Entities that are in the nature of "financial corporations" essentially as defined by the Financial Corporations Act 1974, will be permitted a maximum 6:1 foreign equity product. Consequently foreign interests will need to (re)structure their financing arrangements to avoid the disallowance of deductions.

Clearly, thin capitalisation is more likely to occur where the foreign interest, or its non-resident associate ("NRA"), is a resident of a relatively low tax jurisdiction.

The Rules are structured to apply to four separate investment strategies:

1 A "foreign controller" of a company resident in Australia for tax purposes;
2 A foreign investor which, by definition, is not resident in Australia for tax purposes;
3 A foreign controller of a partnership whether resident in Australia for tax purposes or not; and
4 A foreign controller of a trust estate whether resident in Australia for tax purposes or not.

Each situation is dealt with below. In general, however, the position of a foreign controller of a partnership and a trust estate will be dealt with only where they vary materially from the treatment of a foreign controller of a resident company under the Rules. This article is not exhaustive in its consideration of the Rules.

Broadly a foreign controller is a non-resident, other than an Australian owned non-resident company (see below) having 15% control of a resident company, or a partnership or trust estate (whether resident or not), such control being ascertained by reference to four separate tests relating to control of voting power, entitlement to income or capital and the ability to gain or exercise such control through indirect means. A non-resident will be a foreign controller where either alone or with its associate(s) (whether resident or not) it satisfies any one of the four tests.

In terms of the Tax Act a company is a resident of Australia for tax purposes if it is incorporated in Australia or if it carries on business in Australia and its central management and control is situated in Australia. Generally that will be determined by where the directors meet to do business but it is a question of fact in each instance. The central management and control of a company may be divided between two places in which case the company will be resident in both places. This can be of significance in relation to a branch of a foreign company the establishment of which of itself is insufficient to justify a finding of dual residence. However, the Companies Code in force throughout Australia requires a foreign company upon its registration to lodge with the State delegate of the National Companies and Securities Commission a memorandum setting out the powers of any local board of directors. Given the potential for dual residence under the Tax Act care should be taken in drafting that memorandum.

Key definitions

The Rules contain certain key definitions including:

"Australian – Owned Non-Resident Company" ("AONRC"): An AONRC is a non-resident company in which a resident:

(a) controls or is capable of controlling, either directly or through one or more interposed companies, trusts, or partnerships, not less than 85% of the votes in the non-resident company; or
(b) is beneficially entitled to receive, directly or indirectly, not less than 85% of any dividends that are or might be paid, or of any distribution of capital that is or might be made, by a non-resident company.

As was the case under the FIPGs, debt owed to an AONRC is not considered to be foreign debt and is excluded from the scope of the Rules through the definition of foreign controller (see below). However, debt owed to an associate of an AONRC will constitute foreign debt.

"Associates": The Rules contain a complex and comprehensive definition as to who will constitute an associate of a foreign interest. An associate under the Rules is defined:

(a) specifically for each of a natural person, company, trustee of a trust estate or a partnership;
(b) broadly in the same manner as in other parts of the Tax Act to refer to those persons who, by reason of family or business connections, or those interposed companies, partnerships or trusts which, by reason of voting rights or beneficial entitlement to capital might be regarded as being associated with a particular person, company, partnership or trust.

The concept of an associate is relevant under the Rules for establishing whether the interest of foreign persons in an Australian business should be aggregated for the purpose of determining whether they together constitute a foreign controller and in calculating the amount of foreign debt owed by an Australian business.

"Foreign debt" is defined separately for each investment strategy contemplated by the Rules. Broadly, foreign debt under the Rules, as under the FIPGs, is limited to interest bearing debt owing to a foreign interest or its NRAs which is allowable as a deduction to the Australian business and is not assessable income of the foreign interest. It does not include debt due to resident associates of foreign interests as interest on that debt would be assessable to the resident associate under the Tax Act.

"Foreign equity" is also defined separately for each investment strategy contemplated by the Rules and broadly follows the concept of shareholders' funds found in company accounts. The Rules contain separate provisions for calculating indirect equity through interposed partnerships or trusts.

"Interest" is defined in the Rules in a manner consistent with the definition of interest for withholding tax purposes and also to include the interest component payable under hire purchase agreements and financial leases and the indemnification amounts on bills of exchange or promissory notes that are deemed to be interest under other provisions in the Tax Act.

Resident company

Foreign controller: For the purposes of the Rules a non-resident (other than AONRC) will be a foreign controller of a resident company if:

1 The non-resident alone or together with a resident or non-resident:

(a) has substantial control of the voting power in a resident company — such control exists if the non-resident or its associate(s) (whether resident or not) controls, or is capable of controlling, either directly or through one or more interposed companies, partnerships or trusts, at least 15% of the maximum number of votes that might be cast at a general meeting of the company;

(b) is beneficially entitled to receive, directly or indirectly, at least 15% of any dividends that are, or might be paid, or of any distribution of capital that is or may be made, by a resident company — the Rules enable the tracing of a person's beneficial entitlement (or appropriate proportion of a joint beneficial entitlement) in the whole or part of a dividend or distribution of capital through a chain of interposed companies, partnerships or trusts;

(c) is capable, under a *scheme*, of gaining such control or entitlement — a scheme is any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings, or any scheme, plan, proposal, action, course of action or conduct, whether there are two or more parties or only one party involved;

2 The resident company, or its directors, is or are accustomed or under an obligation (formal or informal) or *might reasonably be expected*, to act in accordance with the directions, instructions, or wishes of a non-resident (other than an AONRC) either alone or together with the non-resident associate(s) — "act in accordance with test" — this is clearly a catch-all provision and a previous course of conduct may not be an essential requirement given the usage of the words "might reasonably be expected".

Foreign debt: For calculating the foreign equity product of a resident company foreign debt includes any amount owing by the resident company:

1 In respect of which interest is *or may become* payable to a foreign controller or a NRA. It is not necessary for the principal amount to be owing to the same person to whom the interest is payable. Any trade debt upon which interest is payable to a foreign controller or its NRA in the event of default of due payment would constitute foreign debt. The Commissioner has, however, indicated that he will not treat the debt as foreign debt in such circumstances until such time as interest actually becomes payable.

2 If the interest is or would, apart from the Rules, be allowable as a deduction from assessable income;

3 If the interest is not, or would not be, assessable income of any income year of the foreign controller or an NRA to whom it is or becomes payable except in specified circumstances — in that regard the fact that withholding tax is paid on interest does not mean that the interest constitutes assessable income, as the Tax Act provides that interest subject to withholding tax is not assessable income. The rationale for this provision is that if Australian income tax is paid at full rates on debt interest there is no loss of tax revenue to Australia. This condition will not apply in certain specified situations which are broadly where interest is paid to a NRA which is a subsidiary of the Australian company in respect of broadly issued debentures, interest which is taken to be paid to a foreign controller indirectly through a non-resident intermediary and taken to be paid to the foreign controller by virtue of "back to back" loans (see below).

For all investment strategies involving a foreign controller only interest-bearing debt to a foreign controller or an NRA constitutes foreign debt. The Rules also exclude arm's length debt which is the subject of a guarantee by an overseas parent of an Australian business in the absence of there being "back to back" lending arrangements (see below) or where special provisions attach to the guarantee — for example the lodgement of a deposit by the foreign controller with the lender as surety.

The scope of what constitutes foreign debt is expanded by certain anti-avoidance provisions contained in the Rules. In essence foreign debt also includes debt owed indirectly to foreign controllers or their NRAs. Those aspects are detailed below in relation to the anti-avoidance provisions of the Rules.

Foreign equity: In relation to a resident company direct foreign equity is the monetary total of:

1 The *paid up value* of all *shares*, and interests in the shares, in the resident company *beneficially* owned by foreign controllers or their NRAs — the paid up value, in relation to an interest in a share, is the proportion of the paid up value of the share equal to the proportion of the total interests in the share represented

by the interest concerned. Both ordinary and preference shares count as equity. This is of relevance to the anti-avoidance provisions of the Rules discussed below;

2 So much of the amount standing to the credit of any share premium account of the resident company as foreign controllers or their NRAs would be *beneficially* entitled to receive by way of distribution if:

(a) the company were wound up at that time; and
(b) the value, at that time, of the assets of the resident company, reduced by the amount of its liabilities, exceeded the paid up share capital of the resident company by not less than the amount standing to the credit of the share premium account; and
(c) the lesser of the following amounts (if any):
  (i) so much of the accumulated profits and, if applicable, asset revaluation reserves of the company as foreign controllers or their NRAs would be beneficially entitled to receive if the whole of those profits and reserves were available to be distributed by way of dividends at that time;

  (ii) so much of the accumulated profits and, if applicable, asset revaluation reserves of the company as foreign controllers or their NRAs would be beneficially entitled to receive by way of distribution if:

  (A) the company were wound up at that time; and

  (B) the value at that time of the assets of the company, reduced by the amount of its liabilities, exceeded the paid-up share capital of the company by not less than the amount of the accumulated profits and asset revaluation reserves.

The level of foreign equity as determined by:

(a) the paid up value of shares and the amount standing to the credit of the share premium account is determined at the end of the income year. This provides a foreign controller with considerable flexibility as it enables any unexpected increase in the foreign debt of a resident company to be covered by the foreign controller taking up further shares or paying up partly paid shares to overcome any potential shortfall in the foreign equity product for the income year;

(b) the level of the accumulated profits and asset revaluation reserves are determined at the commencement of the income year, except, in the transitional year commencing on 1 July, 1987, when the value of the asset revaluation reserves will be the amount as at 20 October, 1987. The reason for the lesser of the two amounts being taken into account is that on a winding up reserves may be applied to make good a loss of capital and therefore will not be available for distribution to shareholders.

The sum of the amounts under 1 and 2 above is then reduced by:

1 Any balance outstanding, at the end of the income year, on all amounts owing to the resident company by foreign controllers or their NRAs — consequently to the extent that share capital is subscribed and some or all of the funds are then lent back to the foreign controller or its NRAs, only the net amount retained by the resident company will be treated as equity in determining whether the foreign equity product is maintained. This aspect militates against the practice of a foreign controller creating a high issued capital in an Australian resident (subsidiary) company to establish a high cost base for capital gains tax purposes with the funds then being lent back. That practice has, from a capital gains tax perspective, the advantage of establishing a high capital gains cost base in anticipation of capital gains arising in the resident company. There is no equivalent reduction of the cost base in the Tax Act for the purpose of calculating capital gains tax;

2 So much of the accumulated profits and asset revaluation reserves as are applied during the income year towards the paid-up value of any shares issued by the resident company to foreign controllers or their NRAs — this aspect avoids the possibility of any double counting of equity. A cash dividend paid during the year of income out of accumulated profits will not, however, reduce the level of foreign equity for that income year; and

3 If there are accumulated losses of the resident company at the beginning of the income year, the amount by which, if the resident company had been wound up at that time and the accumulated losses represented a deficiency of capital, the amount that foreign controllers or their NRAs would be beneficially entitled to receive by way of distribution of capital would be reduced by virtue of the accumulated losses.

In determining foreign equity the asset revaluation reserves:

(a) must in fact exist in the accounting records of the resident company; and

(b) are determined in accordance with the arm's length value of assets being the amount that might reasonably be expected to be paid in respect of a transfer of the assets at that time if the transfer was between independent parties dealing at arm's length with each other.

The value shown in the resident company's accounts will generally be taken to be the amount of the asset revaluation reserve, however, a lesser amount will be substituted where the arm's length value of the assets concerned at the date of the revaluation would produce a lesser amount than shown in the accounts. In addition, where asset revaluation reserves are applied to pay up shares, or where, by virtue of the provisions referred to above, the true value of the reserves is less than the book figure, the foreign equity amount calculated is reduced accordingly.

Foreign investor
The rules as applied to a "foreign investor" are relevant to foreign investors in Australia who hold their investment directly such as a non-resident individual or a branch of a non-resident foreign company.

For the purposes of the Rules a "foreign investor" is a non-resident who derives assessable income in any income year from sources in Australia other than *solely* as a partner in a partnership, or a trustee or beneficiary of a trust estate ("Excluded Capacities"). Those situations are dealt with separately below.

Consequently:

(a) both a non-resident individual or company deriving Australian sourced income, whether through a permanent establishment or branch or through the passive derivation of income such as rents, will constitute a foreign investor;
(b) a non-resident may be a foreign investor in relation to its own direct investments and, at the same time, be a foreign controller in relation to a resident company or a partnership or trust estate (whether resident or not).

Foreign debt: In relation to a foreign investor foreign debt is defined in substantially the same manner as for a resident company except that:

(a) interest in respect of the amount owing may, by definition, only be or become payable to a NRA of the foreign investor and not the foreign investor itself;
(b) as part of specific anti-avoidance provisions (which are discussed below) funds borrowed from NRAs of foreign investors are treated as foreign debt.

Foreign equity: A foreign investor's direct foreign equity is calculated in a different manner from that of a foreign controller of a resident company and is the amount that would be shown in a balance sheet as the foreign investor's equity if:

(a) regard were only had to the activities of the foreign investor in producing assessable income from sources within Australia (other than in the Excluded Capacities);
(b) a balance sheet were prepared at the end of the income year or where the foreign investor ceased (other than temporarily) to be a foreign investor at a time before the end of the income year, at that time,

reduced by the balance outstanding on amounts owing to the foreign investor by NRAs.

Broadly, the foreign equity of a foreign investor will be the funds provided by the foreign investor to fund the Australian investment.

Partnerships
A partnership for the purposes of the Tax Act is a broader concept than for partnership law purposes and is defined as an unincorporated association of persons carrying on business as partners or in receipt of income jointly.
The Rules apply to partnerships where there is a non-resident partner or NRAs and there is partnership income attributable to sources in Australia. Under the Tax Act a partnership is not taxable as such, however, it is required to lodge a tax return.

Foreign controller: A non-resident will be a foreign controller of a partnership if any one of four tests (which are substantially the same as those set out above in relation to resident companies) is satisfied.

The only material variations are that:

(a) the beneficial entitlement test for a partnership refers to capital or profits of the partnership;
(b) the act in accordance test is imposed on the partners of the partnership as opposed to the directors of the resident company.

Foreign debt: In relation to a partnership foreign debt is determined in substantially the same manner as for resident companies.

Foreign equity: In relation to a partnership foreign debt is determined in a manner similar to that of a foreign investor and is defined as the amount that would be shown in the balance sheet as partner's equity, if:

(a) regard were had only to the activities of the partnership in producing *assessable (non-resident partner) income* in relation to foreign controllers of the partnership or their NRAs — activities of the partnership include not only business activities but also those that produce any other assessable income — eg rental income. Where the whole or a part ("non-resident amount") of the individual interest of a partner in the net income or partnership loss of a partnership of an income year is attributable to a period when the partner was not a resident and is also attributable to sources in Australia, the amount of assessable income of the partnership of the income year to which the non-resident amount is attributable is, for the purposes of the Rules, assessable (non-resident partner) income of the partnership of the income year in relation to the partner. Where a partnership has both Australian-source and overseas-source income, the non-resident partners are not subject to Australian tax on their ex-Australian income.
Where foreign controller partners derive ex-Australian source income through the partnership, regard is to be had only to the activities of the partnership producing Australian source income. From the amount so calculated the portion applicable to resident partners is excluded; and
(b) a partnership balance sheet was prepared at the end of the income year of or, where the partnership ceased (other than temporarily) to derive assessable income of the kind referred to in paragraph (a) at a time before the end of the year of income, at that time — the notional balance sheet will exclude assets and liabilities referable to earning ex-Australian income. Where a partnership ceases, other than temporarily, to derive assessable income the notional balance sheet will be prepared as at the time of that cessation;

The resulting amount is then reduced by the balance outstanding

on amounts owing to the partnership by foreign controllers or their NRAs.

Partners' equity will generally be the amount of the partnership capital contributed by foreign controllers less any loans from the partnership back to the foreign controllers or their NRAs.

Loans from foreign controllers and their NRAs to the partnership are treated as debt.

Trust estates

A trust estate for the purposes of the Tax Act is property, or an interest in property, which is vested in and under the control of a person who is a trustee and which produces income.

The Rules apply to trust estates where there is a non-resident beneficiary and there is trust income attributable to sources in Australia.

Foreign controller: A non-resident will be a foreign controller of a trust estate if any one of five tests (four of which are substantially the same as those set out above in relation to resident companies) is satisfied.

The only material variations are that:

(a) the beneficial entitlement test for a trust estate refers to the corpus of the trust estate (ie the trust capital and accumulations which increase it), and to the income of the trust estate;
(b) the act in accordance test is imposed on the trustee of the trust estate rather than the directors of the resident company;
(c) an additional test is imposed where a non-resident is the trustee of a trust so that the non-resident will be a foreign controller.

Foreign debt: In relation to a trust estate foreign debt is determined in substantially the same manner as for resident companies.

Foreign equity: In relation to a trust estate foreign equity is defined in substantially the same terms as for a partnership. As foreign equity of a trust estate is measured at the end of the income year it will be possible for a beneficiary of a unit trust to take up additional units to prevent the foreign equity product of the trust breaching the prescribed units. This may not be possible in the case of a fixed or discretionary trust. The ability of beneficiaries to contribute to the corpus will depend upon the terms of the particular trust instrument. Where the trust instrument does not allow for additional corpus to be added the result may be that any interest on debt in excess of the prescribed foreign equity product will not be an allowable deduction.

Reduction of interest deduction

Broadly the Rules reduce the amount of interest that would otherwise be allowable as a deduction in cases where the foreign equity product, as calculated by reference to the greatest total foreign debt at any point during the income year, exceeds the permissible foreign equity product of the Australian business.

The Rules contain separate provisions for the reduction of interest as an allowable deduction for each investment strategy referred to above and also for resident company groups.

Generally, the total amount of the interest payable on foreign debt which will not be deductible is calculated by reference to the proportion that the excess foreign debt bears to total foreign debt of the Australian business.

In relation to a resident company group the Rules reduce the interest deduction otherwise allowable to a member of a wholly owned resident company group where the foreign equity product, as calculated by reference to the greatest total foreign debt at any time during the income year of *all* members of the group exceeds the foreign equity product of the group member in which a foreign controller holds foreign equity: ie the resident holding company in the group. Whilst foreign debt may be lent to any company within the group, foreign equity will only be invested in the resident holding company of the group. Therefore, the foreign equity product, as calculated by reference to the greatest total foreign debt at any time during the income year of the group, must exceed the permissible foreign equity product *of that holding company* before the Rules are applicable. Grouping of companies in this way permits maximum flexibility as it will not be necessary for each company in a group to comply separately with the foreign equity product provided the group as a whole complies.

The provisions in the Rules relating to partnerships, trust estates and foreign investors operate in the same manner as for a resident company except that no grouping provisions apply.

Commencement and transitional provisions

The Rules will generally apply from 1 July 1987, however, the Rules contain transition provisions which relax the application of the Rules and their time of introduction. The transitional provisions are particularly complex where the taxpayer has an approved substituted accounting period.

The Rules will apply to investments made before 1 July 1987, which were subject to any debt/equity ratio undertaking given under the FIPGs from that date on the basis that the investment will be subject to a corresponding foreign equity product under the Rules, and to all new borrowings on and after that date.

Foreign interests whose investments were not subject to tax conditions imposed under the FIPGs prior to 1 July 1987, had until the earlier of the maturity date of their existing financial arrangements or 30 June 1988, to restructure their inhouse financing to bring it within the Rules.

Companies involved in mineral exploration that were not required to give a debt/equity ratio undertaking under the FIPGs must comply with a 3:1 ratio within certain other specified times. Approvals given under the FIPGs other than the 3:1 or 6:1 foreign equity products will not be affected under the Rules so long as any undertaking given as a condition of approval continues to be observed. However, if a loan matures, is extended or refinanced, the Australian entity will be required under the Rules to thereafter comply with the Rules.

The Rules contain provisions modifying their application where there has been a foreign controller of an Australian business for part only of the income year or where there are different unrelated foreign controllers during separate parts of the income year. In such circumstances the Rules apply to

separate parts of the income year, ie calculation of the foreign equity product is made only for the period when there was a foreign controller or in the case of separate unrelated foreign controllers separate calculations are made for the periods of the income year up to and after the change.

Mixed investments and adjustment of foreign equity product

As indicated above, the permitted foreign equity product of a "financial institution" under the Rules, as under the FIPGs, is a more generous 6:1.

In recognition of the fact that the equity of a foreign controller, in any income year, may be invested in "financial institutions" as well as other investments the Rules provide for the adjustment of the foreign equity product to a figure between 6:1 and 3:1.

The Rules specify three conditions that must apply before an adjustment may be made to the foreign equity product and provide that the Commissioner of Taxation is to determine the extent to which the foreign equity product should be adjusted.

These provisions only apply to the adjustment of the foreign equity product in a resident company, a partnership or trust estate.

The three requirements for an adjustment of the foreign equity product in relation to a particular income year are:

1 That there must be foreign equity (ie equity of foreign controllers or their NRAs) in a resident company, partnership or trust estate ("foreign equity entity");
2 The foreign equity entity must have a beneficial entitlement or interest (direct or indirect) — as defined — in a "subordinate entity" being another company (whether resident or not) partnership or trust estate. If the subordinate entity is a company the entitlement must be to receive either the whole or part of a present or possible future dividend paid by the company or a distribution of capital. For a partnership to be a subordinate entity, the interest must be a proportion of the capital profits of the partnership and for a subordinate entity trust estate, it must be a proportion of the corpus (including accumulations) or income of the trust estate;
3 The Commissioner in making his determination is to have regard to the extent to which the foreign equity of a foreign equity entity is attributable to interests or entitlements in subordinate entities. The Rules express only a broad principle to avoid the complexity of attempting to provide detailed rules for every possible situation, however, the Treasurer's explanatory memorandum in relation to the Rules details a number of situations which assist in assessing how the Commissioner should exercise his discretion. The explanatory memorandum may, in Australia, as a matter of statutory interpretation, be used to assist with the interpretation of the relevant legislation where a legislative provision is unclear.

Anti-avoidance provisions

In addition to the general anti-avoidance provisions contained in the Tax Act the Rules contain a number of specific anti-avoidance provisions some of which are discussed below.

Short term injection of equity: In the absence of appropriate anti-avoidance provisions the observance of the prescribed foreign equity product could be ensured by the short term injection of equity into an Australian business.

The Rules have addressed this possibility by providing that a reduced amount of foreign equity will be substituted in calculating the foreign equity product of an Australian business where there is less foreign equity at any time during the two years following the end of the relevant income year. The clawback period ceases at the time when there ceases to be a foreign interest, so that if foreign equity reduces during the subsequent two years because of the foreign interest having sold out, the Australian business is not prejudiced. This recalculation does not take into account subsequent changes in the accumulated profits, losses or asset revaluation reserves.

Those equity maintenance provisions may, however, be disregarded where the part-year income year is divided into parts for the purposes as a result of there being a foreign controller during only part of the income year or there are different foreign controllers during parts of the year.

Debt and equity where interposed partnerships and trusts: As trust and partnership income maintains its character when distributed to beneficiaries and partners, where one or more trusts or partnerships (but not companies) are interposed between a foreign controller and a company, partnership or trust estate the Rules restrict the eligibility for interest deductions by reference to the ratio of debt and equity investments by partnerships and trusts. In the absence of such restrictions the prescribed foreign equity product could be circumvented. For example, where a foreign controller has an investment as a beneficiary in a trust that investment will be subject to the application of the normal foreign equity product. If the trustee of the trust then invests in another trust, partnership or company the Rules extend a similar foreign equity product requirement to the second trust's investment so that the investment is treated as if the beneficiary had invested directly in the second trust, partnership or company.

Schemes involving debt owing to foreign controllers etc through intermediaries: The Rules contain anti-avoidance provisions directed at schemes (as defined above) whereby loans are made through intermediaries in an attempt to give an arm's length appearance to the borrowing transaction ("back to back" loans). If an intermediary is interposed between a foreign controller and its Australian business, any loans made through the intermediary are treated as if they had been made directly from the foreign controller to the resident company, trust estate or partnership. These provisions look to the true source of funds and disregard the apparent arms length lending from the intermediary resulting in borrowings through an apparent arm's length person in such circumstances constituting foreign debt for the purposes of the Rules.

Schemes involving debt owing by foreign controllers etc through intermediaries: The Rules contain anti-avoidance provisions dealing with schemes (as defined above) by which a foreign controller purports to take up or increase equity in an Australian business but the funds are, in whole or in part, lent back to the foreign controller through one or more intermediaries rather than directly to the foreign controller or its NRAs.

If the conditions of the relevant provisions are met the foreign controller's or its NRA's debt to an intermediary is taken to be a debt owing to the resident company partnership or trustee of a trust estate, rather than to the intermediary with the consequence that the amount of contributed equity which is indirectly lent back to the foreign controller is denied the status of equity for the purpose of calculating the foreign equity product of an Australian business.

Equity borrowed from non-resident associates to be treated as debt in certain cases: The Rules contain anti-avoidance provisions directed at preventing borrowings by a foreign controller of a partnership or trust estate ("borrower") from an NRA of the borrower from being treated as an equity contribution to a partnership or trust. These provisions are not related to companies. Where the requirements for the provisions are satisfied, the capital or corpus contributed is treated as foreign debt rather than foreign equity. In the absence of these provisions the required foreign equity product might be maintained by the conversion of debt into equity by passing the funds through an intermediary.

Recommendations

The Rules therefore raise a number of issues and foreign interests should:

1 Consider if there is any likelihood of the applicable foreign equity product not being maintained in relation to an investment;
2 Identify whether it is "associated" with any other person whether for establishing the 15% threshold for a foreign controller or for calculating the amount of foreign debt owing by an Australian business;
3 To assist with its ability to determine its position quickly and accurately, and for tax audit purposes, maintain appropriate records to monitor closely its foreign debt level – eg foreign debt may blow out where the Australian business has a foreign currency debt or interest-bearing trade debt to a foreign controller or its NRA;
4 Monitor exchange rate variations and note that, in the absence of specific provisions in the Rules for exchange rate variations, rates will be calculated on a daily basis;
5 Consider the appropriateness of revaluing assets prior to the end of any income year;
6 Consider the replacement of foreign debt with foreign equity or loans from "non-associates" bearing in mind that the establishment of such a loan (as opposed to the introduction of foreign equity) will not rectify a breach of the relevant foreign equity product until the following income year;
7 Consider the impact of increasing the amount owing by a foreign controller or its NRA to an Australian business on the applicable foreign equity product;
8 In relation to trust estates, consider the terms of the relevant trust deed to ascertain if it is necessary to cure any disability beneficiaries may have to contribute to corpus. Such inability will be prejudicial where it is necessary to "top up" the foreign equity in a trust estate; and
9 Be aware that the accounting treatment of the funding of a company may be constrained not only by the Rules but also by applicable accounting standards under Australian Companies legislation: eg the treatment of deferred foreign exchange losses.

Postscript

Subsequent to the preparation of this article the Australian Commissioner of Taxation has released certain rulings relating to the application of the Rules to specific situations. □

Tyranny of words

[Mr Micawber:] " 'Second. Heep has, on several occasions, to the best of my knowledge, information and belief, systematically forged, to various entries, books, and documents, the signature of Mr W; and has distinctly done so in one instance, capable of proof by me. To wit, in manner following, that is to say:' "

Again, Mr Micawber had a relish in this formal piling up of words, which, however ludicrously displayed in his case, was, I must say, not at all peculiar to him. I have observed it, in the course of my life, in numbers of men. It seems to me to be a general rule. In the taking of legal oaths, for instance, deponents seem to enjoy themselves mightily when they come to several good words in succession, for the expression of one idea; as, that they utterly detest, abominate, and abjure, or so forth; and the old anathemas were made relishing on the same principle. We talk about the tyranny of words, but we like to tyrannise over them too; we are fond of having a large superfluous establishment of words to wait upon us on great occasions; we think it looks important, and sounds well. As we are not particular about the meaning of our liveries on state occasions, if they be but fine and numerous enough, so the meaning or necessity of our words is a secondary consideration, if there be but a great parade of them.

Charles Dickens
David Copperfield
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