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# Legal services restructured

Restructuring is the in-thing. Here in New Zealand we have had five years of turmoil in areas such as economic and financial institutions, and government administration, both national and local.

In Russia there has been the extraordinary experiment of Mr Gorbachev with both restructuring and open government under the Russians slogans of *perestroika* and *glasnost*. In China Mr Deng has sought to invigorate the economy by re-inventing capitalism, but retaining the forms of a totalitarian regime. As for central Europe, everything is being changed beyond recognition.

In the USA President Reagan and now President Bush, for better or for worse, have tried to re-assert American pride through minor military invasions in Grenada and Panama. And in England of course, for some ten years now Margaret Thatcher has sought, with more or less success, to make market-forces the mechanism for a new economic order.

Influenced though they were by the earlier school of Viennese economists, Milton Friedman and the Chicago School must marvel at what they have wrought, or perhaps more accurately, foretold. In another generation no doubt the pendulum will swing again. But that may not be a good analogy for there is no way the exact forms of the past will be, or can be, revived. The future, in being unlike the present, will be equally unlike the past. If nothing else, technology will ensure that.

In the current climate of rampant market-forces it is not surprising that even the revered legal system of England is undergoing restructuring. The Green and the White Papers put out last year by the Lord Chancellor, Lord Mackay, have certainly caused discussion and some considerable dismay. A favourable article by Simon Gorton on the issue, and a lengthy comment, less favourably inclined, from the *Solicitors Journal* were published at [1989] ZNZLR 322 and 327 respectively.

The relevant legislation is now passing through the United Kingdom parliament. In the *Solicitors Journal* for 5 January 1990 at p 24 there is a short piece on the debate in the House of Lords; and in the Law Society's *Gazette* for 24 January 1990 at p 2 there is reproduced the maiden speech of Lord Byron. His Lordship is a partner in the firm of Holman Fenwick and Willam, and he was previously a barrister. The piece in the *Solicitors Journal* begins:

> As was widely predicted, the second reading of the Courts and Legal Services Bill in the House of Lords just before Christmas resulted in a long line of legal peers and judges making speeches critical of Lord Mackay's proposals.
>
> Lord Lane [the Chief Justice] and Lord Donaldson [the Master of the Rolls] both expressed concern that the Bill had dropped the "interests of justice" criterion for legal reform, which had appeared in the earlier White Paper.
>
> Rejecting allegations by the Master of the Rolls that the Bill was "fatally flawed", Lord Mackay said the principle of the interests of justice was still present in the Bill and intended to prevail over the statutory objective of widening consumer choice in the provision of legal services.

It is a little hard to see, certainly from this distance and without the benefit of the text how a stated statutory objective is subject to an unstated principle. Is one to think it somehow lies in a new principle drawn from the inherent jurisdiction of the Courts to be just, irrespective of what a statute says? Unlikely!

Lord Ackner and Lord Hooson described the Bill as being likely to "Americanise" the English system of justice. Lord Hailsham, the former Lord Chancellor, found it paradoxical that a government that was generally seeking to privatise industry should produce a Bill, in his words,

> the effect of which is the nationalisation of the legal profession and part of the judiciary.

An even more scathing comment was made by Lord Beloff. He was reported as finding it most extraordinary that centuries of legal experience were being set aside by

a Government that was behaving like a wholly owned subsidiary of the Institute of Economic Affairs.

Lord Byron in his excellent, balanced and perceptive speech makes some very telling points. The real issue he suggests is the nature of a profession. He begins by noting the high reputation of the English legal system, and points out that internationally it is the preferred forum for resolving commercial disputes. Why then, he asks, is the government making such radical changes?

He then goes on to describe the situation as he sees it. He says:

> No-one would deny that the present Bill is a politically inspired piece of legislation designed to extend the government's philosophy of market forces and consumerism into new areas. Hence the "statutory objective" in Pt 2 of the Bill is "the development of legal services. . . by making provision for new ways of providing such services and a wider choice of persons providing them".
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> There is nothing here about improving the system or indeed any reference to defects in the existing system. "Different perhaps, but not necessarily better", critics of the Bill would say. Its supporters would argue that more choice will inevitably lead to improvements, because market forces and the power of the consumer will ultimately ensure that only the most efficient and economical services are provided.
>
> The real question is whether the practice of law and the administration of justice are amenable to the government's approach.

The Bill as Lord Byron explains is concerned with four types of legal services which he describes as advocacy, litigation, conveyancing and probate. He restricts himself to looking at what are defined as advocacy and litigation. His Lordship observes with some concern that these services will be able to be provided by others than barristers or solicitors, by those who have "appropriate" qualifications and who are members of some organisation with an "appropriate" code of conduct. These codes of conduct, as well as the qualifications, apparently may differ between different bodies and certainly may differ from those currently applicable to barristers and solicitors.

As Lord Byron observes, no one can tell how this is going to work in practice. He then goes on:

> But it is difficult to escape the conclusion that if the Bill reaches the statute book in approximately its present form, then the practice of law could eventually become something very different from what it is today. A number of additional professions and paralegal groups would emerge with separate rights to conduct litigation and advocacy (and provide other legal services). This would be the complete antithesis of a profession.
>
> . . .The legal profession does not exist for the edification of its members but to serve the public and the proper administration of justice. Why then should the profession not be subject to the sort of market forces which this Bill envisages?

Lord Byron then suggests two reasons. Both of them are particularly relevant to the meaning of what a profession is, and its significance for the actual working of the legal system. He states his reservations about the policy of the government in the following way:

> First, lawyers are not simply selling a product or service – where the only criterion is to obtain the right relationship between quality of service and price, so that the product can be attractive and saleable to the public at large. What distinguishes present members of the legal profession, whether they be barristers or solicitors, is that they all owe an overriding duty to the court in the conduct of their profession. Those who have practised at the Bar will know that the system operates on a basis of trust; likewise the integrity of the solicitors' branch of the profession is of the utmost importance, perhaps even more so than that of the Bar, because the scope for abuse in the preparation of cases is so much greater . . .
>
> Secondly, the consumer of legal services is different from the consumer of the services of a hairdresser or garage mechanic. The layman may only have to seek the services of a lawyer once or twice in a lifetime. He must be assured of a service which is truly "professional".
>
> Of course it may be said that these are all matters which can be covered by means of a code of conduct. Nobody with any experience, however, believes that the mere existence of a code of conduct will ensure that the desired conduct will prevail.

On the question of rights of audience for solicitors, Lord Byron does not foresee disaster. As members of a fused profession New Zealand practitioners are not likely to be over-concerned about that issue either. It is perhaps ironical however that while England is moving, or perhaps it would be better said, the English legal profession is being moved, in the direction of a wider Bar, the situation here is moving in the opposite direction towards a more specialised and distinct Bar. The formation of a separate New Zealand Bar Association related to the New Zealand Law Society by operating as if it is a Section of the Society, is significant in this regard. But the emphasis in England on enforced competition and the inevitable lowering of ethical standards in the name of market forces could well cause pressure for flow-on effects here in New Zealand, greater than the changes that have already occurred with the abolition of the scale fee and the permitting of advertising.

Lord Byron concluded his speech on a sombre note in which he questioned the wisdom of the degree of support given to the English legislation by the Law Society.

> The problem with the Bill is its wider implications. The Law Society has given it a broad measure of support because it extends rights of audience (although it would appear that the majority of individual solicitors who responded to the Green Papers were actually against this proposal). Whether in their support for the Bill the Law Society will be letting a cuckoo into the nest, only future generations can tell.

**P J Downey**

# Case and Comment

## Matrimonial Property Act 1976, s 14: Marriage with an eye to property chances may amount to "extraordinary circumstances".

In *Drummond v Drummond* [1989] BCL 1930, the basic facts were as follows: the wife was 58 and the husband was 69 at the date of the first instance hearing, which was early in 1984. The parties' marriage was a second one for each spouse. The wife's first husband had, on his death, left her their matrimonial home in Titahi Bay, the furniture and a car. On his death, she became entitled to a lump sum Social Welfare benefit of $1000. She had a job at Porirua Hospital, handy to her home.

The present husband had been living with his daughter until there was no longer room for him in her home — she had small children. Some three months before marrying the wife, he took up accommodation in staff quarters at the hospital, where, it seems, he also worked. On marriage, he moved into the wife's home. It was sold in 1980, and another was purchased in Titahi Bay with the proceeds. That home was sold a year later and a third one was purchased in Foxton, the surplus being banked in a joint account. The marriage came to an end in mid-1983.

The Family Court Judge took a very unfavourable view of the husband, whom he found not to be an honest and trustworthy witness. He thought the wife was. He was of the view that the husband had not disclosed the true extent of his financial resources and that, when pressed about them, he became evasive and uncommunicative. He felt that the husband had manipulated the wife throughout their marriage, adding that his principal objectives had been to provide himself with a home, a loyal housekeeper, a malleable companion and property. He found that the wife was living in Foxton, (where, it would appear, she did not want to be), in poor health and with insufficient capital to enable her to return to the Wellington area near her family, and that she had no significant savings.

The Court below had also considered the wife to be very loyal and had believed her statements that the husband had never been so well looked after, that she had given him a good home, that he had nothing, that he was not wanted by his family and had not put into the marriage any more than it had suited him to do. The husband had, furthermore, evidently instigated at least two overseas trips, made possible only by the parties' joint savings and had showed a lack of concern for his wife's interests. Applying s 14, the Family Court Judge awarded the husband a 20% share in the "very unusual circumstances of the case."

The husband appealed, alleging that the Family Court Judge should not have applied s 14 and had let his sympathy for the wife outweigh the prescribed limits of his discretion. Even if s 14 were applicable, it was also argued, 20% was an unjustifiably low award.

Fraser J felt it necessary only to cite the well-known statement of principle by Richardson J in *Martin v Martin* [1979] 1 NZLR 97 (CA), at p 111. He decided that s 14 had been rightly held to be applicable. He accepted that provision of the matrimonial home by one spouse was not, of itself, an extraordinary circumstance but held that that factor needed to be seen in the present case in conjunction with the facts that it was the principal asset, that one of the husband's objectives in marrying the wife was to acquire property for himself and that he had manipulated and influenced her to spend other funds which, without such influence, she would not have spent. Hence the "totality of the situation" here did constitute "extraordinary circumstances". He adverted to the findings that the husband's contributions had amounted only to some minor renovations and alterations to the parties' homes and that his performance of household duties had been negligible. He had brought to the marriage a car of little value, minor household items and $7,000. He had, however, according to the finding of the Court below, led the wife to believe that he had no money at all at the time of their marriage — thus playing on her sympathy notwithstanding the fact that he had this money. She, moreover, had paid for most groceries, the telephone and the power, anything over from her earnings going into the joint account. The gratuity received by her on leaving her Porirua Hospital job also went into that account. She had had a car, which was later written off, in respect of which she received some $2,000 by way of insurance money. This also had been paid into the joint account. (It was to be inferred that that money ultimately found its way into a car purchased later.) The husband had, very occasionally indeed, paid the rates. He had made some payments into the joint account — though the situation was not entirely clear — and, either from that account or from his earnings directly, he made payments in respect of a life policy, building society shares, and something towards the car and repaying a loan in respect of it, and on overseas trips.

Fraser J considered that the 80% award to the wife was "at the upper level of assessments where there has been a disparity in the contributions of the spouses to the marriage", but considered himself not to have been persuaded that the Family Court Judge's discretion should be disturbed in the circumstances of "this unusual case".

The appeal was dismissed with $300 costs to the wife.

The case is not the only one concerning s 14 where only a 20% share has been awarded to one spouse, as may be seen from *Ballantine v Ballantine* [1983] NZ Recent Law 337. Nor is it the only case where there was an element of "opportunism", as may be seen from *Callum v Callum* [1985] NZ Recent Law 129.

**P R H Webb**
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# Legal and ethical issues in the trade in cultural property

*By Professor Robin A Morris of McGeorge School of Law, University of the Pacific in Sacramento, California.*

*This article was originally a speech made by Professor Morris on the Auckland University Marae on 3 August 1989. She argues that artifacts that, as she describes it, function as a repository of cultural and traditional information, should generally remain within the cultural context of their origin. Professor Morris looks at some legal issues, including the 1983 House of Lords decision concerning a Maori head,* A-G of New Zealand v Ortiz. *Finally, she makes some practical suggestions regarding alternative means to the present market forces mechanisms, for sharing and disseminating cultural property.*

**Introduction: Defining cultural property**

Cultural property reflects a specific culture's unique understanding of natural forces as well as supernatural forces. Cultural property also reflects a culture's unique understanding of human relationships to each other and to these forces. Objects of cultural property are invested with historical and theological information, exploring simultaneously the visible and the conceptual worlds. Such objects are often central to the understanding of a particular culture. Cultural property, therefore, uniquely represents the identity of a culture in terms of a people's concept of themselves, these forces and their relationships.[1]

Indigenous cultures characterised by the use of oral traditions do not depend upon the written word for preservation or transmission of cultural traditions and knowledge. In these cultures essential information is retained and transmitted verbally through the spoken word (hence the term "oral traditions") and semiologically through the use and manipulation of symbols. Cultural artifacts can communicate the historical and theological information that is the unique cultural fingerprint of each culture in oral traditions by linking the physical and the metaphysical world and communicating symbolically and as visual aids to the spoken word. Cultural objects, in combination with the oral traditions that surround them, may function as a central part of adaptation and survival of the cultural tradition.

Industrialised cultures relying on written traditions sometimes use architectural structures such as churches or temples to commemorate historical experiences representing shared history or celebrating other shared values and experiences.[2] In these cultures, items of moveable or personal property rarely serve the same culturally definitive purpose and are usually treated more as commodities. For this reason, the significance of objects of cultural property in traditional cultures is conceptually difficult for industrialised cultures.

**I The market for cultural property**

Collectors, dealers and auction houses in industrialised societies have recently become aggressive in finding and trading items of cultural property from traditional cultures. Buyers in industrialised societies are responding to what has become an extraordinarily profitable investment opportunity in items of cultural property and other antiques. Investment in this type of property offers investors an especially attractive opportunity to invest in art because it generally costs less than European masterworks or other items of personal property fashioned of precious metals or stones. While the initial cost of investment in such goods is low by comparison, collections of this type of material have appreciated in value substantially and quite rapidly.

Their efforts to satisfy this market have taken collectors and dealers to countries of origin where the indigenous cultures are primarily based on oral traditions. The economies in these countries of origin may not have been industrialised or the indigenous population often has not shared in the wealth that followed industrialisation of the economy. Typically, the members of these societies are living in impoverished circumstances, lacking cash as well as other necessary items. Collectors and dealers have employed or commissioned these people to search for and secure items of their cultural property in exchange for cash and, in the process, they have unearthed and in some instances preserved items of cultural property which are then purchased for export to another nation.[3] The cash earned is an important source of sustenance to the local people thus employed but who often lack information about the dollar value of their cultural property on the Western market. Some of these "sellers" may also be uninitiated as to

the cultural significance of the very object which they sell.

Ever since the famous (or infamous) Lord Elgin, collectors and dealers have argued that whatever injustices accompany the loss of cultural property, the trade is justified because it preserves these cultural objects. Private collectors and museums in countries of import who purchase cultural property are being confronted by indigenous people and by countries of origin with ethical concerns raised by their acquisitions. These groups have awakened concerns in the international community as they document the nature of the cultural losses inflicted upon their people by the export of this property.

The legal framework structuring transactions in cultural property is of little assistance in addressing the moral dilemmas posed and the international community as well as Courts are beginning to explore the meaning of minimally decent conduct in these transactions. For example, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property discussed below has been adopted in some fashion in most countries of export and a few countries of import like the United States. It explicitly states that cultural property should be protected. American Courts have also been among the most activist in this regard, using domestic criminal and civil law to return cultural property to its country of origin and to punish unscrupulous dealers. See, *Autocephalos Greek-Orthodox Church of Cyprus v Goldberg and Feldman Fine Arts, Inc*, 1989 Westlaw Database 87063 (SD Ind, Aug 3, 1989); *US v McClain*, 545 F 2d 988 (5th Cir 1977) *conv rev'd*, 593 F 2d 658 (5th Cir 1979); and *US v Hollinshead*, 495 F 2d 1154 (9th Cir 1974).

However, the prevailing sentiment in most industrialised, importing nations is still very much in favour of allowing the marketplace to operate without intervention. The rationale for a free market in cultural property can be expressed in economic theory which argues that allocating this property to the buyer who pays the most for it assures that the property will come to rest with the person who has the superior use and thus assuring the maximum benefit to society. Specifically, in the case of cultural property, it might be argued that the buyer who pays the most for cultural property has the greatest interest in protecting that property.

This analysis assumes that market values are the best reflection of the true value of the item. This assumption is clearly wrong in reflecting the intangible values incorporated in cultural property discussed above, and in valuing certain long term values like the transmission of culture. Cultural property may have greater intangible value than its tangible value resulting in a severely undervalued object when allocated in an unregulated market. Moreover, market analysis presumes that people who value this property the most have enough money to pay what they deem to be its true value. In the case of cultural property, the assumption disadvantages indigenous people who may be too poor to express their valuation of the property in market terms.

## II Legal and ethical considerations in the marketplace for cultural property

A general principle of international private law which affects the trade in cultural property more than any other legal rule is the principle that in the absence of a treaty or statute in the country of import, import of items illegally exported from the country of origin is legal. Such a principle makes export prohibitions in countries of origin designed to protect against the loss of cultural property effective only as far as the budget of the country of origin permits it to police its borders; a critical limitation given the severely strained economies of many countries of origin. The dimensions of the problem are aggravated by the mobility, and concealability of this property. Once cultural property is outside the borders of the country of origin, other countries are not bound by any internationally understood principle of private law to restrain the traffic in such property. See *A-G of New Zealand v Ortiz*, [1983] 2 All ER 93.

The combination of current market pressures and this general principle of international law provides an incentive to disregard domestic export laws; operations otherwise known as smuggling. Export prohibitions and other domestic law measures[4] attempting to prevent the loss of cultural property tend mainly to add costs to the contraband rather than diminishing the trade in these kinds of objects.

The reasons offered for a legal standard which encourages smuggling are that this state of law promotes cultural pluralism by allowing the free alienability of cultural property; it has also been said that this trade provides a private market incentive for preservation of endangered cultural property as outlined above. These rationales are based, in part, on the policies of an earlier generation of museum building which contributed to the flowering of unique public collecions like the British Museum and the Louvre. While these rationales may be appropriate for countries of export, they discount the moral claims of the indigenous people and countries of origin to possession of their own cultural property.

Accordingly, participants in the market for cultural property who wish to measure their transactions against a broader spectrum of ethical and moral concerns must turn to the sources of guidance other than the law. The remainder of this article suggests some guidelines for weighing and balancing the competing and conflicting claims to possession of cultural property.

## III Provenance: Essential information for ethical transactions

Title is a legal concept determining ownership of property dependent upon each nation's domestic law. Typically, in the arcane[5] world of international art transactions, people who have smuggled works out of the country of origin in violation of domestic law, sell their work to good faith purchasers in Switzerland. Once title has been transferred in a way that is valid under Swiss law, the piece can then be resold anywhere in the world under the prevailing choice of law rule for determining title to personal property. See *Winkworth v Christie, Manson and Woods, Ltd* [1980] 1 All ER 1123. Questions about good title reveal more about the state of international law and the country

with the most favourable laws for establishing title to personal property than they reveal about the circumstances of the possession that they are investigating.

Provenance is not the same as title. Provenance identifies where a piece has come from and how it has come into the hands of the current possessor. If a collector, dealer or museum wishes to assure that the piece has not been the object of smuggling or other wrong-doing, provenance is information that must be demanded. Apart from the question of provenance, the collector, dealer or museum who wishes to behave in a morally or ethically correct way, must further weigh and balance considerations of preservation, integrity, and accessibility in deciding whether an acquisition of cultural property is proper; considerations spelled out more fully by the late Professor Paul Bator, in his article, "An Essay on the International Trade in Art", 34 *Stanford Law Review* 275 [1982]. Professor Bator suggests the following calculus of values to guide those who wish to operate morally and ethically in the marketplace for cultural property preservation, integrity and accessibility.

First of all, one must consider the case for preservation which is the sine qua non of all other considerations. Lord Elgin's acquisition of the marble statuary of the Parthenon is the best known example. Lord Elgin took the statuary with some form of consent from the Turks who governed Greece at the time. They were using the Parthenon as a munitions dump. If the statuary had remained in the Parthenon and survived the Turks, it might well have been effaced by the severe air pollution of modern Athens. The works reside, well protected, in the British Museum today. While the modern Greek government has been vigilant in requesting their return, the British Museum claims that the right to possess the Marbles is secured to them by title, by their acts in preserving these works, by time and by the cultural pluralism represented by a world-class institution like the British Museum. For a full discussion of this fascinating episode see, Merryman, "Thinking About the Elgin Marbles", 83 *Michigan L Rev* 1888 (1985).

**Integrity** involves the notion that certain types of works have cultural, archaeological or historical meaning when retained in the context in which they are found. Objects with these special contextual claims should not be transferred from the country of origin in the absence of study and documentation and perhaps not at all.

**Accessibility** is a consideration which may mean entirely different things to the country of origin and the country of import. While commonly raised in terms of increasing the access to cultural property in the countries of import, the term also embraces the need of indigenous cultures to hand down to their posterity a rich, deep and varied collection of works representative of their own cultural accomplishments. This notion of intergenerational accessibility is important to the transference of cultural identity.

## IV Conclusion

As a means of balancing the competing consideration outlined above, principled collectors, dealers and museums must begin to explore alternative means of sharing and disseminating cultural property. Typically, collectors, dealers, and others have thought in terms of acquiring ownership. There are other ways in which the desire to see and observe this kind of cultural property can be accommodated without dispossessing cultures of origin from these works forever such as long-term loans, travelling exhibitions, etc. These alternatives may have distinct advantages for cultural institutions who can no longer afford the cost of acquisitions in the area of antiquities and cultural property because the private market can offer prices well beyond their abilities to meet and match.

Countries of origin who wish to deal in a pragmatic and effective way with the market potential of their cultural property may wish to consider the manufacture and sale of authenticated replicas and sales of duplicates. Authenticated replicas or sale of duplicate pieces would meet the market demand for works in this area and would assure the country of origin some control over the loss of potentially significant works.

Finally, countries seeking to foster an ethical atmosphere in these transactions should adopt the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. While this Convention requires little in the way of direct change to the international principle allowing legal import of illegally exported property, it does establish the moral climate in which acquisition and trade in cultural property should be evaluated. □

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1 Defining cultural property has been a difficult task for the law. One commonly used approach is to generate lists or catalogues of this type of property. I believe that such lists and catalogues are inadvisable and unreliable as a means of defining cultural property because this property is best defined in terms of its function as a repository of cultural and traditional information.

2 Consequently much of the preservation effort in countries with written traditions focuses upon preserving architectural structures as repositories of a common history, and emblematic of shared values and experiences.

3 For example, many ethnic villagers create cultural properties which are used for festival purposes and subsequently abandoned or destroyed. Also, many of these cultures create cultural properties in perishable or vulnerable materials such as paper and wood. Without special consideration and care, many of these objects would be permanently lost or defaced.

4 Another type of domestic law popular in countries of origin faced with substantial losses of cultural property is the "national treasure" law which makes the State the lawful owner of cultural property and entitles the State to pursue property taken from it as an owner of the property. In private international law, the status of "owner" confers the right to enter Courts in any country to demand the return of unlawfully taken property provided title can be proven under the applicable law in the forum. This is referred to as a "transitory" cause of action and marginally improves the ability of countries of origin to retrieve lost cultural property.

5 This adjective was chosen by an American Judge to describe transactions in the art world. See *O'Keefe v Snyder*, 83 NJ 478, 416 A 2d 862 (1980).

# Conflicts of interest:

# When may a lawyer act against a former client?

*By Miriam R Dean and Christopher F Finlayson, Practitioners of Auckland and Wellington*

*The various amalgamations of practices and the growth in size of law firms make the problem of possible conflicts of interest particularly relevant at the present time. The authors of this article consider some of the issues and the problems raised. They compare the English with the American approach from the "probable mischief" to the "possible mischief" test. The American approach is now more influential in Canada. Australia and New Zealand, it is suggested, seem to be leaning toward the American view, at least to the extent of the Courts seeking to avoid even the semblance of improper conduct.*

*The authors gratefully acknowledge the contribution made by Mr J A Farmer QC to this article.*

**I Introduction**

Electrolux, in the United States, had used takeover star Neil Anderson, of Sullivan & Cromwell, in a prior takeover. In early 1988, Electrolux approached Anderson to work on a hostile takeover – the fee would be "as low as $1 million, or . . . as high as $2 million". The ultimate target company was Murray Ohio. In 1987 Sullivan & Cromwell had been consulted when Murray Ohio began to fear a hostile takeover. Sullivan & Cromwell decided – without telling Electrolux – that there was no conflict because the firm had counselled Murray Ohio on a possible proxy fight defence only. Electrolux made its bid. Murray Ohio complained that Electrolux could not use Anderson because of his firm's prior representation of the company. A restraining order was sought temporarily enjoining Electrolux from making the offer because it relied on counsel who had access to confidential information concerning the company's takeover defence tactics. An "angry" Judge Wiseman rejected Sullivan & Cromwell's case that no conflict existed. The order was granted – lifted seven days later after Sullivan & Cromwell had withdrawn and established that no confidential information had been passed to Electrolux. However, a takeover bid is hardly assisted by a seven day moratorium. Murray was bought by a white knight[1].

It is becoming an increasing feature of modern practice that lawyers will be called upon to act against former clients. The possible ramifications of so acting may ultimately prove disastrous for the lawyer, his or her firm and the new client, as both Sullivan & Cromwell and Electrolux experienced first hand in the Murray Ohio affair. It may have been as Sullivan & Cromwell saw it, "groundless litigation perpetrated by a defensive takeover target". However, the fact remains that Sullivan & Cromwell were obliged to withdraw; Electrolux was temporarily enjoined from proceeding with its bid; and ultimately Murray Ohio was taken over by a white knight.

In many cases there will be an obvious conflict of interest which prevents a lawyer from acting against (and more particularly suing) a former client. The clearest example is where the lawyer previously acted for the client in a related matter and may have received confidential information concerning that matter. However, there will be other cases where the issue is by no means so clear. The current retainer may bear little or no relationship to the former client's retainer, confidential information which may have been received may have long been forgotten, or it may have been another member of a firm who previously acted for the client and may have received confidential information. There are obvious pragmatic considerations to be taken into account. Considerable business would be turned away by law firms if in all cases no lawyer ever acted against a former client. This is especially so in current times, as lawyers increasingly change firms and firms amalgamate.

On the other hand, there are cases where, even in the absence of a patently obviously conflict of interest, it may be inappropriate that a lawyer should act against a former client. Consequently, it is predicted that as has been the experience overseas, New Zealand Courts will face an increasing number of applications to prevent solicitors (and even barristers) from acting against former clients. To the authors' knowledge there have already been at least four such applications. Two did not proceed after the solicitors concerned agreed to withdraw; the remaining two both proceeded to a hearing in the High Court. In one case, the application for disqualification was dismissed. In the other, the application was granted. In neither of these cases was any written decision delivered indicating the law applicable to these situations. However, in another context (the consultant-client relationship), the recent decision of *Effem Foods Pty Ltd v Trade Consultants* ([1989] BCL 777) does include some general observations as to the duties of a lawyer to his or her former client.

The purpose of this article is to discuss the relevant law and in particular to consider these questions:

1 When may a lawyer act against (and more particularly sue) a former client?

2 Is it enough that there is a "*possibility* of mischief" (the test applied in North America, including recent Canadian cases) to disqualify a lawyer from acting in circumstances where there is a substantial relationship between the earlier and later proceedings and so ensure that there is no *appearance* of impropriety?

3 Or, is the test to be applied a different one, namely, that there is a "*probability* of mischief" (the *Rakusen* test[2]) with the result that it is generally only in cases where the lawyer has received confidential information from a former client which may be relevant to later proceedings that it would be wrong to act against a former client?

## II Jurisdiction

*Solicitors*

It is submitted that there can be no question but that the Court has jurisdiction to "regulate the conduct of its officers": *Re a Solicitor* 131 SJ 1063. In *Davies v Clough* 59 ER 105; (1837) 8 Sim 262, (at 265) the Court observed as follows:

> I have not been able to find any authority exactly on point, and must, therefore, proceed upon some general principle. The cases, however, appear to afford this general principle, namely, that *all Courts may exercise an authority over their own officers as to the propriety of their behaviour*; for applications have been repeatedly made to restrain solicitors who had acted on one side from acting on the other, and those applications have failed or succeeded upon their own particular grounds, but never because the Court had no jurisdiction. (emphasis added)

It is suggested that the policy considerations are obvious:

> It is part of a court's duty to safeguard the sacrosanct privacy of the attorney-client relationship . . . In doing so a court hopes to maintain public confidence in the legal profession and assists in protecting the integrity of the judicial proceeding. (*Freeman v Chicago Musical Instrument Co* 689 F 2d 715, 721 (7th Cir 1982)).

Indeed, there is even the suggestion in the American cases as to a duty on attorneys representing parties to litigation to "report relevant facts regarding conflict of interest of opponent's attorney to the Court"as part of the Court's "continuing obligation to supervise the members of its Bar": *Dunton v County of Suffolk* 729 F 2d 903 (at 909 and 908 respectively).

*Barristers*

Section 61 of the Law Practitioners Act 1982 provides that subject to the Act, barristers of the Court are to have all the powers, privileges, duties and responsibilities of their English counterparts. The relevant rules for the conduct of a barrister in England have recently been restated in the Code of Conduct for the Bar of England and Wales. The latest edition has effect from 1 February 1989. Paragraph 16 ("acceptance of instructions") includes the following rules:

16.9 A barrister may not accept a set of instructions or a brief in any matter with which that barrister has previously been concerned in the course of another profession or occupation, or with which any firm or company in which that barrister has been a partner or director or by which that barrister has been employed, has been concerned during the period of that barrister's partnership, directorship or employment.

16.10 A barrister is not obliged to accept a set of instructions or brief if that barrister has previously:

(a) advised;
(b) drawn pleadings for; or
(c) appeared for another person on or in connection with the same matter.

16.12 *A barrister should not accept any set of instructions or a brief or advise or draw pleadings in any matter if that barrister would be embarrassed in the discharge of his duties as a barrister by so doing.* (emphasis added)

16.15 A barrister may not accept a set of instructions or a brief in any case where, by reason of his connection with the client, it will be difficult for him to maintain professional independence.

Rule 16.12 is particularly relevant. *Halsbury* (Vol 3(1) para 464) suggests that for the purposes of rule 16.12 such embarrassment could occur if the barrister had received instructions from the previous client containing confidential information. (See also the provisions of the New South Wales Bar Rules, "B. Acceptance of Briefs" as to the rules applying in that jurisdiction.)

It has been established in England for many years that the conduct of barristers is the exclusive responsibility of the Senate of the Inns of Court, as exercised by the Bar Council. In *R v McFadden* (1975) 62 Cr App R 187 James L J said (at 189):

> Disciplinary functions in regard to the Bar are exclusively vested in the Senate of the Inns of Court and the Bar and are exercised by the Bar Council. A judge who considers that he had cause to complain of the professional conduct of the barrister may make his complaint to the Bar Council but he had no power himself to take disciplinary action in that regard. He can of course commit to prison a barrister who is guilty of contempt of Court.

A barrister is not an officer of the Court. That appears to be the position since *Wettenhall v Wakefield* (1833) 10 Bing 335; 131 ER 932. In *Rondel v Worsley* [1969] 1 AC 191 at 227, Lord Reid described a barrister as an "officer of the Court", but *Halsbury* suggests that he did not intend this in the sense that a solicitor is an officer of the Court. *Halsbury* suggests that the Court has no

disciplinary jurisdiction over solicitors, and no general powers equivalent to those that may be exercised over solicitors under its inherent jurisdiction and pursuant to RSC Ord 62, Rule 11 (costs against solicitors personally).

However, this cannot be the position in New Zealand. Despite the provisions of s 61 of the Law Practitioners Act, the fused state of the two professions in New Zealand means that the Courts must be able to exercise some supervisory control over barristers who find themselves in conflict of interest situations. Certainly, in colonial times, Judges were prepared to suspend or prohibit barristers from practice, particularly in colonies where the professions were fused. In *Re Antigua Justices* (1830) 1 Knapp, 267; 12 ER 321 the Court observed:

> In the colonies there are no Inns of Court, but it is essential for the due administration of justice that some persons should have authority to determine who are fit persons to practise as advocates and attornies there. Our advocates and attornies have always been admitted in the colonial courts by the judges, and the judges only. The power of suspending from practice must, we think, be incidental to that of admitting to practice, as it is in the cases in England with regard to attornies. In *Antigua* the characters of avocates and attornies are given to one person; the Court therefore that confers both characters may for just cause take both away.

See also *Attorney General of the Gambia v N'jie* [1961] AC 617 (PC).

The authors submit that these same principles must apply equally to barristers in New Zealand in conflict of interest situations. The Court does retain supervisory jurisdiction of the Court by virtue of s 61 of the Act.

**III New Zealand Rules of Professional Conduct**

The relevant rules of professional conduct are contained within the *Code of Ethics* of the New Zealand Law Society. These rules apply to both solicitors and barristers alike. However, there are no specific rules dealing with conflicts of interests of the type at issue or specifically dealing with divulgence of confidential information. The following rules may, however, be relevant:

1.1.3
*Acting For More than One Party*

(1) A practitioner acting in any matter shall not act for any other party in the same matter without the prior consent of both parties.

(2) Where a practitioner is acting for both parties in any matter wherein a difference or conflict of interest arises between them, it shall be the duty of the practitioner to advise each party of his right to seek independent advice and the practitioner may no longer act for both parties; he may however, continue to act for one party unless and until by reason of information derived by the practitioner from the other, that other *may* be prejudiced. (emphasis added)

(3) In this rule, "practitioner" includes any partner, employee or employer of the practitioner.

The only other possible guidance to be obtained from the Code is in its commentary on the rules dealing with relations with clients and the public and, in particular, the following prohibition on practitioners acting in respect of any matter in which they have had a personal interest:

1.1.2.5

> "*The solicitor client relationship is one of confidence and trust.* It must never be abused. The professional judgment of a practitioner should at all times be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Nor should the practitioner ever seek to advance his personal interest or position at the expense of a client. This rule seeks to give effect to these fundamental principles". (emphasis added)

As most practitioners should be aware, the New Zealand Law Society has prepared a revised Draft Code. In its introduction to the Draft Code, the Society observes that the provision of guidelines in New Zealand is by necessity "more complex" than in most other common law countries, where "one is either a barrister or a solicitor and the functions of each branch of the profession are clearly defined" (revised Draft as at 23 May 1989 at 2).

Chapter 1 of the Draft Code deals specifically with conflicts of interest. For present purposes, the significant provision proposed is rule 1.06:

> A practitioner must not act against a former client of the practitioner when through prior knowledge of the financial or other affairs of the former client which may be relevant to the matter, to so act would be to the detriment of the former client.

In essence, this rule seems to attempt to apply the *Rakusen* test. Otherwise, little specific guidance is given as to when and in what circumstances, a conflict of interest may arise. Neither is any guidance given as to the validity or otherwise of 'chinese walls' as a device to overcome conflicts of interest in the large law firms. (The use of 'chinese walls' is addressed briefly a little later in this article.)

It may well be said that any conflict of interest matter is properly a matter for the relevant Law Society[3]. The authors do not agree. First, as already noted, solicitors (even if barristers are not) are officers of the Court. Therefore, quite apart from any professional rules, the Court has a duty as part of its inherent jurisdiction to regulate its proceedings and the conduct of its officers and in the authors' view this should include barristers also. Secondly, relying on the Law Society might well be inappropriate in many cases because of the need for urgency in the resolution of an application for removal of a solicitor/barrister, or more generally because of issues relating to the public administration of justice.

Therefore, it is submitted that the present Code (and any future Code) can only establish a framework by

which New Zealand lawyers must govern their affairs and, in particular, their relationships with their clients and the public. As the cases to be discussed below clearly show, these rules should therefore be applied together with and in the light of the legal principles developed by the Courts in resolving conflict of interest situations.

**IV The Law**

The authors suggest that the relevant law, and especially the more recent developments in this area, are usefully discussed in an article by P W Kryworak, "Acting Against Former Clients – A Matter of Dollars and Common Sense", 45 *Carswell's Practice Cases* 1. (See also "Developments in Law – Conflicts of Interests" 94 *Harvard Law Review*, 1247 (1981) especially at 1315-1335.)

In the Kryworak article, the author traces the law applicable to conflict of interest situations and canvasses current trends and changes in the law. He first discusses the traditional English approach (based on a *probability* of real mischief test) and secondly, the growing influence of American jurisprudence (based on the *possibility* of real mischief test) on Canadian Courts in these types of applications.

In short, his thesis is that the Canadian Courts are now largely adopting the American test: or at the very least the English test is now being "applied in light of current attitudes towards conflict of interest, justice and even the concept of fairness" (at 17).

*The traditional English approach: The Probability of Real Mischief Test*

The traditional approach to conflict of interest situations was established by the English Court of Appeal in *Rakusen v Ellis Munday & Clarke* [1912] 1 Ch 831, namely, the so-called "probability of real mischief" test. Rakusen consulted M (a partner in a small firm) to act in relation to wrongful dismissal proceedings. He then changed his solicitors and issued a writ. Subsequently, C (M's partner) commenced acting as solicitor for the other party. C had known nothing of the consultations between Rakusen and M. Rakusen applied for an injunction to restrain the solicitors from acting.

The Court emphasised that it must "act in each case according to the circumstances of the case": Fletcher Moulton LJ at 840. There is no general rule that a solicitor, having previously acted for a party to proceedings in relation to a particular matter, cannot act against the former client in anything relating to that matter.

However, a Court will interfere where "mischief is rightly anticipated" or there is "such a probability of mischief that the Court feels that, in its duty as holding the balance between the highest standard of behaviour which it requires of its officers and the practical necessities of life, it ought to interfere and say that a solicitor shall not act": Fletcher Moulton LJ at 841. This will arise where the solicitor is in a position to use confidential information obtained from the former client which is relevant to the proceedings at hand to the detriment of that client.

The traditional *Rakusen* test remains an oft-cited principle. The most recent English illustration of the *Rakusen* test is in *Re A Solicitor* (1981) 131 SJ 1063.

The facts were as follows. The applicant had used the respondent, a firm of solicitors, for over ten years and regarded them as his "family solicitors" – although at the time of this application the only matter in which he retained them was in connection with the probate of his father's estate. The respondents also acted for O, who was a director of a large public company of which the applicant had formerly been managing director and the affairs of which were being investigated by a governmental department enquiry. Since the evidence which O gave at the inquiry was hostile to the applicant, their interests in the investigation were in conflict. The applicant, who had instructed a different firm to act for him in the company investigation, objected to the fact that the respondents were acting for O and by originating motion sought the directions of the Court as to whether they should continue to act for O in the inquiry.

It was the applicant's case that in view of the conflict of interest which existed between him and the respondent that it was wrong that his family solicitors should act. He claimed that over many years he had taken his solicitors into his confidence about personal and family affairs. Although *he could not point to any particular piece of information which he would want to keep confidential*, the applicant was upset to find that they were now acting against his interests.

In advancing his case, the applicant relied on certain English Law Society Rules, namely:

9.01: A solicitor should not accept instructions to act for two or more clients where there is a conflict or a significant risk of a conflict between the interests of those clients.

9.02: *If a solicitor has acquired relevant knowledge concerning a former client during the course of acting for him, he must not accept instructions to act against him.* (emphasis added)

9.03: A solicitor must not continue to act for two or more clients where a conflict of interest arises between those clients.

In reply, the respondent argued that it would be very unfair to him if DHBW, the firm in question, was now to cease acting for him. The solicitors had spent 1,500 solicitor hours on his affairs, and had accompanied the respondent to hearings. The respondent relied heavily upon those solicitors for advice. A change of solicitors would mean that a good deal of expensive work would have to be done over again to put the new solicitors in the picture. This would lead to delays. Counsel also added that neither he, nor anyone in his team within DHBW, had any knowledge of the matters in which the applicant had retained DHBW. They submitted that this was an entirely different and unrelated matter.

The Court approved and adopted the *Rakusen* test. In this case, it refused to grant an order preventing the solicitor from acting because there was *no* evidence of a "probability of mischief" if the solicitors continued to so act. The key points emphasised by the Court may be summarised briefly as follows:

(1) As previously noted, the Court accepted that there was no

question but that the Court had jurisdiction over the matter. However, it indicated that it would be "more usual to seek a ruling from the Law Society" and that it "would not like it to be thought that the Court can be substituted for the Ethics and Guidance Committee and invited to give rulings on all aspects of professional conduct". (Lexis, Engen Cases at 3)

(2) The Court acknowledged the right of a party to a solicitor of its choice. It recognised that a change of solicitors would lead to delays and a good deal of expensive work being redone.

(3) However, the Court did not doubt for a moment that circumstances may be such that a solicitor ought not to be allowed to put himself/herself in a position where he/she cannot clear his/her mind from information which has been confidentially obtained from a former client. The critical point in *Re A Solicitor* is that it was not actually suggested that the solicitor had acquired "relevant knowledge concerning his former client". Indeed, the evidence was that the former client could not "think of any confidential information which he [had] communicated . . . and which might be relevant in connection with the [case]." (at 4).

(4) Finally, the Court emphasised the role of solicitors as officers of the Court and that the Court can exact from them a higher standard of professional honour than it might from persons in other occupations.

*The American approach: The Possibility of Real Mischief Test*

The North American approach invokes the "possibility" rather than "probability" of mischief test. Adopting what might be considered to be a more modern approach to the vexed question of conflicts of interest, the American attitude is based on the precept that justice must not only be done but must manifestly be *seen* to be done.

On the American view, the existence of a "*substantial relationship*" between past matters and proceedings at hand gives rise to an irrebuttable presumption that an attorney who has acted on a past matter substantially related to a present matter will have received confidences which *may* be relevant to the present litigation. Furthermore, it is presumed that attorneys within a firm share each other's confidences so that knowledge will be imputed from one attorney to the other (including past affiliates)[4]. The rationale here is that lawyers in a firm are "thought to be so intimately acquainted that one lawyer can reasonably be expected to share confidences and secrets that have been trusted to him with all his colleagues in the ordinary course of legal business". ("Conflicts of Interest in the Legal Profession" 94 *Harvard Law Review* (1981) 1247 at 1355.) With the advent of the large law firms this presumption of "sharing among affiliates can become sorely strained" (supra, 1355-1356). However, while the US Courts have been prepared to allow the presumption to be rebutted in the case of *former* affiliates, the rule is still strictly applied in the case of *present* affiliates and attempts to use the 'chinese wall' to overcome this presumption have met with little success (supra, at 1363).

The US Courts recognise, of course, that a party to proceedings has the constitutional right to choose its own counsel and therefore a Court should be reluctant to separate a client from its counsel. However, on the American view, a Court should *not* hesitate to order a disqualification where a "conflict of interest exposes a former client to prejudice and this taints the trial": *Armstrong v McAlpin* 625 F 2d 433, 449-450 n 4 (2nd Cir. 1980). It is a situation where a delicate balance must be maintained between the prerogative of the party to proceed with counsel of its choice and the need to uphold strict ethical standards.

On a general note, practitioners may find the American Bar Association Model Rules (1989 edition: Center for Professional Responsibility American Bar Association) concerning conflict of interests worthy of study. The rules were only very recently amended in February of this year. (American Bar Association, House of Delegates, Denver, Colorado.) Briefly, the key provisions of the ABA Model Rules in respect of conflict of interest are as follows:

1.7 (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(i) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(ii) Each client consents after consultation. . .

As the Rules observe by way of commentary, "loyalty is an essential element in the lawyer's relationship to a client" and lawyers "should adopt reasonable procedures, appropriate to the size and type of firm and practice to determine in both litigation and non-litigation matters the parties and issues involved in order to determine whether there are actual or potential conflicts of interest" (at 26). Thus, Rule 1.7 requires that ordinarily a lawyer may not act against a client who the lawyer represents in some other matter, even if the other matter is wholly unrelated, in circumstances where the representation of one client would clearly be adverse to the other.

Rule 1.9 provides:

1.9. (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the *same or a substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter *in which a firm with which the lawyer formerly was associated* had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information . . . that is material to the matter;

unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information had become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 permit or require with respect to a client.

Significantly, Rule 1.9 deals expressly with the position of lawyers moving between firms. In its commentary, the ABA notes that there are "several competing considerations".

> First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. (at 35-36)

This rule is based on what the ABA describes as a "functional analysis" — the two functions involved being the preservation of confidentiality and the need to avoid positions adverse to a client.

Finally, Rule 1.10 deals with the question of imputed disqualification:

1.10(a) While lawyers are associated in a firm, none of them shall knowingly represent a client where any of them practising alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of the client represented by the formerly associated lawyer, and not currently represented by the firm, unless:

(i) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and;

(ii) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) a disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

The rule of imputed disqualification "gives effect to the principle of loyalty to the client as it applies to lawyers who practise in a law firm". The Rule is based on the premise that "a firm of lawyers is esentially one lawyer for the purposes of the rules governing loyalty to the client, or from the premise that each lawyer is bound by the obligations of loyalty owed by each lawyer with whom the lawyer is associated." (at 40)

*The Emle Case*

The application of this "substantial relationship" test was approved and adopted by the US Court of Appeals in *Emle Industries Inc v Patentex Inc* 478 F 2d 562 (2nd Cir 1973). In the authors' view, the case contains a very useful and interesting discussion of conflict of interest issues.

The point at issue was whether one Mr D Rabin should continue to act for the plaintiff Emle against two defendants, Patentex Inc and Burlington Industries Ltd ("Burlington") in circumstances where he had previously acted for Burlington. In particular, the defendants were concerned that issues which had arisen in previous litigation in which Mr Rabin had acted for Burlington would arise in the current litigation. Therefore, Mr Rabin's representation of the plaintiff "might result in disclosure or conscious or unintentional use of confidential information acquired by him during the [previous] litigation". (at 561)

A motion for disqualification was granted by the District Court. The decision was upheld on appeal. A number of salient points emerge from the decision:

(1) First, the Court must take as its starting point its reponsibility to preserve a balance, delicate though it may be, between an individual's right to his own freely-chosen counsel and the need to maintain the highest ethical standards of professional responsibility. This balance is "essential if the public's trust in the integrity of the Bar is to be preserved". (at 564-565)

(2) As part of the exercise of its inherent jurisdiction, the Court must consider any relevant rules of professional responsibility. In the *Emle* case, the Court had particular regard to Canon 4 of the Code of Professional Responsibility which provides that "a lawyer should preserve the confidences and secrets of a client". Considerable emphasis was placed by the Court on the need for "strict enforcement" of high ethical standards. (at 570)

(3) It is unnecessary to consider whether an attorney had, in fact, received confidential information. It is enough if "it can reasonably be said that in the course of the former representation the attorney *might* have acquired information relating to the subject matter of his subsequent representation." (at 571) Therefore, the only issue is whether there is a clear "substantial relationship" between the prior and present proceedings. In the *Emle* case the Court had no hesitation in finding that this was the case.

(4) The dangers of allowing a solicitor to press claims against a party if, in doing so, the solicitor might employ information disclosed to him/her in confidence during prior representation are twofold. First, "even the most rigorous self-discipline" may not prevent a lawyer from unconsciously using confidential information to the detriment of the former client, for example in cross examination. Secondly, the converse is that "out of an excess of good faith" a lawyer may be too scrupulous in the opposite direction, ie by "refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety". (at 571)

(5) It must be recognised that an issue will be "developed at trial". If a solictor is permitted to continue to act there will be a risk that he/she might make use of confidential information as that issue is developed. (at 573)

(6) A client's privilege in confidential information "is *not* nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources." (at 572-573)

(7) A motion to disqualify is rarely likely to be barred by the doctrine of laches. This is because disqualification is in the "public interest". Therefore, the Court cannot act contrary to that interest by allowing a party's delay to move for disqualification to allow a conflict of interest to continue.

(8) Following on from the above, the Court emphasised that its duty was not only to the parties involved in this proceeding "but to the public as well". The Court must exercise its leadership to "ensure that nothing, not even the appearance of impropriety, is permitted to tarnish [the] judicial process'. (at 575)

A recent case suggests that the "substantial relationship" test may not even be confined to the specific claim of the current client. In *Crawford W Long Memorial Hospital of Emory University v Yerby*, 373 SE 2d 749 (1988)[5], the Supreme Court of Georgia was required to consider whether an attorney, who had commenced a medical malpractice suit against the hospital, was entitled to proceed in circumstances where he had previously represented that same hospital in 18 malpractice suits. It was undisputed that the attorney had not in any way represented the hospital against the specific claim of his current client. However, the Court held that it was unnecessary to determine whether the claim was "substantially related" to the previous 18 claims he had defended. In this case, the "ongoing relationship" between the attorney and the hospital would have provided him with information which could be detrimental to his previous client. In the light of his prior representation on the "same general subject matter" as well as the fact that this claim "[grew] out of an event that occurred during the time of such representation" it would create an "impermissible appearance of impropriety" for him to continue to act (at 751).

*The policy reasons for the American approach*

As Kryworak observes (at 16), the policy reasons for the strict duty placed on US attorneys are succinctly outlined in a decision of the U S District Court in *E F Hutton & Co Inc v Braun* 305 F Supp 371 (1969). The relevant passage is worth quoting in full:

> The duty not to represent conflicting interests . . . is an *outgrowth of the attorney-client relationship itself, which is confidential, or fiduciary, in a broader sense.* Not only do clients at times disclose confidential information to their attorneys; they also repose confidence in them. The privilege is bottomed only on the first of these attributes, the conflicting interests rule, on both.
>
> First, the ethical standards for attorneys must be formulated and construed in that way which will *best protect the interests of the client and uphold the dignity of the legal profession.* A strict construction of a lawyer's duties in cases like this one would give clients cause to feel they had been mistreated. If an attorney is permitted to defend a motion to disqualify by showing that he received no confidential information from his former client, the client, a layman who has reposed confidence and trust in his attorney, will feel that the attorney had escaped on a technicality. *If courts protect only a client's disclosures to his attorney, and fail to safeguard the attorney-client relationship itself — a relationship which must be one of trust and reliance — they can only undermine the public's confidence in the legal system as a means for adjudicating disputes.* The position urged by Hutton, if adopted, could only dispute the quality of justice.
>
> The *second consideration which has persuaded this Court concerns the difficulties involved in determining whether confidential information has been disclosed to the former attorney.* The responsibility for making necessary decisions cannot be shirked, but Courts have a duty to avoid making needless distinctions. Upon careful consideration, *this Court has reached the conclusion that the receipt of confidential information is not a prerequisite to disqualification.* (at 395-396; Kryworak at 17)

The authors submit that these same policy considerations must be equally applicable in the New Zealand context, and this submission is developed in section V below.

*The Canadian cases*

In discussing the influence of the American jurisprudence in Canada, Kryworak suggests that whilst the *Rakusen* test "remains an oft cited principle there is no doubt . . . that the application of the test has changed drastically over the years". (at 17) Whether the "probability of real mischief" test survives today in Canada is, in his view, "a moot question". He suggests that the American approach is the more influential now in Canada and has

gained "wide recognition" in the decisions of Canadian Courts: "[it] focuses on the appearance of fairness for both the litigant and the general public" (at 17).

The genesis of this new Canadian approach is to be found in a decision of Mr Justice Goodman in *Steed & Evans Ltd v MacTavish* (1976) DLR (3d) 420 (1965). Since then, there have been a number of cases which have rejected the *Rakusen* test in favour of the American approach. In one such case, *Goldberg v Goldberg*, Ont HC, March 15 1982 (Kryworak, at 9) the Court expressed the appropriate test in Canada in these terms:

> There is no doubt that it is the duty of a solicitor not to act for the opponent of his former client in any case in which his knowledge of the affairs of his former client will give him an undue advantage. *I go further to say that it is the duty of a solicitor not to act for the opponent of his former client where he has acquired information in that previous relationship from which it may appear that he is in a position of conflict.* (emphasis added)

In *Goldberg* the Lower Court had refused to disqualify the solicitor concerned upon the grounds that the applicant had not shown that any confidential information had likely been received by the solicitor concerned. However, applying the more stringent American approach, the Ontario High Court had no doubts that the Lower Court decision should be overturned and the attorney disqualified from acting.

On a lighter note, the decision in *Szafer v Chodos* (1986) 54 OR (2d) illustrates the potentially far reaching consequences of the misuse of confidential information which a solicitor has received in the course of acting for a client. In that case, the defendant, a solicitor, learned in the course of acting for the plaintiff in an action for wrongful dismissal that the plaintiff was experiencing marital difficulties. The plaintiff's wife, who was a legal secretary, had worked in the defendant's law office. An adulterous affair developed between the plaintiff's wife and the defendant, the discovery of which caused the plaintiff "acute stress and anxiety". The plaintiff brought proceedings against the solicitor alleging breach of fiduciary duty – that the defendant had utilised confidential information for his own advantage. The Court upheld the plaintiff's claim. The Court was "satisfied that [the defendant] used confidential information for his own purposes in order to obtain the delights and benefits of the affair". The plaintiff was awarded special damages (comprising medical expenses) as well as general damages of $30,000 for the "reactive depression and anxiety he suffered as a result of the defendant's conduct" (at 680).

*Australian cases*

Several recent Australian cases are noteworthy. The first is *D & J Constructions Pty Limited v Head* (1987) 9 NSWLR 118, where a company sought to restrain a firm of solicitors from acting for another company with which it was in dispute. Bryson J declined to grant an injunction because the plaintiff had not established that the defendants were in possession of any confidential information.

In this case, Bryson J adopted the *Rakusen* test (at 122). It is not known whether the American authorities were brought to his attention. However, it is submitted that there is at least an "influence" of the American approach in various of His Honour's observations as to the importance of upholding "the *appearance* that justice is being done" (emphasis added: at 123). Also, while the principle in both cases may be the same, namely, that the Court will restrain a solicitor from acting when a real mischief is likely to result from the communication of confidential information, the Court of Appeal in *Rakusen* was of the view that such information, given to one solicitor, could be concealed from another solicitor in the same firm. Bryson J, however, acknowledged the risk of inadvertent disclosure and the difficulty of "building walls around information" (discussed later in this article),

The second case is *National Mutual Holdings Pty Limited & Others v Sentry Corporation & Ors* (1989) 87 ALR 539. It is necessary to give a brief outline of the facts. The first applicant ("National Mutual") had contracted with the first respondent ("Sentry") to purchase shares in the capital of the second applicant ("Sentry Holdings"), which was a company incorporated in the Australian Capital Territory. The sale agreement was expressed to be governed by the law of Victoria. Stephen Jacques Stone James ("SJSJ") acted for Sentry in relation to some aspects of the sale agreement, principally out of its New York office.

In late 1986 the applicants retained Mallesons ("M"), a Melbourne firm of solicitors. On 1 July 1987 SJSJ and M merged to become MSJ. The present proceedings were instituted on behalf of the applicant by MSJ.

In April 1989 Sentry commenced proceedings in the United States District Court seeking to restrain MSJ and SJSJ from continuing to represent National Mutual. The claims to relief were based on breach of the New York Code of Professional Responsibility, breach of contract, tort ("negligent and wilful breach of a duty not to represent National Mutual or any interest other than Sentry in connection with the legal advice and counsel allegedly provided to Sentry" (at 546)) and breach of fiduciary duty ("not to expose Sentry's confidences and secrets to the risk of disclosure or use contrary to the interests of Sentry" (at 546)). No such relief was sought by Sentry from the Australian Court, although a cross-claim against SJSJ claimed damages in contract and tort arising from the earlier relationship between them. The applicant now sought inter alia orders that Sentry be restrained from taking any further step in the New York proceedings and that the cross-claim against SJSJ be struck out.

In considering whether or not Sentry should be restrained from continuing with the New York proceedings, Gummow J was required to review the American and Australian law as to conflict of interest. The applicants argued that Sentry had failed to indicate precisely what confidential information had been conveyed to SJSJ by Sentry. Sentry's response was that there was a legitimate juridical advantage to it in litigating in New York, because "more

rigorous standards" were required of New York attorneys which inter alia did not require it to identify specific confidential information which might have been conveyed.

After reviewing *Rakusen* and recent criticisms of the case by Dr P Finn (at 559-560) and other relevant material (including *D & J Constructions Pty Limited*) His Honour concluded:

> . . . it is unnecessary to decide whether the law in New York gives Sentry a substantial juridical benefit of advantage because of a more rigorous treatment of "conflict of interest" raised by a party against its former solicitors, since retained by the other party to litigation. *It is sufficient to say that there is a real possibility that the law in [Australia] is no less stringent than that which Sentry submitted to be the law to be applied in the New York proceedings.* (at 561, emphasis added)

Gummow J did not need to take this point further, since he found that, in any event, Sentry should be restrained from pursuing the New York proceedings upon the basis that they would have a "tendency to interfere" with the Australian litigation. On this, His Honour held:

> In my view, prima facie, there is an interference with the conduct of litigation in this court where, as in the present case, one party seeks in the courts of another country to enjoin its former solicitors from acting as solicitors for an opposing party in the litigation in this court. It is a procedure apt to bring about a situation whereby that other party changes his solicitor, a step of primary and paramount concern to this Court. (at 563-564)

The cross claim brought against SJSJ also involved consideration of the conflict of interest issue, even if only in a peripheral way. MSJ emphasised the delay by Sentry in bringing the cross claim. It argued that it would be placed in an impossible position:

> On the one hand, as solicitors for the applicants, they would be assisting their clients to recover the maximum damages from Sentry; on the other hand, as cross respondents in their own right to the cross claim by Sentry, it would be in their interests to minimise the amount for which Sentry was to be held liable and which Sentry would seek to pass on to MSJ. (at 567)

MSJ went on to argue that if:

> The applicants in the principal proceedings were to lose [MSJ] as their present solicitors, the result . . . would be infliction of prejudice upon the applicants: given the detailed preparation of the case this far, . . . the introduction of fresh solicitors would involve much more than the transmission of paper, there being a fund of experience in the case which would not be readily transmissable or not transmissable at all, by one firm of solicitors to another. (at 567)

Indeed, it was suggested that the cross claim against MSJ and the commencement of the New York proceedings generally "were calculated, in the stronger sense of that word, to harass the applicants in the Australian proceedings and MSJ, and thereby to gain an improper advantage of Sentry in the Australian proceedings". (at 568)

His Honour took the view that the evidence fell short of providing grounds upon which he could properly conclude that there was any "such calculation by Sentry". He did not consider that the case sought to be made in the cross claim against MSJ was so untenable that it could not possibly succeed. Leave was accordingly granted.

It is suggested that the *National Mutual* case raises important and interesting issues for practitioners. Significantly, Gummow J has cast doubt on whether the *Rakusen* decision can any longer be considered the applicable law in Australia. Indeed, as already noted, he went so far as to suggest that there is a "real possibility" that the law in Australia is no less stringent than that applying in the USA. The case usefully highlights the conflict of interest problems which can arise from a merger of firms. Indirectly, the decision also touches on the question of the validity or otherwise of 'chinese walls' — one of the issues arising in the case being whether information obtained by the New York firm of SJSJ placed persons handling the litigation for National Mutual in the Melbourne office in a conflict of interest.

Finally, conflict of interest issues have arisen recently in several cases in the Family Law jurisdiction. In *In the Marriage of Thevanaz* (1986) 11 Fam LR 95, a solicitor was restrained from acting against a former client who, together with his wife, had previously been represented by a former partner of the solicitor. It was the Court's view that it was of the "utmost importance" that justice should not only be done but should *appear* to be done even if the risk that justice might not appear to be done is "merely theoretical" (at 98).

As Bryson J noted in the *D & J Constructions* case, it is clear that in the family context it may be said that the Courts need to be particularly scrupulous in protecting the disclosure of confidential information (at 123). Nonetheless, it is significant that the injunction was granted in the *Thevanaz* case. the *Thevanaz* decision has been subsequently considered in *Re the Marriage of P A & R M Magro* (1989) 12 Fam LR 770 and in *Re the Marriage of R P & A A Gagliano* (1989) 12 Fam LR 843. In both of these cases, orders were granted to wives restraining their husbands' solicitors from continuing to act in disputed matrimonial proceedings.

## V Appropriate approach for New Zealand

As has already been observed, there has not yet been a reported New Zealand case dealing with disqualification of a solicitor or counsel in a conflict of interest situation. However, in the *Effem* case (supra) Barker J referred to the "general situation" as being succinctly stated in the *Rakusen* case and also in the "helpful decision" of Bryson J in the *D & J Constructions* case. Recent developments in the analogous area of fiduciary obligations may also be of some relevance: *Mid Northern Fertilisers Ltd v O'Connell Lamb Gerard & Co* (unreported, Auckland, Thorp J, A151/85, 18 September 1986).

The authors would be concerned if the *Effem* case were taken as

suggesting that the strict *Rakusen* test is the applicable New Zealand law. His Honour did not refer to any of the American or Canadian authorities in his judgment. In any event, the *Effem* case was concerned not with solicitors' duties but with those of consultants. Indeed, His Honour recognised that cases involving solicitors acting against former clients call for a "higher standard" than that applicable to consultants. Therefore, it was unnecessary in the *Effem* case to consider whether the *Rakusen test is in fact the appropriate one in the solicitor/client context. Therefore, it is respectfully submitted that any observations of His Honour on this issue are obiter dicta only.*

However, in so far as Barker J heeded Bryson J's urging for a "cautious attitude to any proposal that would allow a solicitor to act against a former client", especially "because the *spectacle of a lawyer readily changing sides is subversive of the underlying appearance that justice is being done*" (emphasis added: at 26) there may, in any event, be something of an American influence in His Honour's observations.

It is the authors' submission that the appropriate test to be applied in this country in conflict of interest situations is the "*possibility* of real mischief or prejudice" test, developed by the American Courts and adopted and approved in at least the Canadian jurisdiction. Even if the American test is not followed to its fullest extent, it is at the very least essential that the Courts now place a greater onus on solicitors (and counsel) to avoid situations of conflict of interest including situations where there may be only the *appearance* of a conflict. Times have changed dramatically since *Rakusen*. As Bryson J observed in the *D & J Constructions* case ". . . each court must to some extent interpret its own times and manners and the conduct which it should expect or even fear from its practitioners" in deciding the degree of control to be exerted.[6]

There may well be an analogy in the trend taken by the New Zealand Courts in recent years to the question of disqualification of adjudicators for bias or alleged bias. There, the trend has been toward an acceptance of a "reasonable *suspicion*" of bias test rather than a "real *likelihood*" of bias test: *Anderton v Auckland City Council* [1978] 1 NZLR 657, at 689; *McNaughton v Tauranga County Council (No 2)* (1987) 12 NZTPA 429, at 435.

In *Anderton*, Mahon J said: (at 689)

> It will be recalled that in *English v Bay of Islands Licensing Committee* it was said by Salmond J that the test of antecedent probability of partiality resulting in disqualification by reason of predetermination "must be applied with the utmost caution". Any expression of opinion by that great jurist must command unswerving respect. Today, however, the *balance of authority clearly favours the concept of public confidence in the administration of justice as being the controlling consideration*, so I think it no longer true to say the "utmost caution" is required. In applying the "real likelihood" test a reviewing court will assess for itself whether an impartial observer apprised of all the relevant facts would consider whether the real likelihood existed, and where the "reasonable suspicion" test is relied upon the court will judge the impression, to be considered objectively, on the mind of the litigant or observer unacquainted with any outside facts or circumstances created by the outward form or conduct of the proceedings under review.

It is suggested that this trend is consistent with the New Zealand Courts adopting the North American test to conflict of interest situations rather than the strict English test. It is surely fundamental that the public confidence in the administration of justice today involves the proposition that justice must not only be done but must manifestly be seen to be done: *Re JRL; Ex parte CJL (1986) 66 ALR 239, 244 (HCA); Jeyaretnam v Law Society of Singapore* [1989] 2 WLR 207, 213E (PC). Whether or not there will in fact be an injustice in any case is not the issue. It is enough that there *might* be an injustice for justice not to be seen manifestly to be done: *Murdoch v New Zealand Milk Board* [1982] 2 NZLR 108, 120-121.

The authors are not alone in their criticism of the *Rakusen* test. In a paper by Dr P Finn, "*Conflicts of Interest - The Businessman and the Professional*", Legal Research Foundation Seminar, University of Auckland, 28/29 March, 1987, the *Rakusen* test is described as "untenable" (at 17). Dr Finn's criticisms are fourfold:

(i) First, the test was formulated when the law of breach of confidence was "in an embryonic state" and paid no heed to the concept of "unconscious use of information" (at 17);

(ii) Secondly, the *Rakusen* test places an undue onus on a former client to prove a real likelihood that confidential information will be misused. In Dr Finn's view, "the *Rakusen* ruling tear[s] aside the protective cloak drawn about the lawyer/client relationship" (at 18)

(iii) Thirdly, a solicitor is required to put at his client's disposal not only his skill, but also his knowledge. If, as is well accepted, "a solicitor cannot pray in aid a duty of confidence to justify his non-disclosure to his client of relevant information he possesses, then the *Rakusen* rule conflicts with the duty of a lawyer to his second client" (at 18-19);

(iv) Finally, the *Rakusen* rule does not, in Dr Finn's view, eliminate, as it should, the fear which a member of the public may have that disclosures which he/she may make to a lawyer may become known to a third person. "To allow that apprehension is to prejudice the possible utilisation of legal services" (at 19).

(As already noted, these same criticisms were implicitly endorsed by Gummow J in the *National Mutual* decision.)

Essentially, Dr Finn suggests (as the authors of this paper have done) that the approach which has been adopted in the United States to conflict of interest situations is now the appropriate test for

Commonwealth Courts. Dr Finn acknowledges, however, that when coupled with the American related "imputation" rule (which imputes the knowledge which one member of a firm has obtained in acting for the former client to all members of that firm) "it can make an industry out of applications for lawyer disqualification" (at 21). Dr Finn therefore advocates application of the American "substantial relationship" test but in combination with a "less stringent" imputation rule for law firms here in Australia and New Zealand than that which is applied in the United States.

His suggestion is that in the case of the *law firm*, there should be a *rebuttable* presumption that by virtue of a previous retainer a lawyer has received such confidences that he/she cannot act against that client. In this situation, even if it is improper for the lawyer previously engaged to act provided he/she can prove that there has been no access to confidential information (and neither will there be any such access in the future).

In his view, this approach would "give some scope for the use of 'chinese walls' " (at 35). Whether this is so, or should be so, and indeed the whole subject of 'chinese walls' is another issue in itself. There is now in the United States an enormous amount of literature on the concept, legality and effect of 'chinese walls' as a solution to the conflict of interest problems which may arise in multi-service firms (more particularly banking and security firms). Generally, as already noted earlier, the use of 'chinese walls' to rebut the presumption of shared knowledge has met with very limited success and been characterised as an attempt to avoid ethical obligations. (See "Developments in Law – Conflicts of Interest" supra, at 1369.)

Here in New Zealand comments made by Barker J in the *Effem* case, Thorp J in the *Mid-Northern Fertilizers* case and Tompkins J in the *McNaughton* case would suggest that the 'chinese wall ' "will almost invariably prove to be illusory. A person who engages the services of a partner acting as such engages the services of the whole firm" (at 431). In *Effem*, Barker J considered that Bryson J's comments in the *D & J Constructions* case on this subject were "*very salutary for large professional firms*" (at 26) viz:

> I would think that the court would not usually undertake attempts to build walls around information in the office of a partnership, even a very large partnership, by accepting undertakings or imposing injunctions as to who should be concerned in the conduct of litigation or as to whether communications should be made among partners or their employees. The new client would have to join in such an arrangement and give up his right to the information held by such parties and staff as held it. Enforcement by the court would be extremely difficult and it is not realistic to place reliance on such arrangements in relation to people with opportunities for daily contact over long periods, as wordless communication can take place inadvertently and without explicit expression, by attitudes, facial expression or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control".

Careful thought would therefore be required as to whether such a refinement of the American rules as Dr Finn suggests is necessary or wise.

## Conclusion

It will be obvious to the reader that the subject of conflict of interests raises various complex and competing considerations. It is the authors' view that the *Rakusen* test is no longer the appropriate one in present times. It may be that given the size of our legal profession the American test does require some refinement for New Zealand. The answer may not be clear. What should be clear is that the issues raised are important and warrant most careful consideration by the profession, expecially in the context of the current review of the Code.

It should go without saying that any application for disqualification will be a sensitive one and should not be brought lightly. It is regrettable that in America the Courts have become frustrated by a proliferation of disqualification motions and the use of such motions for delay and other purely tactical purposes. However, there seems no reason to believe that the adoption of the American test would inevitably lead to such a situation here. It would be regrettable if such a fear was allowed to cloud the overriding consideration that:

> . . . the stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct. (*Emle*, at 575)

## Postscript

Since this article was submitted for publication readers may like to note that in *Kupe Group Limited v The Auckland City Council* (unreported interlocutory decision of Barker J), His Honour endorsed further the views of *inter alia* Tompkins J in *McNaughton* and Thorp J in *Mid-Northern Fertilizers Ltd* (supra) as to the difficulties of erecting 'chinese walls' in large law firms to avoid conflict of interest situations (pp 11-13). □

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1 S Brill, "Fatal Arrogance: Can Sullivan & Cromwell survive its Superiority Complex"? *The American Lawyer*, October 1988, 3.

2 See *Rakusen v Ellis Munday & Clarke* [1912] 1 Ch 831 discussed in section IV.

3 The role of the Law Society vis-a-vis the Courts in such situation is discussed in *Re A Solicitor*, supra. *In the marriage of Thevenaz* 11 FAM LR 95 (Aust) discussed later in this article, Frederico J observed that while at "first sight" it appeared to him that the matter should be resolved by the relevant Law Society, His Honour went on to find that the Court clearly had "the power to restrain" (at 97-98).

4 Refer Rule 1.10 of the American Bar Association *Model Rules of Professional Conduct* which imputes the knowledge which one member of a firm has obtained in acting for a former client to all members of the firm. See also *Panduit Corp v All States Plastic Mfg Co* 744 F 2d 1564, 1577 (Fed Cir 1984).

5 See also the commentary in "When Can a Lawyer Sue a Former Client", *National Law Journal*, April 3, 1989.

6 These comments were made in the context of consideration of the applicability of the even more rigid rule which existed before *Rakusen*: that prior to *Rakusen* a "more ready apprehension of mischief" might well have been appropriate. The authors submit that the same reasoning applies in suggesting that the *Rakusen* test formulated some 75 years ago is no longer appropriate in current times.

# Company management reform

*By Timothy J Castle, LLB, ACI, Arb, Barrister of Wellington.*

*The author was until recently a litigation partner with Perry Castle in Wellington. In recent years he has undertaken a wide range of company and securities laws litigation. In this article he examines some of the principal reform measures and reports which have been produced since the sharemarket crash in October 1987 and considers their legal implications and consequences.*

**Introduction**

In the wake of the collapse of the sharemarket, now over two years ago, has come a raft of measures designed to remedy problems associated with New Zealand companies and securities laws. In the past eighteen months at least eight pieces of substantial legislation, or reports for proposed reform, have been introduced or produced. It is at times very difficult for those involved with companies, either advising or managing them, to keep abreast of the recent developments and proposals.

This paper is designed to provide a brief summary of the latest developments, and highlights those areas which I consider will be of interest to this group. Of course it has not been possible to discuss every new provision; I broadly discuss the ramifications of each. My comments should be looked at now, in the light of the Law Commission's Report No 9 – "Company Law Reform and Restatement", about which I say little in this paper pending further study.

I discuss the following measures:

1 The Contributory Mortgage Regulations.
2 The Corporations (Investigations and Management) Act.
3 The Companies Amendment Act 1988.
4 Law Reform (Miscellaneous Provisions) Bill.
5 The new Stock Exchange Rules.
6 The High Court Rules Amendment 1988.

**1 The Contributory Mortgage Regulations:**

These regulations were recommended by the Securities Commission and came into force on 1 January 1989. The regulations relate to offers to the public of interest(s) in contributory mortgages: and prescribe requirements relating to the management and auditing of those interests after the sale of the interest has been completed.

According to the press statement of the Justice Minister, the Rt Hon Geoffrey Palmer, at the time of the introduction of the regulations, the regulations are designed to help protect public investment in contributory mortgage schemes.

The Minister emphasised that the regulations had been contemplated and worked on for a number of years, and were designed to bring the operation of the contributory mortgage schemes under the protective regime of the Securities Act 1978.

The regulations require contributory mortgage brokers to be registered and to make annual reports. Brokers will be required to register nominee companies to act as the custodian of the investments and securities of the broker schemes, and brokers must also establish trust accounts so as to keep investors' moneys separate.

Mortgage brokers are also required to appoint independent auditors to check on the brokers' financial statements and records, and on whether they had complied with the requirements of the regulations.

The regulations specify how investors' contributions are to be dealt with, and prescribe forms of authority to be used. The uses of general authorities are limited to investment in mortgages, which secure investments totalling no more than two-thirds of an independent registered valuer's valuation, and for an investment term of no more than five years. Any other type of mortgage investment would have to be authorised by a special authority.

The regulations impose stringent duties on the contributory mortgage broker. Brokers must take reasonable steps to ensure that there are assets available under the personal covenant of the mortgagor, or guarantor, or indemnity, sufficient to discharge the amounts payable under the contributory mortgage. Every broker must comply with the provisions of Part II of the Credit Contracts Act on behalf of the contributors, and must take reasonable steps to ensure that every contributory mortgage in respect of which they act is registered at the earliest practicable date.

Restrictions are also placed on mortgaging or transferring a nominee mortgage, and on the creation of prior charges and discharges, or partial discharges of nominee mortgages.

Finally, duties are imposed upon the broker in the event of default by the mortgagor.

**2 The Corporations (Investigations and Management) Act**

This Act contains a range of measures designed to enable the Registrar of Companies to determine whether a corporation is at risk, and to enable action to be taken in relation to any such corporation. The Act has replaced the Companies Special Investigations Act 1958, under which the Statutory Managers for Equiticorp were appointed. The Statutory Managers for Chase were appointed under the new Act.

The new Act applies to any corporation –

(a) That may be operating fraudulently or recklessly;
(b) to which it is desirable that the Act should apply –

(i) for the purpose of preserving the interests of the corporation's shareholders or creditors;
(ii) for the purpose of protecting any beneficiary under any trust administered by the corporations, or —
(iii) for any other reason in the public interest

if those shareholders, creditors, or beneficiaries, or the public interest cannot be adequately protected under the Companies Act 1955, or in any other lawful way.

Part I of the Act gives the Registrar power to require a corporation to supply information relating to its business, operation, or management, and to require that information to be audited. The corporation commits an offence if it fails to comply or supplies false or misleading information. The Registrar is also authorised to require a corporation's auditors (past or present) to disclose information about the corporation's affairs.

The Registrar is also authorised under Part I to appoint a person to investigate the affairs of a corporation, to determine whether to exercise powers conferred under Part I, Part II or III of the Act. These relate to the power of the Registrar to declare a corporation to be at risk, or alternatively, to place the corporation under statutory management. These are discussed later in this paper.

The person appointed by the Registrar to conduct an investigation can require the corporation or any officer, employee, or other person to supply information relating to the corporation's affairs, produce documents for inspection, or reproduce information in a useable form. Powers of entry and search are also provided.

Part II of the Act empowers the Registrar to declare a corporation to be a corporation at risk. A corporation may be declared at risk if the Registrar has reasonable grounds to believe that the corporation is one to which the Act applies, or may apply. (These grounds are set out above.)

A declaration that a corporation is at risk has three consequences

(a) The corporation and persons associated with the corporation must immediately consult with the Registrar about its affairs and methods of resolving its difficulties;

(b) The Registrar may give advice and assistance towards resolving the activities; and

(c) The Registrar may, with the consent of the Securities Commission, give specific directions to the corporation aimed at preserving the interests of members and creditors. Those directions may prevent the corporation from dealing with any property or funds, and in addition, the corporation may be required to place any investment moneys received into a trust account.

It is an offence under the provisions of the Act to disclose that the corporation has been declared to be at risk. There are exceptions to this "Associated person" is defined in cl 2 of the Act.

Under Part III of the Act the Governor-General on the advice of the Minister of Justice given on the recommendation of the Securities Commission may declare by Order in Council that a corporation or associated person is subject to statutory management. The main consequences of statutory management are

(a) Management of the corporation vests in the statutory manager;

(b) Claims, and the exercise and enforcement of rights, against the corporation cannot be proceeded with, and

(c) The manager may exercise a host of powers, including the power to restructure the affairs of the corporation.

The Securities Commission may only recommend that a corporation be subject to statutory management if it is satisfied on reasonable grounds that

(a) The corporation is one to which the Act applies; and

(b) In the case of a corporation that is or may be operating fraudulently or recklessly, the statutory management is necessary for three purposes — to prevent the risk of further deterioration of the corporation's affairs; to prevent any fraudulent activities; and to enable the corporation's affairs to be dealt with in a more orderly or expeditious way;

(c) In the case of certain corporations it is desirable for the purpose of

preserving the interests of shareholders, creditors, or beneficiaries, or the public interest;
or
enabling the affairs of the corporation to be dealt with in a more orderly or expeditious way.

A statutory manager has such powers, rights, and authorities necessary to carry out the powers conferred by the Act. Without limiting that statement, the Act specifically provides that the statutory manager has in the case of a body corporate all the powers of the board of directors, and the members in general meeting, and further, all the powers of a company liquidator. In addition, the statutory manager has many other powers specifically conferred upon him or her by the Act.

**3 The Companies Amendment Act 1988**

The Companies Amendment Act 1988 was enacted on 21 December 1988 and introduces a number of amendments. These are briefly described below:

1 It extends a prohibition in the Companies Act in relation to the managing of companies to persons against whom a judgment has been obtained under the new Insider Trading legislation contained in the Securities Amendment Act 1988.

2 It also extends the Court's power to restrain persons so prosecuted from managing companies.

3 It provides a new power for the Registrar of Companies to prohibit certain people from managing companies. The Registrar may prohibit a person who is an officer of or concerned in, or a person who

took part in the management of a company;

(a) That has been wound up, or is being wound up because of the inability to pay debts

(b) That has ceased to carry on business because of an inability to pay its debts.

(c) In respect of which execution is returned unsatisfied in whole or in part

(d) In respect of the property of which a person has been appointed as a receiver and manager, or a judicial manager, or a statutory manager, or as a manager to exercise control under or pursuant to any enactment whether or not the appointment has been terminated, or that has entered into a compromise or arrangement with its creditors.

The Registrar can exercise his power up to five years following the person's involvement in such a company. The exercise of this power is subject to the authorisation of the Securities Commission.

4 There is a new requirement that every officer of a company notify the company of his or her shareholding and debentureholding in the company. The company also has an obligation to maintain a register. This provision is to take effect from 1 July 1989, while the remaining provisions take effect upon enactment.

**4 Law Reform (Miscellaneous Provisions) Bill**

A number of amendments to the Companies Act 1955 are contained in the Law Reform (Miscellaneous Provisions) Bill which was introduced into Parliament on 15 December 1988. Among the more significant amendments is a new provision which will enable the Official Assignee, in his or her capacity as provisional liquidator, to dispense with the requirements to summon separate meetings of the creditors and contributories of the company being wound up. Such meetings are, however, only to be dispensed with if certain conditions are met.

Presently, when a company creates a charge, it must cause a copy of the instrument by which the charge is created or evidenced, to be delivered to the Registrar. This must also be accompanied by a statutory declaration as to the execution of the instrument and the affirmation that the copy is a true copy. The Bill will place that requirement so that the copy will have to be accompanied by a certificate in the prescribed form by an officer of the company, or its solicitor.

The Bill inserts a new section into the Companies Act dealing with unclaimed surpluses where the liquidator of the company is the Official Assignee. The Official Assignee will be required to pay any money representing surplus assets to the Secretary of Justice who, after twelve months, pays it into a liquidation surplus account. The money in that account

(a) May be paid to any person entitled to payment in the winding up of any company whose surplus assets have been credited to the account; or

(b) may be paid in meeting the claims of creditors of any company in the winding up of which the Official Assignee or any other person is liquidator, for payment of the costs of proceedings in the winding up, the costs of legal and other expert advice, and the costs of expert witnesses.

Finally, new sections are to be inserted by the Bill which will remove the requirement of an audit of a liquidator's account, statement of accounts, and balance sheet if the liquidator is the Official Assignee.

**5 New Stock Exchange Rules**

On 19 July 1988 the New Zealand Stock Exchange released an exposure draft of proposed changes to its listing requirements. The proposed changes contain several important new features, including

1 A revised definition of what constitutes relevant information for the purposes of disclosure of information to the market.

2 A broadening of the existing powers of the Exchange to investigate possible breaches of listing requirements and to seek further information from companies about transactions which have been announced.

3 Reference to the Contracts Privity (Act) to enable shareholders in certain circumstances to take steps to enforce the listing requirements against a particular company.

4 The posting of a bond by listed companies to cover expenses relating to enforcement of the listing requirements.

5 The replacement of a second board by a non-standard board to cover listings with unusual features, such as non-voting shares, or shares with restrictions on the transfer.

At the time of the announcement of these changes the Stock Exchange indicated that the changes were aimed at ensuring a more fully informed market in which companies would face even greater obligations to abide by the provisions of the listing agreements. Failure to do so could enable shareholders to use the Contracts Privity Act to seek compliance by the company with its obligations.

**6 High Court Amendment Rules (No 2) 1988**

These Rules have amended R 7000W(1) to provide that any person who may apply for the winding up of a company under s 219 of the Companies Act 1955, also has standing to apply for the appointment of a provisional liquidator. The old Rule allowed this privilege only to the company itself, its creditors and contributories, which meant that even though, for example, a majority of directors could commence winding up proceedings, they could not apply under R 700W(1) for the appointment of a provisional liquidator.

Consequently, as from 1 January 1989, the following persons may apply for the appointment of a provisional liquidator when application is made under s 219 of

**continued on p 57**

# Unfettered discretion?

*By Raybon Kan, Research Scholar 1988, Energy and Natural Resources Law Association of New Zealand.*

*This article considers the implications of the High Court decision in* Petrocorp v Minister of Energy *in which Greig J held that the Minister had an unfettered discretion as to the licensing of the area to be mined and who would hold a licence. The author criticises the decision as being a discouragement instead of encouragement of prospecting for oil which latter is the principle in accordance with which the statute should be interpreted.*

In *Petrocorp v Minister of Energy* [1989] BCL 1977, Greig J has gone where no Judge has gone before: the case is the first to interpret the Minister of Energy's powers under the Petroleum Act 1937. The case lays claim to another first, however: Greig J has discovered two examples of a phenomenon believed not to exist since the 1968 House of Lords decision in *Padfield* [1968] AC 997: unfettered Ministerial discretion.

The case answers a single question, posed as numerous no-lithoform-unturned grounds of review. The question was whether holders of a petroleum mining licence who prospect and make a fresh discovery within the mining area, have any right to mine that discovery. The licence holders applied under s 20 for the mining area to be extended 100 square km to encompass the new discovery, Ngaere. The Minister, himself a member of the joint venture holding the licence, declined the application and granted the licence to himself under s 36.

Greig J held that the licence itself did not give a right to mine new discoveries, and both s 20 and s 36 were unfettered discretions. Upon this finding, the facts become immaterial to determining whether the powers were validly exercised – they must have been, if the discretions were unfettered. However, the facts should be set out for the direct manner in which they pose the legal issues.

The seven plaintiff oil companies, with the defendant Minister, were joint venturers in the Waihapa petroleum mining licence. It had been granted in November 1987 after prospecting had turned up the Waihapa gas deposit in onshore Taranaki. The licence itself featured a graticulated map of the area covered but was expressed to apply ". . . only to the development of that petroleum discovery known as Waihapa. . ." Further, it provided that if the licensees should discover any further deposits within the area comprised in the licence, then for the new discovery's purposes ". . . this licence shall be treated in the same manner as if the discovery were made under a petroleum prospecting licence". The Act provides that the holder of a prospecting licence has the right on applying under s 12, to surrender that prospecting licence in exchange for a petroleum mining licence, as long as the Minister is satisfied petroleum has been discovered within the prospecting licence area, and that the prospecting licence-holder will comply with the petroleum mining licence's conditions. (Section 11, Petroleum Act 1937).

**continued from p 56**

the Companies Act 1955 to wind up a company

1 The plaintiff.
2 The company.
3 A majority of the directors of the company.
4 Any creditor of the company.
5 The Registrar or Deputy Registrar of Companies.
6 All or any of the foregoing persons.

**Conclusion**

Where is this reform process taking us?

The report of the Ministerial Inquiry into the Sharemarket is the latest in a series of measures designed to remedy perceived problems in the laws of company management and securities in New Zealand. These measures have attacked the problems, either by way of addressing specific issues, or alternatively, as part of more general reviews.

The Minister has also recently announced the establishment of a new Serious Fraud Office.

In the midst of all the announcements of reform, or proposed reform or proposed reforms, it is important not to lose sight of the specific objectives of the various reforms and/or reviews. I would like to see these objectives identified, articulated, and, then, met by those carrying out the review(s) and reforms. By this process I would argue that the risk of conflict between the various measures can be minimised. The setting of the objectives is a matter of policy, which is the responsibility of Government. It is against the background of an identified objective or set of objectives that a programme of appropriately co-ordinated reform can be developed.

The Law Commission's Report No 9 "Company Law Reform and Restatement" should be carefully studied to see whether it or its recommended new Companies Act has not only set the objectives, but co-ordinated reform in a way which makes the objectives achievable. □

At the time the Waihapa petroleum mining licence was granted, Government policy was to remove itself from commercial participation in petroleum exploration. Crown interests in four petroleum mining licences (including Waihapa) had been offered for sale, and tenders were sought to buy the Crown's 70% share in Petrocorp.

On 26 February 1988, Petrocorp as joint venture operator struck oil within the Waihapa area, but at a level above the Waihapa gas deposit. Called Ngaere, the find lay mainly outside the Waihapa area, and was estimated to hold 40 million barrels of oil, valued at more than $350 million.

On 9 March the joint venture applied for a s 20 extension of the Waihapa petroleum mining licence area to include Ngaere. Sensing resistance from officials, Petrocorp wrote directly to the Minister on 30 March. On 12 April, the eventual decisions were set out in a draft memorandum for the Cabinet Policy Committee. The Minister had not yet replied to Petrocorp's letter, and on 15 April a telephone conversation between Petrocorp and Ministry senior officials shed no light on what was afoot. The Ministry's remarks were deliberately worded to avoid disclosure to Petrocorp as to what was proposed.

The Minister's proposal (to decline the application, grant himself a licence, and then sell it) needed Cabinet approval because Government policy was still to divest of Crown interests in petroleum mining licences. Cabinet granted approval on 27 April, and later that day the Minister wrote to Petrocorp without hinting what would happen.

By a letter dated 4 May, the Minister advised the joint venture of his decisions, and invited it to negotiate with him to purchase the Ngaere petroleum mining licence and other Crown interests including the Minister's 38.36% share of the Waihapa petroleum mining licence. The joint venturers sought judicial review.

**Unfettered discretion**

Unfettered discretion puts a decision beyond review because by definition there are no grounds by which to challenge it. When faced with an extension application, the Minister need not consider the geological evidence. The Minister could consult the entrails of a Barbie doll, or ring Nancy Reagan's astrologer. But as Wade has said, unfettered discretion has no place in public administration: public authorities including Ministers are bound to act reasonably, in good faith and upon lawful and relevant grounds of public interest. (*Administrative Law*, 6 ed, 1988, p 399). Simply because it is good for the Government does not mean it is permitted: the ground of public interest must be *relevant* to the discretion's purpose.

With respect to s 20, Greig J does not make it clear but he presumably means there are no express or implied relevant considerations. (*Petrocorp v Minister of Energy*, judgment, p 19). One would have thought the application mechanism, with its need to be supported by a work programme and geological evidence, would provide relevant considerations aplenty.

As for s 36, its paramountcy stems from the fact that it is expressed to be subject to its own provisions rather that the rest of the Act. Section 36 provides that subject to its own provisions, ". . .the Minister may, on behalf of the Crown — (a) Grant any licence to himself. . ." It also permits the Minister to buy, sell or otherwise deal in licences, and to carry on mining operations, either alone or jointly. It is clear that joint ventures are envisaged, but if Greig J is correct, they carry no anti-conflict obligations. Section 36(4) provides that a Crown licence confers the same rights, benefits and privileges a private person would acquire. But this does not seem to be an invitation to use provisions relating to private licences as a guideline: section 36(6) provides that the section is not to be construed to impose any obligation on the Crown, nor to render any provisions binding on the Crown unless they do so expressly.

Greig J noted only three provisions were expressed to bind the Crown: s 4 (no prospecting or mining without licence); s 33 (notice of entry to be given to occupiers of land); and s 39 (persons injuriously affected are entitled to compensation).

Greig J's reasoning must be read in light of some other provisions. By s 3, petroleum in the ground in its natural state is declared to be the Crown's property. By ss 5 and 12 the Crown may name its cut in any licence. The two sections by which the Minister may grant mining licences to others (ss 11 and 12) are expressed to be subject to the provisions of the Act.

Greig J said s 36's "wide unrestricted powers" were consistent with and a consequence of the reserved right of Crown ownership. (p 23) He found that in respect of the granting of a licence, there was a right to intervene at any stage, and to resume any mining rights or licences applied for and to maintain the overriding right of ownership of petroleum by the Crown. (p 23)

> The exercise of the powers under s 36 are left to the unfettered discretion of the Minister without any express or implied terms as to the principles or considerations which may be applicable in their exercise. This is the widest kind of Ministerial discretion which leaves, in the end, policy and general national interest as the underlying and overriding factors which the Minister must take into account.

But the widest kind of Ministerial discretion is not necessarily unfettered. Whereas with s 20 Greig J said it was an unfettered discretion and left it there, the pre-eminent s 36 power appears to be an unfettered discretion with some qualification — or should we say fetter:

> Of course the Minister cannot act in bad faith or for purposes which are not authorised by the Act, but those purposes are very wide and inevitably much must be left to the discretion of the Minister acting in accordance with policy set out by the Government in the national interest. (p 24)

Greig J held that the s 36 powers took priority over and were unimpeded by any of the considerations and discretions which applied to the Minister's other powers, and in particular the power to extend a licence.

Thus, whenever faced with an application in respect of a

petroleum mining licence (be it under s 11, 12 or 20) it is *necessary* for the Minister to use all the information at his disposal (whether received as a joint venturer or in his regulatory capacity; and whether confidential or open-file) to consider the find's potential. It is then *incumbent* upon the Minister to consider, in light of the general public interest and the purposes and powers of the Act, what best to do with the find and the discovery which at base (by virtue of s 3) belongs to the Crown. (p 36)

**The Minister's purpose and procedure**

Relying on the affidavit in which the Minister swore that "the ultimate question in my mind was how best to deal in the interest of the nation with what was clearly a valuable Crown owned resource," Greig J accepted that the national interest was at the heart of the Minister's decision, and was satisfied this was a principal if not primary consideration which the law required. Greig J entirely rejected accusations that the Minister was opportunistic, trafficking in the licence and seeking naked capital gain. (p 27)

As for procedure, Greig J dealt first with the Minister's use in his regulatory capacity of information received as a joint venturer. He found that in any event the same information would have been given to the Minister to support the extension application. (p 36) It would have been improper and unreasonable for the Minister not to use all information given to him as regulator of the industry.

Greig J drew support from the *Smith Kline & French* drug licensing decisions in England and New Zealand which have held that in determining whether to permit the marketing of a generic drug, health authorities may use all information in their possession, including confidential information provided by the drug's originator, who may suffer by the generic drug's expeditious entry onto the market. (p 39)

**Audi Alteram Partem**

Greig J held that the joint venture had no legitimate expectation of a hearing once the Minister had contemplated he might refuse the application. The Act gave no more than a legitimate expectation of fair consideration, which in Greig J's view had been satisfied. Astonishingly, a legitimate expectation as to outcome was not argued by the plaintiffs, despite the turnabout in policy. As such, evidence of representations by a junior Ministry officer stood in limbo because it went to substance and not procedure. In any event, Greig J said a junior officer's representations could not oblige the Minister to grant an extension when the application took place after a substantial and important new discovery which made circumstances different to those prevailing at the time of the representations. (p 48)

In other words, a promise to grant a licence upon a discovery cannot be binding if the discovery is unprecedented and very substantial, whatever that means.

**Fairness**

In *NZ Maori Council v A-G* [1987] 1 NZLR 641 Richardson J said in judicial review the:

> . . . result or outcome may itself be such as to compel the conclusion that the discretion was exercised unreasonably. . . (at 678).

Greig J acknowledged it was in a sense unfair that persons who have done all the work and made the discovery should not reap its benefits; all the more when Government policies to that point had been to divest of direct interests in petroleum resources for private enterprise to take over. However, far from using this unfairness to invalidate the decision, Greig J held that the unprecedented and very substantial size of the discovery "necessarily required" the Minister to reconsider existing policies, and in light of the discovery to apply the principles and purposes of the Act. (p 50) In deciding whether to grant himself a licence, the expenditure and effort of an explorer in making the discovery was "not a relevant consideration at all." (p 44)

Why a duty to reconsider policies rather than a mere entitlement? Perhaps it is to avoid precedents like *A-G for Hong Kong* [1983] 2 AC 629 and *Liverpool Corp* [1972] 2 QB 299, which have made binding on public authorities their published criteria for a certain outcome, unless the policy is incompatible with the due exercise of public duty. A duty to reconsider policies clearly means published policies are not binding. Crown undertakings count for nought, at the precise time they count most.

**Conclusion**

For an Act whose long title aim is to make better provision for the encouragement and regulation of mining for petroleum, *Petrocorp* is the antithesis of both. What incentive is there to prospect if your effort, expenditure and luck do not entitle you to the discovery?

Regulation is about information and control not unfettered discretion, which has more in common with the rule of kings than the rule of law.

A duty to reconsider policies, which heightens with the discovery's size, means this: the more promising the application, the lower its chance of success. *Res ipsa loquitur.* □

## Some Vacancy!

The following classified ad appeared recently in the *Texas Bar Journal.*

> Small, highly disorganised Dallas/Fort Worth law firm, having characteristically waited past the last minute, frantically seeks associate with two to four years of experience in general business representation and litigation.
>
> Successful applicant must be able to function with little or no guidance in extremely chaotic environment and be able to stand long periods of indecision punctuated by short bursts of frantic activity.
>
> Toleration to tobacco smoke required. Affinity for hard liquor recommended. Free parking. Only the stouthearted need apply.

# Resale Price Maintenance law and dealership problems: Recent trends

*By Warren Pengilley, Solicitor of Sydney, Australia*

*This paper was originally given in a New Zealand Law Society seminar. The author, who has distinguished academic credentials, was appointed Commissioner of the Australian Trade Practices Commission from 1975 to 1982 when he returned to private practice in Sydney. He is a Barrister and Solicitor of the High Court of New Zealand and is a former Visiting Overseas Fellow at Canterbury University. Previous articles of his have been published in* The New Zealand Law Journal. *In Australia retail price maintenance litigation has been at the forefront of the Trade Practices Commission's enforcement of legislation against restrictive trade practices. It is the author's view that the Australian experience has clear lessons for New Zealand practitioners as to the potential impact of the relevant New Zealand provisions in the Commerce Act 1986 when these become more widely known and enforced.*

**The "breaking" of Resale Price Maintenance in Australia**

The New Zealand Resale Price Maintenance ("RPM") law is based upon prior Australian legislation. In fact, the Australian law pre-dates the Trade Practices Act of 1974. Resale Price Maintenance prohibitions in Australia date from 1972. In view of this, and in view of Closer Economic Relations Treaty uniformity, it is of relevance to New Zealand to be informed about how it all started in Australia. This is probably the most basic knowledge to have if discussing RPM with an economist arguing for repeal of the law. Let us go back to the beginning and talk politics.

If one believes Australia's present Prime Minister, he, when in 1971 a director of the Australian Council of Trade Unions ("ACTU") Enterprise, Burkes Stores in Melbourne, was almost singularly responsible for "breaking" Resale Price Maintenance in Australia.

Dunlops had a policy of requiring retailers to mark up shirts 22½%. Burkes wanted to sell at a 15% mark up. Dunlops said to Burkes that, if this was done, Burkes would get no shirts. Burkes said to Dunlops that if Burkes got no shirts, Dunlops would not have anyone to make further shirts. Dunlops folded. RPM prohibitions were subsequently enacted.

It seems to the writer that the question of who "broke" Resale Price Maintenance in Australia is largely a matter of interpreting the facts in accordance with the usual objectivity generated by one's political affiliations. It is important, however, to go back to this early history. The initial history of RPM largely indicates why RPM prohibitions are supported politically on a bi-partisan basis in Australia. Thus it matters very little what economists might argue as being the economic rights and wrongs of the prohibition. The law is unlikely to change in Australia. If New Zealand continues to model its laws on those of Australia for CER uniformity, the law is unlikely to be changed in New Zealand either.

**The approach of this paper**

The basic thrust of RPM is to prevent a supplier stopping discounting. However, as we shall see, it is not quite as easy as that once the law tries to define its apparently simple objective.

Throughout this paper, we deal with the RPM position primarily from the supplier viewpoint as it is the supplier who is called upon to make decisions and it is at the supplier that the proscriptions in the legislation are directed. However, it is not difficult to make the transition to the retailer viewpoint if anyone wishes to do this.

**The market realities of RPM if legal**

Before engaging in a discussion of the RPM law, perhaps some basic facts in relation to Resale Price Maintenance should be stated. All too often, lawyers look at the arid law and completely forget the social and economic policies which give rise to the law. Therefore we should ask why a supplier wants to restrict the price below which a reseller may not sell his goods. One would think that a supplier would be delighted to have his reseller cut prices and thereby stimulate demand for his product. The world of commerce, however, is not quite so simple. In days when Resale Price Maintenance was legal, manufacturers stated their reasons for engaging in it were, amongst others, "to ensure profit protection for all retailers"; to prevent price advertising of promotional lines to the exclusion of "top of the line" models; and to ensure a responsible role in satisfying after-sales service, the theory being that discounters will not offer such service as it necessarily means that the product must be sold more expensively.

It is also of interest to know just how much RPM was, in fact, engaged in when the practice was legal. There have been various studies made of this throughout the 1950s and 60s. It appears to be a fairly common conclusion that somewhere in the order of 25-35% of goods sold were subject to Resale Price Maintenance restrictions when such practice was legal. These surveys vary from countries as diverse as Sweden, Great Britain and Australia. It should be

noted that Ron Bannerman, in his role as Commissioner of Trade Practices in Australia, in his very first report in 1968, commented that:

> Resale Price Maintenance operates very widely both on producer goods and consumer price goods. Indeed, there are instances of RPM extending into areas where until recently there was price competition.

Reports and inquiries in relation to RPM indicate that Resale Price Maintenance, when legal, was the norm in industries such as petrol, motor vehicles, motor accessories, cigars and tobacco products, beauty accessories and cosmetics, liquor, tyres, tubes, oil, confectionery, footwear, gramophones and accessories, records, domestic electrical equipment and appliances, photography equipment, sporting goods, TV and radio, furniture, cutlery and crockery, books and dental goods. This list is not complete but it is adequate to demonstrate that RPM was quite pervasive when permitted. Australian cases since 1972 show that RPM has, even when illegal there, been attempted in industries substantially in accordance with the above.

**The arguments "Pro" and "Con"**

The arguments for allowing RPM are that it prevents "loss leader" selling, assists retailer profitability; assists small business; and ensures "after sales" service. The arguments for illegalising RPM are:

1 That prices tend to be set at the high, rather than the low level, in order to keep all dealers happy. Thus prices tend to be those of the least efficient retailer.

2 That RPM is a means of suppressing competition at the retail level which is contrary to the principles espoused by the Trade Practices Act of Australia and the Commerce Act of New Zealand. In many cases, it can be alleged that RPM is merely a different method of achieving horizontal retail price fixing.

3 That the appropriate mark-up is selected by the supplier not the retailer. Thus it is a mark-up selection by a party not incurring the relevant market pressures and may or may not have anything to do with the actuality of business costs. In any event, the same mark-up for all retail entities cannot possibly take account of the different costs to each.

4 That "on the ground" the small business is not protected. Despite the theory of equal treatment, a manufacturer will not cut off a large retail discounting outlet on complaint of a small retail outlet. This is for the quite pragmatic reason that the large outlet is too important to the manufacturer. On the other hand a manufacturer may quite willingly curry favour with a large outlet by cutting off supplies to a small outlet if complaint is made about such outlet's discounting. There is a good deal of support in the Australian case law for the view that this is how RPM sanctions operate "on the ground" regardless of the theory that all are treated equally.

**Risk taking**

It is important in commercial advice that lawyers look at "risk taking". This involves an evaluation of the commercial possibilities of a client being taken to Court by a competitor, by a dealer or by governmental enforcement authorities and what will happen if a client is so taken to Court. On these questions, there are some quite pragmatic observations which can be made. These are:

1 RPM is unlike horizontal arrangements in the sense that in horizontal arrangements the common interest is served by all parties remaining silent – the so-called conspiracy of the smoke filled room. In RPM, a victimised party who is, say, cut off with supplies has no interest whatsoever in keeping quiet about it.

2 The offence of RPM is *per se*. It does not require the complexities of competition assessments. Hence a successful case requires only proof of the facts. This makes proceedings much easier than in the case of most horizontal arrangements and most exclusive dealing arrangements in which proof of anti-competitive effect is necessary. RPM cases, being easier ones than most other restrictive trade practices cases, have great appeal to the governmental enforcers of the Act. Cases can be mounted on the "hit list" principle even if such cases fall quite outside pious policy statements and even though they may not serve any overall pro-competitive ends.

3 Although the writer is not aware in detail of the views of the New Zealand Commerce Commission, it is certainly the case that the Australian Trade Practices Commission is most anxious to enforce the law in the RPM area. In a study which the writer did in 1984 (but which has not been updated), an analysis was made of the Commission's litigation record under the Restrictive Trade Practices provisions of the Australian Trade Practices Act. As far as the writer is aware, no other study on this point has been conducted in Australia. The writer's analysis showed that, up to June 1983, close on 45% of Commission litigation under restrictive Trade Practices provisions of the Australian Trade Practices Act related to RPM infringements. Nothing since then would appear to vary this statistic and, indeed, the present percentage may be even higher than that at that time.

4 Pecuniary penalties for breach of the prohibition are not small. Section 80 of the Commerce Act provides a maximum penalty of $NZ300,000 in the case of a body corporate in breach and $NZ100,000 in the case of an individual in breach. Penalties can be imposed upon individuals who aid and abet breaches of the legislation. Despite the size of these fines, the onus of proof on the Commerce Commission, in bringing actions for breach is the civil onus only. (Commerce Act, s 80(3))

Penalties imposed by the

Federal Court of Australia for RPM breaches have been far from small. For example in *The Bamix Case* (1985) ATPR para 40-534 the Court imposed a pecuniary penalty of $AUS132,000 plus costs. In the latest case at the time of writing this paper *General Corporation Japan* (1989) ATPR para 40-922 a penalty of $AUS130,000 was imposed on the corporation and a penalty of $AUS26,000 personally imposed on the Corporation's South Australian State Manager.

5 Important also is the fact that, because there is frequently a victimised party who has had supplies cut off and who is thus forced out of business, Australian Federal Court Judges have been quick to see "blood on the floor" in inflicting penalties. In the writer's belief, Judges are fairly strong on morality whatever one may believe about their ability in the field of economics. Thus the sight of victimisation has led to judicial characterisation of RPM in one case, for example, as "ruthless" [*TPC v Pye Industries* (1978) ATPR para 40-089]. It can be but noted that the ultimate sin as perceived by most economists and anti-trust practitioners – that is, horizontal price fixing – has, by way of contrast, sometimes failed to excite much outright condemnation from the Federal Court and, indeed, has brought forth on occasions some not inconsiderable judicial utterances of sympathy (see, for example *TPC v Culley* (1983) ATPR para 40-399)

6 Damages can be awarded and this is a remedy which can and is frequently used. In particular, if there has been Commission litigation, the question of "coat tail" actions is very real. The law reports do not accurately reflect the RPM civil litigation record as many damages claims have been settled after Commission proceedings. Further, in view of the high penalties extracted in Commission proceedings, the threat to run to the Commission is a very strong negotiating weapon in relation to damages claims and this threat, when pressed, tends to encourage out of Court settlements which can be quite favourable to retailers.

For all of the above reasons, RPM activity must be regarded as high risk. In advising a client, therefore, a totally different profile must be taken in RPM from that taken in, say, horizontal recommended price arrangements, which is a far different proposition from RPM in risk taking terms.

No doubt, this paper to date has pontificated a good deal on the social, economic and risk taking factors in relation to RPM. This is done consciously because all too often lawyers engage in a parsing and analysis of statutes without realising the background static against which such statutes must be interpreted. In particular, it is important that lawyers understand the risk taking elements which have been elaborated. Only if these elements are understood can good commercial advice be given.

We now turn to the law on the subject.

**Some general observations on the RPM provisions**

It is not intended here to parse and analyse the basic legislation in detail. The reader can do this as competently as can the writer. What is desired is to discuss the general principles applicable to the legislation. These general principles are:

1 The prohibition involves the doing of an Act and *it catches unilateral action as well as action by agreement.*

2 The legislation prohibits various conduct which is aimed at thwarting sales by a supplied party below the supplier's "*specified price*". The term "specified price" is of crucial importance in the operation of the legislation and this will be dealt with in greater detail later in this paper.

3 The legislation prohibits various conduct preventing discounting *below* a specified price. It does not catch conduct involving *the setting of, or the enforcement of, a maximum price above which sales may not be made.*

4 The conduct prohibited is a resale below a specified price of *the goods* supplied. It is therefore of importance to note that the legislation does not operate if the on-going sale by the supplied party is of goods which have been transformed, incorporated into other goods, treated, manufactured, or otherwise substantially varied from the goods supplied or where the goods are resupplied to another party in combination with other goods or services.

5 The legislation prohibits a supplier preventing a re-seller *advertising* at below a specified price. This is achieved in New Zealand by s 37(5) of the Commerce Act whereby the word "sale" is defined as including "advertise for sale, display for sale, and offer for sale". In this regard, the New Zealand Statutory Draftsperson is to be commended for achieving in 26 words what the Australian Draftsperson has taken some 204 words to outline in s 96(7) of the Australian Trade Practices Act.

6 "Recommended" prices are permitted [Commerce Act s 39]. However such recommendations must, in fact, be strictly recommendations and nothing else. More is said on this point later in this paper.

7 Agency transactions are not caught as there is no "supply" in an agency situation. There is no "gift, sale, exchange, lease, hire or hire purchase" within the definition of "supply" in s 2 of the Commerce Act.

**What is a "specified price"?**

As has been previously stated, the concept of a specified price is of vital importance. If there is no specified price, then there can be no Resale Price Maintenance. The classic exposition of this matter in Australia is in *Peter Williamson Pty Ltd v Capitol Motors* (1982) ATPR para 40-291 in which Peter Williamson was terminated because he was, as the Court found, "the worst performer of the Sydney Metropolitan Dealers". Peter Williamson alleged that he was

terminated because of his discounting activities. There was a "recommended" price list in existence but it was demonstrated that this was enforced in any way and was not therefore a "specified" price.

In order for a price to be "specified", it must be able to be defined. There are various formulae in the Act and a price may be a "go price" or a price within a range (Commerce Act ss 37(4)(b); 37(4)(c); 38(2)). A "recommended" price list may also be a "specified price", as may a catalogue of prices. *In the Bata Shoes Case* ((1980) ATPR para 40-161), the Federal Court stated that:

> The fact that the specification of a price is couched in terms of a recommendation does not prevent it from being a price specified by the supplier.

It is a question of fact in this event whether a recommended price is, in reality, a specified price. In *Peter Williamson v Capitol Motors*, Capitol Motors was quite fortunate in being able to establish that it did not enforce its recommended prices in any manner whatsoever.

In the *Ron Hodgson Case* (1980) ATPR para 40-143, however, the supplier was not quite so lucky. Mr Justice Franki of the Federal Court of Australia concluded in this case that he was "satisfied on the evidence (that the) respondent had adequate commercial reasons to terminate the applicant's franchise when it did". However, His Honour also found that there was a recommended price list which was enforced by Westco Motors and therefore that Ron Hodgson was also terminated for a reason which included, as a substantial and operative reason, the reason that the applicant had sold or was likely to sell Mazda vehicles at a price less than that specified by Westco. Perhaps the cynic may conclude from this case that the best thing a dealer with a bad track record can do is to commence discounting and hope the supplier will discipline him for doing so. If then terminated, the dealer can seek the assistance of ss 37 or 38 of the Commerce Act. The *Ron Hodgson* decision certainly does show that "disciplining" discounters does not assist a supplier who wishes to terminate one of them. Furthermore, the decision does show the inherent difficulty in having a "recommended" price list at all.

The only attitude which can be taken to "recommendations" is to take seriously the view that:

> A "recommendation" . . . implies a freedom to follow or not to follow, to accept or to reject the recommendation according to one's own discretion. (*Bertram v Clemons* (1955) LMD para 941 – This case discusses the applicable principle but is not a Trade Practices Case)

It is generally thought that ss 37 and 38 of the Commerce Act protect "discounters". This is not the case at all in law. They prevent inhibiting a party from selling below "a specified price". Thus if there is no specified price, and particularly if there is no recommended price list, a supplier may terminate a discounter at will without breaching the Resale Price Maintenance prohibitions. When such terminated discounter complains, the supplier may politely smile at him and advise that the reason for terminating him is because he is a "dog-eat-dog pricer", a "give-away pricer", a "disrupter of the market", a "low-baller" (a favourite American term), or "a dirty discounter". These are expressions of philosophical attitude in relation to the reseller's activity. Making known a philosophical attitude on price matters is not specifying a price. Similarly, the supplier may ascend to the stratosphere of adjectivally ridden invective about a dealer's discounting activities. But abuse, no matter now colourfully expressed, is not the specifying of a price either. It must be stressed that it is a far different thing to make these statements when there is no recommended retail price list from making them when there is such a list.

It must, however, be noted that other sections of the Commerce Act may be breached in dealer termination cases. An interesting case in Australia on this point was *Mark Lyons v Bursill Sportsgear* (1987) ATPR para 40-809 where Bursill terminated a ski boot retailer who was discounting. There was no specified price involved and so the retailer could not sue under the Australian provisions equivalent to ss 37 and 38 of the Commerce Act. The retailer was, however, successful under the Australian provision akin to s 36 of the Commerce Act in that the supplier had misused its market power by terminating the retailer. The case illustrates the point made that other sections of the Commerce Act have also to be considered in dealer termination decisions. It should be added, however, that it is unlikely on the facts of *Mark Lyons v Bursill* that the same result would have been reached in New Zealand. The New Zealand Commerce Act in s 36 operates only when a party has a dominant position in a market. Section 46 of the Australian Trade Practices Act operates if a party has a "substantial degree of power in a market". In *Mark Lyons v Bursill*, a 30% market share was, in the circumstances, adequate to come within the Australian s 46. It is doubtful if such a market share would be adequate to come within s 36 of the New Zealand legislation.

**Non-supply "For the reason that" sales are likely to be engaged in at below a specified price**

As a broad "in principle" statement, a supplier can deal with whomsoever he likes and this freedom of action is not affected by competition law. Nonetheless, a supplier who refuses to supply "for the reason that" the supplied party will engage in sales below a specified price breaches the Act. The reason does not have to be the dominant reason so long as it is a substantial reason – see s 2(5)(b) of the Commerce Act. It was held in the *Mikasa Case* (1972) 127 CLR 617 by the High Court of Australia that the Resale Price Maintenance prohibitions do not operate only for the benefit of parties already receiving supply but they also operate for the benefit of prospective purchasers. Again, therefore, in practical terms, if a supplier does not have a recommended price list and a discounter requests supply, the supplier can politely smile at the discounter and advise him that he is a "dirty discounter" and he does not wish to supply for this reason. In the event of having a recommended price list, things are far more difficult. Indeed in *Mikasa*, the recommended price list was held to be the equivalent of a specified price list. Festival stores,

a discounter, was entitled to supplies as Mikasa was withholding goods for the reason that Festival stores was likely to undersell the recommended price list.

**Some short observations on recommended price lists and refusal of supply**

From what has been stated, it should be obvious that the writer's belief is that having a recommended price list can but rarely be in a supplier's best interests – at least in a legal sense. Commercially, a supplier has a great deal of freedom to trade with whomsoever he wishes if there is no recommended price list. This freedom is very much cut down if there is a recommended price list in existence. Recommended retail price lists do tend to hang on in various industries with the obduracy of paspalum. It is the writer's belief that they are, from a legal viewpoint, somewhat dangerous. The existence of a recommended price list clearly does inhibit the freedom of a supplier to cut off dealers or, alternatively, to decline to supply future dealers.

If recommended price lists are retained, a supplier must clearly comprehend that the lists are being retained for "marketing reasons" and that they do have legal risks.

The importance of the necessity to specify a price is shown in the *Peter Williamson* case and *The Golden Fleece* case (dealt with in part XI of this paper in relation to dealer subsidy schemes).

**"Recommended" prices and "enforcing" specified prices**

It is not intended to go through the detailed case law as to what constitutes conduct "enforcing" a specified price. One good example in Australia is that of the *Mobil Oil* case (1984) ATPR para 40-482. Mobil was found guilty of RPM because its representative said, in the context of a specified price, the following:

> You are destabilising the market by that drop.
>
> I want the price up.
>
> You will get no help or support from me until the price is back up.
>
> I would point out to you strongly, Bob, that you will lose any support or help from me if you continue to keep the price at 37.2.

In the Australian *Bamix* case (1985) ATPR para 40-534, Bamix was found guilty of Resale Price Maintenance, and a penalty of $AUS132,000 plus costs extracted from it for this offence, because its representative had said:

> It is not possible to sell for less than $85.00. The structure of things must have a point of direct demonstration to keep the price at a consistent level – always upward, not decreasing or discounted.
>
> The retail prices as specified have to be strictly adhered to. This is to ensure uniformity of price throughout Australia.

When the retailer protested to Bamix that he was being asked to sign something which was illegal under the Trade Practices Act because it constituted Resale Price Maintenance, the Bamix representative said to him "you sign it or else!".

The above examples from *Mobil Oil* and *Bamix* demonstrate cases of actual or threatened coercion but it is clear that such a degree of coercion is not required. In order to breach the Act, only an "inducement" not to sell below a specified price has to be found. A study of the New South Wales case of *R v Bodsworth* (1968) 2 NSWR 132 as to what constitutes an "inducement" is rewarding. The Court in that case said that "inducement" may merely be persuasion aimed at producing some willing action and inducing conduct did not necessarily involve compulsion aimed at producing some unwilling action by some form of force or fear of some form of force. It is clear that a number of statements which a supplier may regard as mere "exhortations" may in fact constitute "inducements". A major advantage of not having a price list of any sort is to protect a supplier if he makes exhortatory statements because there will not be in these circumstances a "specified price" – a prerequisite to a triggering of s 37 and s 38 of the Commerce Act.

In fact in the *Heating Centre* case (1986) ATPR para 40-673, the Federal Court of Australia held that "mere persuasion, with no promise or threat may well be an attempt to induce" Resale Price Maintenance.

**Dealer subsidisation schemes**

Another matter which has come under Court scrutiny in Australia is dealer subsidisation schemes. The two most relevant cases are *TPC v Mobil* (above) decided by the Federal Court of Australia in August 1984 and *TPC v Golden Fleece* (1985) ATPR para 40-528 decided by the Federal Court in October 1984. In the *Mobil* case, Mobil had a dealer subsidisation scheme to enable dealers to meet competition at a certain price. Some of the statements made by the Mobil representative who was clearly involved in the tactic of "walking up the market" (as it is referred to in the Australian petrol industry) have been previously mentioned. He wanted to get the price up and used the carrot and stick of the subsidy as a method of doing this. One Mr Quayle, whose relationships with Mobil had never been totally amicable and who operated a Mobil site in a somewhat inconclusive settlement rejoicing in the name of "Dog Swamp", proved difficult in this regard and as a result of his complaint the Trade Practices Commission took action against Mobil. In *Golden Fleece*, whilst the Golden Fleece representative clearly wanted the same result as did the Mobil representative, the subsidy was not used as a threat to achieve this result. There were various discussions with the discounting dealer, one Mr Cullen, where terms such as "his risky situation" were mentioned. It was also pointed out that Mr Cullen was getting "a very good price" and that he should not "sell at such a cheap price". However, there was no specifiction of price but just general philosophical observations on allegedly "proper" trading conduct which should be engaged in by Golden Fleece retailers. In due course, Cullen was terminated by Golden Fleece in accordance with the terms of the arrangement he had with them. It was held that there was no specified price and thus Golden Fleece had not engaged in RPM.

The lessons from these two cases are fairly clear and can be stated as follows:

1 Recommended retail price lists are always dangerous. However, it appears in the petrol industry that no-one speaks in any other terms and it is probably unlikely that petrol companies will abolish references to retail prices for this reason. It should be pointed out, of course, that if Mobil had not had any specified price it could happily have terminated Mr Quayle on his "Dog Swamp" site candidly giving as the reason that he was "a give away pricer" and that would have been the end of the matter.

2 If there is a dealer subsidy policy, it should be clearly articulated and it should clearly state that the dealer can resell at any price he wishes. Any termination of price subsidies and the basis on which such termination can exist should also be clearly laid down. If it is possible, then the phasing in of a subsidy for a specified period of time is desirable. Of course, this cannot happen in all industries because of rapidly fluctuating prices but where it can be done, it should be. It is very difficult to allege an RPM illegality if a subsidy is given only for a specific period and is withdrawn because the period expires. If the basis of withdrawing a subsidy is that such subsidy is no longer necessary to meet competition then the supplier should have objective evidence to verify its decision to withdraw the subsidy. One point is clear. This is that a price subsidy cannot be used as a weapon to obtain adherence to specified retail prices. Further, a supplier engaging in subsidising its dealers may have to sit by and watch with a sense of benign bewilderment – and no more – if the reseller uses such subsidy to discount prices contrary to the express wishes of the subsidising supplier.

3 The difference in result between the *Mobil* case and the *Golden Fleece* case may well be based on whom the Court believes on the day. Frequently there will be little corroborative material to back up the evidence given. The whole area of supplier-dealer conversations is frequently one of innuendo and emotion. Often statements are made by sales representatives who do not realise the wider ramifications of what they say. Put simply, Mobil lost because Mr Quayle of Dog Swamp was believed. Golden Fleece won basically because Mr Cullen's evidence that Golden Fleece had told him to "bring your prices up or you won't get deliveries" was not believed by the Court.

**Dealer conspiracies with elements of supplier enforcement**

Lawyers around the world should, I believe, all take note of the United States Supreme Court decision in *Monsanto* 1984 – 1 Trade Cases para 65906. This is not directly relevant to Resale Price Maintenance but in a paper such as this one would be remiss if one did not draw to the attention of the reader to the possibility that a supplier can become involved in a conspiracy with dealers to cut off a specific dealer. Generally speaking, the cut off of supply will be for anticompetitive activities, ie the cut off dealer is discounting. Whilst it has been consistently said throughout this paper that one does not infringe the prohibitions against Resale Price Maintenance if one has no recommended price list and subsequently cuts off a party from supplies because he is a "dirty discounter", this is not the law should the supplier become involved in a conspiracy with dealers to cut off a specific party. In other words, what one can do unilaterally, one cannot do by agreement. The possibility of dealer induced collective boycotts or price arrangements are matters which, in the writer's view, have not been adequately publicised in either Australia or New Zealand and, therefore, are frequently overlooked. In *Monsanto*, the United States Supreme Court held that, whilst complaints about particular discounters by other discounters which are made to a supplier are "natural" and from the manufacturer's perspective "unavoidable", a manufacturer or supplier can nonetheless infringe competition legislation in the event that he takes certain action. The United States Supreme Court found difficulty expressing the conflicting viewpoints in that a manufacturer or supplier has an interest in an efficient distribution system, must co-ordinate the activities of its dealers and must be assured that its product will reach the consumer persuasively and effectively. Thus, a manufacturer/supplier cannot be constrained from acting solely because the information upon which it acts originates as a price complaint. There must be "something more". This "something more" must be evidence that tends to exclude the possibility that the manufacturer and the non-terminated distributors were acting independently. There has to be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and the non-terminated dealers "had a conscious commitment to a common scheme designed to achieve an unlawful objective" or "a unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement". It is an unlawful arrangement for dealers and a manufacturer to act in concert to boycott a discounting dealer.

When an existing dealer enlists the aid of a manufacturer to choke off one of the dealer's competitors, although the agreement to be invoked is vertical in nature (manufacturer-dealer), the restraint thereby achieved is horizontal in its impact (dealer-dealer) as it is an attack by one dealer on another. Both price fixing and boycotting are banned *per se* under the Commerce Act. A dealer organised collective boycott or price fixing arrangement is no more favoured than any other type of collective boycott or price fixing arrangement. Neither is a dealer boycott or price fixing arrangement any more blessed because its enforcement mechanism involves the manufacturer or supplier rather than the dealers themselves.

In the *Monsanto* case the Court held that Monsanto infringed the equivalent of s 29 of the Commerce Act in that it had actively tried to "get the market place in order" and had stated that it would make "every effort . . . . to maintain a minimum market price level". As the Court found, there was:

> An agreement or understanding that distributors would maintain

> prices, and Monsanto would not undercut those prices on the retail level and would terminate competitors who sold at prices below those of complying distributors; these were "the rules of the game".

Therefore, if a supplier wishes to terminate the "dirty discounter", this should be done by unilateral action and not by arrangement, express or implied, involving dealers. Entirely different rules apply to arrangements involving more than one party from those which apply to unilateral conduct.

**"The Chicago School of Economics" and RPM in the United States**

A lot of recent American thought on Resale Price Maintenance has been expressed by the so called "Chicago School of Economics". This thought has had a considerable influence in making the concept of legal Resale Price Maintenance somewhat respectable in recent times. The Chicago School argues that price restrictions on Resale are in effect no different to other restraints of a territorial, customer or product nature and that, as such other restraints are tested by a competition test, so also should Resale Price Maintenance be so tested.

This writer may well be somewhat pre-Cambrian and unsophisticated in his economic analysis, but he tends to regard price restraints as quite different to other vertical restraints. However, on one smog-ridden morning (October 16, 1983) when the writer passed through LA Airport, *The Los Angeles Herald Examiner* reported US Anti-trust Attorney-General Baxter as saying that there was "no reason why consenting adults cannot agree to consult with each other on the prices they will charge for goods". Baxter in fact filed a brief on behalf of the Justice Department in the *Monsanto* case urging the Supreme Court to review its *per se* ban in relation to conspiracies to fix Resale Prices. The Court did not do this and indeed Baxter's attitude was greeted by a United States Senate resolution that he "cease propounding arguments in Court designed to weaken the law prohibiting vertical price restraints". Nonetheless, the American scene is adding a new respectability to the view that RPM should be subject to a competition test.

**The future of RPM in Australia and New Zealand**

The writer does not believe there is a strong general pressure to weaken the Australian RPM law and, given this, it is probably also unlikely that the New Zealand law will be substantially changed. Any amendment to make RPM subject to a competititon test would, in this writer's view, be de facto legalisation of the practice. The writer agrees with the views expressed in the Australian Trade Practices Commission's first (1975) Annual Report, to which he was a signatory as a member of the Commission, that:

> priorities begin with price .... vertical price fixing has been illegal (since 1972) .... there should be no backsliding in these fundamental areas.

The writer believes that the history of RPM, the bipartisan support of its illegalisation which arose from the 1971 Burkes/Dunlops situation and the Australian experience of the law in actual operation will ensure the retention of strong RPM prohibitions in Australia. For himself, he believes this to be a quite proper legislative approach for both Australia and New Zealand.

## Attachment "A"

**A supplier's Resale price maintenance ("RPM") checklist**

**DO**

1 Consider the desirability of abolishing "recommended" price lists. "Recommended" prices can easily become "specified" prices and they inhibit a supplier's freedom to reject supply or terminate existing supply.

2 Educate staff about Resale Price Maintenance prohibitions. It is staff at the workforce (eg salespersons) who usually involve the company in RPM infringements.

3 Carefully lay down the terms of any dealer subsidisation scheme and ensure that it is not used as a tool in preventing sales below specified or recommended Resale prices.

**DON'T**

1 Use a recommended price list in a manner which makes it a "specified price".

2 Extol the virtues of any minimum advertising or resale prices.

3 Restrict minimum price advertising.

4 Make threats or in any way disadvantage a reseller because of his advertising or selling below a specified or recommended price.

5 Offer rewards or inducements to a reseller for advertising or selling above or at a specified or recommended price.

6 Base the withdrawal of any dealer subsidy on the fact that such dealer has sold or advertised below a specified or recommended price.

7 Become involved in any agreements or arrangements with competitors or dealers to "discipline" any person. Any such action taken must be taken as a result of a unilateral decision and must otherwise be legal under the Commerce Act.

**IT IS PERMISSIBLE TO**

1 Have "recommended" prices so long as they remain strictly "recommended".

2 Fix and enforce a maximum price.

**REMEMBER**

1 RPM can be committed if the conduct is for a *substantial reason* that a party is selling or advertising below a minimum price. *The reason need not be the sole reason.*

2 There are other sections of the Commerce Act which apply to dealer terminations and which may be relevant.

3 The RPM provisions apply in favour of a party requesting supply as well as in favour of a party already being supplied.

4 Prices can be ascertained by comparisons or formulae and

do not have to be specified in dollar and cents terms.

5 Dealer subsidy programmes should be clearly spelt out as to when a subsidy may be withdrawn. Withdrawal of a subsidy cannot be related to a supplied entity advertising or selling below a specified or recommended price.

6 The result of cases will depend upon who is believed in Court. Frequently there will be little corroborative material to back up the evidence. Mostly evidence is of conversations and these are frequently made in emotional circumstances with innuendo meanings to words. If there is any possibility of an RPM action eventuating from any particular discussion, staff [presuming they are themselves innocent of any possible RPM breach] should be encouraged to make a contemporaneous diary entry of the conversation so that they can, if necessary, refresh their memories from such notes should subsequent proceedings eventuate.

**THE LEGISLATION DOES NOT APPLY**

1 To the true agency agreements (ie agency agreements in law not arrangements colloquially called "agency").

2 To a situation where there is no specified or recommended price.

3 To the specification and enforcement of maximum prices.

4 Where the goods supplied are transformed, treated, manufactured or otherwise substantially varied by the supplied party before being on-sold.

### Attachment "B"

**Glossary of terms of description of price competitive entities (Discounters)**

It is difficult to find too many terms of approbation of discounters. Generally speaking, cases, press reports and trade journals speak of discounters with distaste.

If you like a discounter, you may call him:

an efficient operator;
a good bargainer and a person who gives a "good deal";
a price competitor; or
a vigorous competitor.

The following terms descriptive of discounters in less than approving terms have been encountered by the author in various contexts over a period of about 15 years:

"backyarder";
baiter of customers;
cheap importer;
causer of chaos;
causer of rabble
causer of "merchant biting merchant";
cutter of standards;
dirty discounter;
disrupter of the market (or of the orderly market as the case may be);
"dog eat dog" pricer;
dumper;
"fly by nighter";
"give away" pricer;
irrational operator;
"lowballer";
"mere peddler" of goods;
Ned Kelly operator;
non believer in "fair prices";
non believer in "reasonable pricing";
non provider of services;
person who should be "dealt with";
person who should be "disciplined";
predatory pricer;
resorter to "any tactics";
resorter to subterfuge;
rotten discounter;
ruthless pricer;
stubborn and resistant pricer;
underhand operator;
unethical operator;
unprofessional trader;
unrealistic pricer;
unscrupulous pricer;
weasel on his mates.

No doubt there are many additional which can be made to this list. Your author welcomes contributions! □

# Increased jurisdiction of the District Court

*On 11 January 1990 the office of the Minister of Justice Hon W Jeffries issued the following press statement which underlines the increasing importance of the District Courts in the judicial system of New Zealand.*

High Court workloads are expected to ease following the increase in levels of District Court civil jurisdiction which came into force late last year Justice Minister Bill Jeffries said today.

"Amendments to the District Courts Act lift the level of civil claims that can be heard in the District Court from $12,000 to $50,000", said Mr Jeffries. "It will mean a large number of cases that would have had to await a High Court hearing can now be resolved in the District Court."

Mr Jeffries said the increase was a natural and realistic step to be taken. It would bring the general civil jurisdiction of the two Courts more into balance and recognise the effects of inflation in recent years.

"The previous level of $12,000 was set in 1980 when it was lifted from $3,000, which in turn had been raised from $2,000 away back in 1972. So, in terms of both practicality and time, the latest increase is quite appropriate," said Mr Jeffries.

Other changes to the jurisdiction of the District Court include actions for the recovery of land where the rent does not exceed $25,000 (up from $6,000), or, if no rent is payable, where the value of the land does not exceed $200,000 (up from $50,000).

Actions in the District Court exceeding $12,000 (formerly $3,000) can now be referred to the High Court on application of defendants. Persons under 20 years of age can now sue for wages up to $50,000 (up from $12,000).

Mr Jeffries said these were all positive moves in the jurisdiction of the District Court.

"They should lead to quicker resolution of civil Court actions and a better sharing of the workloads between the Courts. That will help in achieving our overriding objective of improving the administration of justice.

"The Government's aim is a quality justice system. This is another step towards that goal," said Mr Jeffries. □

# The potential of the New Zealand Bill of Rights

*P T Rishworth, Lecturer in Law, University of Auckland*

*What difference will the Bill of Rights make if it is enacted, as proposed, as an ordinary statute rather than being entrenched as "supreme law"? In this article it is argued that the Bill may have more significance in New Zealand law and legal practice than is commonly thought.*

**Introduction**

The Labour Government's recently introduced New Zealand Bill of Rights Bill is presently before the Justice and Law Reform Select Committee. If it is ultimately enacted, the New Zealand Bill of Rights Act will be an ordinary statute and will not be entrenched as "supreme law". In this respect the Government has followed the recommendation of the Select Committee which last year reported on the White Paper proposal for a Bill of Rights. The Committee believed that public opinion was against the White Paper proposal because it would entitle the judiciary to strike down legislation. The latest proposed Bill of Rights is designed so that it does not allow such "judicial supremacy". The Prime Minister claims, therefore, that the new proposal "is in line with public opinion", although this does not necessarily follow from the fact that public opinion was against the first proposal. It is not yet known what the public thinks of ordinary bills of rights. Be that as it may, it now seems likely that there will be a Bill of Rights in this watered-down form. Many people assume such a Bill will not have much impact. In this article I argue that this assumption is unjustified. Bills of Rights in other countries have many applications other than striking down legislation. While that particular application may be denied to our Judges by the new proposal, there are nevertheless some areas where the new Bill could make a real difference to existing law and practice – principally in criminal procedure. The proposed Bill of Rights has the potential to be much more significant to legal practice than its description as an "ordinary statute" would suggest. In this article I will consider the potential effect of the New Zealand Bill of Rights in three areas: (1) its effect on legislation, (2) its effect on the common law, and (3) its effect on administrative acts by public authorities.

This article proceeds on the assumption that the Bill will be enacted. I am not intending to contribute to the debate about whether the Bill of Rights is needed or is a good thing, nor about whether the Treaty of Waitangi should be in it. Nor will I descend into detail about the specific content of rights created by the Bill. My purpose is simply to outline some possibilities as to how lawyers will be able to invoke the Bill of Rights for clients if enacted.

**1 The effect of the Bill on legislation passed by Parliament**

I deal here with cases where litigants claim that their rights have been unjustifiably infringed by legislation. To use an example from Canada, it may be that a person seeks to defend a Sunday trading prosecution by arguing that the legislation creating the offence infringes his or her freedom of religion because it amounts to state enforced recognition of the Christian Sabbath. Faced with such a claim, the Court will first need to determine whether a right in the Bill has been infringed at all. If so, the Court must go on to consider, under cl 4, whether or not the infringement is a "reasonable limitation" on the right, is "prescribed by law" and is "demonstrably justifiable in a free and democratic society". There is a host of issues tied up in these steps in the inquiry. For the purposes of this article, however, when I speak of statutes infringing rights I shall be assuming an infringement which is not saved by cl 4. In fact, of course, many alleged breaches may be resolved at this stage of the inquiry. But my present concern is with the remedies that the Bill of Rights may provide for *proven* breaches of its provisions.

Where it is legislation that infringes the right, the Bill of Rights will be able to be invoked by a defendant in aid of his or her defence by reason of cl 3. This provides:

> **3 Application** – This Bill of Rights applies to acts done –
> (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

Legislation is an "act done" by the legislative branch. And, although cl 3 is not clear on this point, I think the intention is that the Bill will apply to existing legislation as well as to legislation passed after the Bill is enacted. But what is the Bill's effect on legislation?

*The effect on interpretation: choosing between two or more*

*possible meanings of a statute*

The explanatory note to the Bill makes it plain that the Bill is not intended to confer power upon Judges to strike down provisions in statutes which are inconsistent with rights in the Bill. The Bill is only intended to affect the interpretation of statutes. The clause designed to give effect to this intention is cl 5:

> **5 Interpretation consistent with the Bill of Rights to be preferred** —
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

This clause seems to be addressed to only one type of interpretation problem which Courts face: cases where there are, linguistically, two or more possible meanings of a statute. At present, the task of a Court in such cases is to adopt the meaning which will best give effect to the legislators' intention. In deciding what the intention is, the Courts must look at the words in their context, as well as to the social and legal framework into which the words were enacted, and at such other sources of legislative intent (eg, now, *Hansard*) as they are allowed by law to consult. The question is whether cl 5 will require a different approach.

On first impression, it might be thought that cl 5 merely prescribes a special way to choose between several possible meanings in those (rare?) cases where all but one meaning of a statute will infringe rights. Clause 5 would require that a Court must, *qua* machine rather than as a searcher for the legislative intent, "prefer" that one meaning. But this cannot be the intended effect of clause 5, for two good reasons. First, it would render the Bill of Rights scope as a safeguard for rights rather haphazard and arbitrary. It would mean that the ability of Courts to uphold rights would depend upon whether the language fortuitously throws up an ambiguity which the Courts can exploit. If it does, then cl 5 says the Courts are to "prefer" such a meaning, whether or not it carries out Parliament's intention. If that is correct it would require Courts to ascribe meanings to statutes which Parliament did not intend. Or at the very least, to give serious thought to so doing — if that is what it means to "prefer" such a meaning. I cannot believe this was the aim of cl 5. The second reason why cl 5 cannot require such a mechanical approach is that it is expressly contemplated that the new Bill of Rights will not prevent future Parliaments from legislating in denial of the rights. Given, therefore, that a future Parliament could quite legally pass laws intending to infringe rights, it would make a mockery of this aim if Courts were required by cl 5 to exploit any accidental ambiguities so as to reach an interpretation other than the intended one.

So what is the effect of cl 5? I believe that the intent of cl 5 is revealed if one treats the word "properly" as implicit after the word "can" so that it reads "wherever an enactment can *properly* be given a meaning that is consistent with the rights" etc. This makes it plain that the Courts must be satisfied that the meaning they adopt is one which it is proper to adopt under general interpretation principles — that is, the meaning which carries out the legislators' intent. Seen in this way, cl 5 does not represent a radical departure from the existing approach to interpretation. Even at present, the Courts are rightly slow to ascribe to Parliament the intention to abridge fundamental rights and freedoms in the absence of clear and unmistakeable language. But language can of course be clear and unmistakeable even if it contains ambiguity, and my point is that cl 5 does not and ought not require Courts to exploit that ambiguity to reach a meaning which application of the general principles of interpretation reveals to be unintended. (As an example of ambiguity where the meaning and intent is clear, consider the sign "Dogs must be carried on escalators".)

My conclusion is that cl 5 is a statutory articulation of what has always been an interpretation principle. Parliament is not lightly to be assumed to intend to interfere with fundamental rights and freedoms such as appear in bills of rights. But for reasons developed in the next section of this article, it would be a mistake to conclude that cl 5's effect will be negligible.

*Reading down legislation so as to impose limits on plain words*

By "reading down", I mean interpreting legislation so as to depart from its clear words by implying into it words which are necessary if the legislation is to operate without infringing rights. I believe that cl 5 can properly be taken to justify this approach to interpretation, where it is necessary to do so to uphold a right guaranteed by the Bill, and where the legislative purpose of the enactment is not frustrated by so doing. This differs from simply preferring one possible interpretation of the words to another, since the effect of reading down is to imply limitations on the scope of the statute that are simply not articulated in the statute at all. Reading down is not uncommon in countries with entrenched constitutions, where the technique is sometimes adopted as an alternative to striking down legislation altogether. It is important to realise that this does not justify the rewriting of the statute so that it is given a meaning other than its intended one: it is, or should be, confined to the making of exceptions to statutes where this can be done so as still to leave the intended purpose of the statute unimpeded. And the language of the statute must permit the "reading down", if only in the sense that it does not expressly rule it out. In fact, this approach is not unknown even under the present regime of statutory interpretation, and the Bill of Rights will only increase the scope for this approach. Some examples will illustrate.

In *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 the Court of Appeal construed the words "every person" so as to exclude solicitors, reasoning that the solicitor-client privilege (which would be undermined if the words were given their plain meaning) was a principle so fundamental to the legal system that one would have expected express words if Parliament had intended it to be taken away. What the Bill of Rights will do in this area is operate as a compendium of similar fundamental principles which the Courts can draw upon to reach similar decisions in appropriate cases. For an example of a case

where this would almost certainly have produced a different result, consider *Rich v Christchurch Girls' High School Board of Governors* [1974] 1 NZLR 1. There the relevant statute gave the school principal a right to be present at all School Board meetings, but the principal's attendance at the particular meeting in issue in this case would assuredly have been a breach of the nemo judex rule were it not legitimised by the statute. The question was whether the nemo judex rule was excluded because the principal had a statutory right to be present. The Court of Appeal held that the statute prevailed so that there was no basis for a complaint that natural justice had not been observed. I think this case would be decided differently if the Bill of Rights had been in force. Then the applicants for judicial review could have argued that the principles of natural justice guaranteed by s 26 of the Bill of Rights required the reading down of the words of the section at issue so that they provided, in effect, that principals had a right to be present at school board meetings *except* where to do so would offend the principles of natural justice. The Bill of Rights serves as a foundation for making this type of argument, because it can be taken to represent a compilation of principles which our society has collectively endorsed as fundamental. It is quite reasonable to argue that it ought not lightly to be assumed in any particular case that Parliament intended to oust these fundamental rights and freedoms. This type of argument could not succeed where to read down would require a rewriting of the statute in the sense that its sphere of intended operation would be impeded. The *Rich* case (if decided as I contend) and the *West-Walker* case are consistent with this approach because each decision still leaves the legislative intent basically intact, but has simply made exceptions for a limited class of case. If in either case there were linguistic or extrinsic reasons to believe that the legislators had the particular instances in mind, and had intended them to be covered by the general words, then it would not have been permissible to make the exceptions. The language would rule out such an approach.

An example of reading down in a Charter case is *R v Cancoil Corp* (1986) 52 CR (3d) 188. In this case an offence which appeared to be one of absolute liability (permitting no defence of due diligence) was treated as one of strict liability (thereby allowing such a defence). This was done because the Supreme Court of Canada had previously held that absolute offences carrying imprisonment as a possible penalty violate the Charter's guarantee of life liberty and security under s 7. There was no ambiguity about the statute in *Cancoil*, so it was not a case of preferring one meaning to another, but a meaning consistent with the Charter was not expressly ousted by the statute. The Court was therefore prepared to read the statute down. Of course, if the Court had not been able to read the statute down then it would have invalidated it, for the Charter does justify judicial supremacy over the legislature. That latter option will be denied New Zealand Courts under our Bill.

To accept "reading down" is not to countenance judicial supremacy. It is really only another way of saying that the various rights in the Bill, having been declared fundamental by Parliament, ought henceforth to be treated as implicit in legislation save where Parliament has taken the trouble expressly, or by necessary implication, to override them. Thus, where to do so would not frustrate the apparent purpose of the legislation, the Courts ought to read down under s 5 becase the restricted meaning is one which "can be given". (Conceptually, this justification for reading down does not apply to existing legislation with the same force as to future legislation, but in the former case one could treat the Bill of Rights as if it were a direction by parliament as to how all existing legislation is to be interpreted.)

**2 The effect of the Bill on the common law**

In this section I will make two points. First, that the Bill of Rights will control the content and application of the common law; secondly, that the Bill of Rights will be able to be relied upon by persons only when it is the Crown or other public body referred to in cl 3 that seeks to invoke the common law against them. It will not, in other words, be relevant in purely private litigation based upon common law actions. I will look at these two propositions in turn.

*(a) Common law is subject to the Bill of Rights*

In Canada it is well established that the Charter regulates the content and application of common law rules. This was settled without controversy by the Supreme Court in *RWDS Union v Dolphin Delivery* (1986) 33 DLR (4th) 174. The point was reasonably clear because s 52 of the Charter says that the Charter is "supreme law" and that any "law" which is inconsistent is of no force or effect. It was not difficult to read "law" as including the common law. In New Zealand there is no equivalent to s 52 so the position is not quite so straightforward, but I believe the same result ought to be reached for the following reasons.

The Bill will be a statutory enactment of rights, many of which have never been incorporated in a statute before. Statutes generally prevail over the common law if it is adjudged that they were intended to do so. I think that such an intention is clear in the Bill of Rights, and that it is of no consequence that the Bill does not explicitly say that it is to prevail over the common law. Thus whenever a common law doctrine infringes one of the rights in the Bill, the common law doctrine ought not to be applied. In fact, given that Judges have always been free to develop the common law, the proposition I am arguing for is not all that extraordinary. The Bill of Rights will simply operate as a reason why certain doctrines of common law may need to be modified. There is no issue of judicial supremacy involved if the Bill has this effect. The Bill may, however, require lower Courts to modify common law doctrines even when the rules of precedent would have required that they follow the existing articulation of that doctrine in a higher Court. The Explanatory Note to the Bill confirms my approach: "Action that violates [the] rights and freedoms will be unlawful". I submit that the common law ought not be invoked by a Court when to do so would give effect to an unlawful act perpetrated by a public authority.

At this point it must be acknowledged that it is very difficult to conceive of a common law rule which, by its content, infringes rights contained in the new Bill. One possibility (and it is only a possibility) that comes to mind is in the area of defamation. In the United States case of *New York Times v Sullivan* 376 US 254 (1964) the Supreme Court held that the law ought not to allow a public figure to succeed in a defamation case unless he or she could prove malice on the part of the defamer. This was held to flow from the United States' Bill of Rights guarantee of freedom of speech. It is conceivable that our common law as to defamation could also be influenced and modified given the statutory enactment of a freedom of expression. I do not, however, think this to be likely, as there is room for differing views as to the proper limits of free speech and different views are taken in the United States in a variety of areas (eg contempt of court, obscenity).

Another more likely scenario is that a common law rule, of itself neutral, may in certain cases be applied so as to infringe rights contained in the Bill. Canadian and United States cases provide examples. It may be, for instance, that the mechanical application of a common law evidentiary rule, such as the rule against hearsay, will exclude defence evidence which is exculpatory and ought in the interests of a "fair" trial (required by clause 24(a) of our Bill of Rights) to be admitted. Other rules of evidence under the common law may also produce unfairness on occasion. American and Canadian authority suggests that in such circumstances the Courts ought to suspend the operation of the common law rule so as to allow the evidence to be admitted. This is held to be required in Canada because the Charter's guarantee of "life, liberty and security" is taken to include the right to make a "full and fair defence" to a criminal charge. In the United Sttes the similar doctrine of exceptions to evidentiary rules is built upon the "due process clauses" in the Constitution. I believe the same doctrine can be held to flow out of our proposed Bill's guarantee of a "fair and public hearing". After all, the North American "full and fair" defence doctrine is tautological: "fair" alone would suffice and we have that word in our Bill. Note that under this doctrine, the evidentiary rule itself is not modified because in fact the common law rules have developed precisely because they are generally fair and just. The new dimension which the Bill of Rights adds is to require that the rule be waived in the interests of greater fairness and justice in the particular case. The doctrine has some affinity with the argument made above that the Bill will justify making exceptions to statutes. So here, the Bill serves as a reminder of the fundamental aims of the legal system, and of the fact that these aims ought not to be sacrificed to rigid application of statutory *or* common law rules. Readers who wish to pursue the topic of "constitutional exemptions" from common law evidentiary rules are referred to Paciocco, *Charter Principles and Proof in Criminal Cases* (Carswell 1988) which deals with the matter comprehensively.[2] If our Bill of Rights proceeds then this will be an important book in New Zealand. The subject is also dealt with in *R v Rowbotham* (1988) 63 CR (3d) 113 at 164 and *R v Williams* (1985) 50 OR (2d) 321.

*(b) The common law is only subject to the Bill of Rights when it is sought to be invoked by the Crown or other public authority*

This is established in Canada by the *Dolphin Delivery* case (supra). That case settled a long controversy in Canada as to whether the Charter applied to private as well as state action. The answer was that it does not. The Charter controls the common law, but only where it is the Crown or a public authority that seeks to rely upon it. This conclusion was reached on consideration of the text of the Charter and the legislative history. In New Zealand the text of cl 3 seems to require the same answer, especially in the light of the Explanatory Note that says

> The Bill of Rights applies to the judicial branch of government, which could mean that even in private litigation there is a public element, because the usual result of litigation is a Court order or judgment issued by the judiciary. This argument was made and rejected in Canada, but was a weaker argument in that the Charter did not expressly say that the judicial branch was subject to it. This notwithstanding, I think that our Bill makes it clear that it will not apply in private litigation, because the express reference in cl 3 to persons exercising public power excludes, by implication, purely private actors. Further, there are good reasons why the judicial branch needed to be made subject to the Bill of Rights *other* than so to make all private litigation subject to the Bill simply because it will end in a Court order: there are actions which a Court may take which depend not on statute nor on executive prerogative, and which would therefore not be subject to the Bill if the judiciary were not especially mentioned; for example, punishing for contempt on its own motion under inherent powers, or acting so as to deny the right to trial without undue delay.

**3 The effect of the Bill of Rights on executive action**

This is where the biggest potential effect of the Bill will be. Traditionally, Bills of Rights in "supreme law" form have controlled not only the law making powers of the legislature, but also the "administering" power of the executive and other persons wielding public power. In other words, Bills of Rights control what the state actually does as well as the types of law it may pass. Under our proposed Bill, the legislation-controlling function is not intended, but the Bill's ability to serve as a constraint on the exercise of public power is not impeded merely because it will be an ordinary statute. Obviously as an ordinary statute, it will be the law of the land and must be observed by those who are bound by it.

To appreciate the significance of this fact, it should be realised that the great majority of Charter cases to date have concerned the enforcement of the criminal law, with the majority of these cases being challenges to police action in the investigatory or trial process, rather than challenges to the content of statutes (Russell, "Canada's Charter: A Political Report" [1988] *Public Law* 385 at 386). Indeed, a survey after four years under the

Charter showed that 11% of Charter cases involved defence challenges to the admission of breathalyzer evidence based on alleged breaches of Charter rights perpetrated in the process of detaining persons to take the breath test. And the success rate for defendants in Charter cases in that period was nearly 30% (Morton, "Impact of The Charter of Rights and Freedoms" (1987) 20 *Cdn Jnl of Pol Science* 31 at 36). The Charter is obviously very significant in criminal investigations.

Will the same be true here under a Bill of Rights? I believe there is no reason, in principle, why it should not. There is one major difference between the Charter and our Bill which needs to be examined. The Charter has a "remedies" clause. Section 24(1) says that persons can apply to a Court for remedies when their rights have been infringed, and s 24(2) says that evidence obtained in breach of a Charter right shall not be admitted if to do so would bring the "administration of justice into disrepute". There is therefore a real incentive for defendants (and, it has to be said, especially guilty defendants) to argue that their Charter rights have been infringed. Our Bill has no equivalent. It is silent on what should happen when rights have been infringed by action. But there is a clear implication that the Courts ought to grant remedies for breaches. This implication is justified for three reasons. First, it is hard to imagine how some of the rights in the Bill could ever be infringed by legislation — eg the right to counsel and the right to trial without delay — and it follows that if there was any point in their inclusion in the Bill it must be that the Courts are to give remedies for their infringement by state action. Second, the Explanatory Note says "the Courts might enforce these rights in different ways in different contexts", indicating that it is the legislators' intention that the Courts ought to grant remedies. Thirdly, the Courts need no fresh infusion of power to give remedies for breaches since there is already an array of suitable remedies within their jurisdiction, eg exclusion of evidence, stays of proceedings, damages. All the Bill does is provide new reasons to exercise them. Further, there were reasons in Canada why an express remedies clause was inserted in the Charter: the Supreme Court had been so timid in enforcing rights under the old Canadian Bill of Rights that it was thought that they needed a clear message to be more "activist" under the Charter. I suggest that our Courts need no such message. It is also relevant to note that the United States Bill of Rights has no express remedies clause but that has not deterred American Courts from developing a vast array of judicial remedies ranging from the exclusion of evidence to ordering the bussing of school children from one school district to another.

Assuming that our Courts will be empowered to give remedies for breaches of the Bill, the key questions will be how willing the Courts are to actually do so in individual cases, and whether the Bill will have the effect of giving rights (and remedies) to people to a greater extent than under existing law. The Charter experience is that the Courts have been assiduous in taking the Charter seriously on both these fronts. First, they have interpreted the specific rights very generously — even to the point that where the rights previously existed in positive law they have abandoned old precedents as to the content of those rights and adopted more expansive views (see, for example, *R v Therens* (1985) 18 DLR (4th) 665 which differed from the pre-Charter case of *Chromiak v The Queen* (1979) 102 DLR (3d) 368 as to the meaning of "detention" and hence as to when a suspect must be advised of his or her right to counsel). Secondly, the Supreme Court has shown a willingness to exclude evidence much more readily than in pre-Charter days (see *R v Collins* (1987) 38 DLR (4th) 508). These two factors make Charter litigation very worthwhile to defendants, and hence prolific.

### *Application of the Bill in the civil context*

The rights in the Bill will also control the exercise of discretions vested in public authorities by statutory or prerogative powers. Those powers must not be exercised in such a way that rights are infringed. Of course, even under existing principles of administrative law one could no doubt challenge decisions which, to take one example, were discriminatory in a way prohibited by cl 18. Nevertheless, one can foresee how a "judicialisation" of the public political arena may develop based upon some of the Bill's rights. Persons may seek to challenge decisions made by local government to place nativity scenes on public land at Christmas time, or crosses at Easter, arguing that the power to take that type of action is denied by cl 12 of the Bill (freedom of religion). This argument would be greatly assisted by invoking the Supreme Court of Canada's decision in *R v Big M Drug Mart* (1985) 18 CCL (3d) 385 to the effect that freedom of religion includes a freedom from the imposition of religious values by the state. It is then only a small step to argue similar points in opposition, say, to school board decisions as to what should be taught in public schools. These types of issues are common in American litigation.

### Conclusion

I believe the Bill of Rights has a lot of potential. However, as has been clearly shown in Canada, which had a Bill of Rights for 22 years before the more consequential Charter of Rights was enacted, the effect which a Bill might have in the Courts is only partly related to its wording. Much depends on the approach which Judges take to it, and this in turn can depend upon Judges' perception of the importance of the Bill as judged by its mode of enactment and public opinion. I have not been concerned in this article to examine these factors. My concern has simply been to look at the potential of the Bill of Rights as judged by the language it contains. □

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1 I owe the inspiration for this section (and the analysis of the two New Zealand cases mentioned) to my colleague Dr Jim Evans, and to his book *Statutory Interpretation: Problems of Communication* (Oxford, 1988). It is Dr Evans who introduced me to the notion that a developed system of interpretation requires that exceptions be allowed in certain cases, but that, in order that citizens will know where they stand under the law, such exceptions ought to be made only to give effect to matters of "common public understanding" (Evans, 202). My only original contribution here is to suggest that the Bill of Rights will serve as a document that can be taken to represent such "common public understanding".

2 I have drawn on a number of Professor Paciocco's points in this section.