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Work and contract

The distinction between contracts of service and contracts for service is well enough known, although the definition of "employment contract" in the Employment Contracts Act 1991 tries to muddy the water a little more. It may be that it will become of even greater significance now that Hugh Fletcher's contract with Fletcher Challenge is covered by the same document as that of any Tom, Dick or Harry cutting down trees for the company. At least awards, and the law flowing from them, applied only to a restricted group, albeit a large one; but now *all* employees come under one statute with certain basic terms arbitrarily written into their contracts. Thus a large section of the population has been deprived of its existing legal rights of access to the ordinary Court system and the normal interpretation of contracts. Existing contracts of service seem to have been effectively amended by statute regardless of the wishes or intentions of the parties, and all future contracts will be circumscribed by what can at best be described as an act of political arrogance and of legal ignorance regarding the rights of citizens.

One's work is the most basic of all activities. It is how one earns one's daily bread, in both the literal and metaphorical meanings of that word. To put a dispute about employment matters involving someone in senior management on the same basis as his or her most junior staff member in having the terms of their respective contracts interpreted and applied by mediators – who may not even be legally qualified – is a situation that defies comprehension. Admittedly there is a right of appeal, but that is to the Labour Court, or as it is now to be called the Employment Court; and the right of further appeal to the Court of Appeal, as stated in the Act, is very, very limited. Indeed the Court of Appeal is expressly deprived of jurisdiction on the interpretation of an employment contract.

In fact, it now turns out, despite the political palaver, the new Act is designed *not* to do the very thing its proponents so loudly proclaimed originally. From a legal point of view the single most significant change that was made after the Bill was introduced into the House, and before it was finally passed, was on the question of jurisdiction. As introduced into the House clause 4 of the Bill acknowledged the jurisdiction of the High Court and District Court or any other Court, to hear and determine any action founded on an employment contract. Now there is exclusive jurisdiction vested in, of all things, an Employment Tribunal, with some appeal rights to the Employment Court, but for practical purposes no further. This Tribunal is an administrative body with the members appointed by the Minister for a term of four years, and they may then be reappointed. Subservience to government policy will presumably be one of the criteria considered at that time! This is a revolution indeed. One wonders what the New Zealand Law Society had to say about this jurisdictional point.

The issue has been raised very pointedly by Dr Rodney Harrison of Auckland who wrote about it to the Minister of Labour, as reported in the *New Zealand Herald* on 6 May 1991. A perusal of Dr Harrison's letter indicates the seriousness of the issue as a matter of legal principle. His letter covered five specific areas of concern to him. Among other things he pointed out that the removal of the jurisdiction of the ordinary Courts has constitutional implications. As he has remarked on a later occasion many people whose terms and conditions of employment were not covered by industrial awards have had their existing rights to use the ordinary Courts stripped from them. This, he acknowledges, may be arguable, but if it turns out to be so then this is legislation with retrospective effect in a most fundamental area. The basic principle of contract law was consent or agreement, but Parliament has apparently simply ridden roughshod over this principle. Where now the much vaunted "sanctity of contracts"? This issue needs at least more considered and careful legislative clarification.

As Dr Harrison points out the Employment Tribunal is not a Court. It does not have to be presided over by a legally qualified person, and it is not bound by any precedents or rules of interpretation of contracts, nor of admissibility of evidence. He goes on to say:

> What all this means is that a *lay* Tribunal is being empowered to deal with first instance decisions in relation to all or nearly all of the range of legal disputes to which an Employment Contract may give rise, without any limitation of jurisdiction in terms of monetary or other limits. This is in substitution for traditional rights of action which lie in respect of individual contracts of employment in the ordinary Courts (or in the case of Awards or Collective Agreements, in the Labour Court). Not only that, but in addition the lay Tribunal is given power to dispense with any need to reach a decision based on law, including the wording of the individual Employment Contract, but may decide in equity and good conscience, on the basis of evidence which may be wholly inadmissible and indeed unreliable as a matter of probative value.

The Minister is quoted in the newspaper report as having replied that the change had been carefully considered by the Select Committee. Perhaps it was, but that does not make it right.

In his letter to the Minister Dr Harrison raised other issues. To a layman, or an ignorant politician, these may appear to be irrelevant technicalities, but some of the points he made go to the basis of the rule of law as a working reality, as distinct from the arbitrary whim of a decision maker. The specific matters he referred to, in addition to the jurisdictional question, were procedural shortcomings, restrictions on rights of appeal, implications of the change, and finally, remedies. Brief quotations from Dr Harrison's letter on two of these points will illustrate the nature of his concerns. He wrote:

> *Procedural Shortcomings*
>
> The procedural disadvantages of a Tribunal procedure as distinct from the procedures of the ordinary Courts in major and serious matters will be considerable. Under clause 68D [now s 88], the Tribunal basically regulates its procedure as it thinks fit. There does not appear to be any power to subpoena witnesses, nor to engage in the usual interlocutory processes such as discovery, which litigants in the ordinary Courts are entitled to. There is no equivalent of clause 97 [now s 130] enabling detailed procedural rules to be made with application to Tribunals. Parties disputing over an employment contract may have to have their disputes dealt with summarily and without pleadings, in cases which might involve exposure to liability for hundreds of thousands of dollars.
>
> In my view it is no answer to say that these matters may be removed to the Labour Court pursuant to clause 68J [now s 94]. Removal is discretionary, and may be refused.

Then under the heading about the implications of the change, Dr Harrison pointed out the problems that might arise of double jurisdiction, with, of course, the inherent procedural differences already noted. He wrote:

> *The Implications of the Change*
>
> The implications of giving to the Tribunal and the Court [ie the Employment Court] an exclusive jurisdiction in respect of proceedings founded on an Employment Contract do not appear to have been understood. The exclusive jurisdiction is not limited to personal grievances, nor to wage disputes, nor to disputes in the nature of what used to be called "disputes of rights" (see now Cl 34 [now s 44]). All proceedings "founded on an Employment Contract" are removed from the jurisdiction of the High Court. This would include proceedings against employees for breach of restraint of trade covenants in employment contracts, for breach of duties of fidelity by Company Directors, for breaches of duties to account. However, claims by or against employees in tort (other than those relating to strikes or lockouts), under the Fair Trading Act, and (possibly) under the Contractual Remedies Act will remain with the High Court. I am presently acting for a Plaintiff employee who is suing his former employer and its Directors for breach of his Employment Contract, under the Fair Trading Act, and in tort for interference with contractual relations and conspiracy to injure. Under the new regime, the Plaintiff would have to issue proceedings in two separate Courts. In the same way, the Plaintiff in the Lintas litigation [1986] 2 NZLR 437, who sued for breach of contract, breach of fiduciary duty, and the tort of conspiracy, would have to issue proceedings in two separate Courts (in fact, in a Tribunal on the one hand and in the High Court on the other).

From a legal point of view, and from that of the rights of individual citizens the question of jurisdiction is one that cannot be overstressed. As the first of the extracts from Dr Harrison's letter quoted above so clearly indicates what is at issue is the very nature of a "contract" and its interpretation. This new legislation has implications, in the extent of the changes it makes to the legal system, that are of a much more fundamental nature than the political and industrial criticisms made of it by trade unionists, Labour Party politicians, and newspaper editorial writers.

The effect of the new regime is to limit the rights that citizens have had, and to extend greatly the power of an administrative body into an area of substantive law. The end result is the exact opposite of what was originally proclaimed to be the intention. The very term employment contracts is now a dishonest misnomer. Whatever else they are, they are not legal contracts. Perhaps industrial agreements would be a better term. What was understood by most people as going to happen was that industrial awards would be replaced by individual contracts, but what has been done, in jurisdictional terms, is to turn existing or future individual contracts of employment into personal industrial awards.

P J Downey

Judicial appointment

Mr Justice Rabone

On 3 April 1991 the Attorney-General announced that after consultation with the Chief Justice, the Chief District Court Judge and the Minister of Justice it had been decided that short term secondments would be made to the High Court from the District Court Bench. The Attorney-General stated that it was anticipated that one or two District Court Judges would be appointed to be temporary High Court Judges for a fixed term. At the conclusion of that term the Judge concerned would return to District Court duties.

The first such appointment was announced on 23 April 1991. The appointment was that of Judge John David Rabone who has been a Judge of the District Court at Wellington with jury trial jurisdiction. Mr Justice Rabone holds office as a temporary High Court Judge. The term of Mr Justice Rabone's appointment is for a period that commenced on 29 April 1991 and will expire on 19 July 1991. The temporary Justice practised in Wellington prior to his appointment to the District Court Bench. He was for some time with the Crown Law Office in Wellington. Mr Justice Rabone is sitting in Wellington. □

Case and Comment

Character and product merchandising

In *Television New Zealand Limited v Gloss Cosmetic Supplies Limited* (1989) 3 TCLR 83 the High Court was faced with a submission that New Zealand law recognise that "character and product merchandising" (at 86) was an exploitable right and that TVNZ had such a right in the name "Gloss".

"Gloss", in case readers have forgotten, was the name for that long running New Zealand "soap" set in the glitzy world of advertising.

Television New Zealand had sued in passing off and for breach of the Fair Trading Act seeking an interim injunction to prevent the defendant producing and selling cosmetic products under the name "Gloss". Relying upon the well traversed principles of Lord Diplock in the *Advocaat* case (*Erven Warnink v J Townend & Sons (Hull) Limited* [1979] 2 All ER 927 at 932) the plaintiff argued that it had goodwill rights in the name "Gloss" and that if the defendant were to be permitted to market cosmetics under the same name (even with different artwork and logo) there would be a misrepresentation in the sense that consumers might be confused into believing that there existed some form of trade connection between it and the defendant such that TVNZ might suffer damage (because its ability to exploit and capitalise on the name "Gloss" would be harmed).

The Court was persuaded that a serious question to be tried did arise both under passing off and Fair Trading Act breach and on "the balance of convenience" an injunction should be granted.

Despite confessing "to a degree of personal cynicism as to the notion of a cult or secondary meaning having developed" (*TVNZ v Gloss Cosmetics*, supra 88) the Judge did not accept the defendant's submissions that the word "Gloss" was purely descriptive. The plaintiff had produced evidence from the world of communication who urged upon the Court the view that there would be an inevitable association between cosmetics marketed under the name and the TVNZ series.

There are two, intertwining, threads of interest in the case.

The first relates to the old debate as to whether there is/should be a (wider) tort of "unfair competition" and the implicit argument as to what should be the underlying principles of such a tort.

The second is the rise of character merchandising and its protection.

From time to time in the course of the recent developments in passing off commentators and Judges have thrown up the notion that lurking beneath this whole area is a broader basis for action perhaps better named "unfair competition". (See for example, *Bollinger v Costa Brava Wine Co Limited* [1959] 3 All ER 561.) The debate became significant enough that the Australian High Court took the opportunity in *Moorgate Tobacco Co Limited v Philip Morris & Anor* (No 2) (1984) 156 CLR 414, to pronounce that there was no such general action for unfair competition or unfair trading. At the same time that Court accepted that this did not and should not prevent "the adaptation of the judicial doctrine of passing off to meet new circumstances involving the deceptive or confusing use of names, descriptive terms or *other indicia* (emphasis added) to pursuade purchasers or customers to believe that goods or services have an association, quality or endorsement which belongs or would belong to goods or services of, or associated with, another or others . . .".

But prior to *Moorgate* the flexibility of passing off and its ability to adapt to new situations had long been recognised. In *Henderson v Radio Corporation* [1969] RPC 218 an Australian Court restrained a record company from selling records with the unauthorised photograph of a well known ballroom dancing couple. The Court held that there was a sufficient connection between the fame of the ballroom dancers and the sale of records such that a misrepresentation might arise.

A subsequent Australian decision is more obviously a starting point for character merchandising case developments. In *Children's Television Workshop v Woolworths (NSW) Limited* [1981] RPC 187 the Court used, as a basis for a finding of misrepresentation in passing off, evidence disclosing a public belief in the existence of a commercial arrangement between the owner of the fictional "Sesame Street" characters and a look-alike toy sold by the well known chainstore.

The two best known recent character merchandising cases in Australia both concerned the movie "Crocodile Dundee". In *Hogan v Koala Dundee Pty Ltd* (1988) 83 ALR 187 the defendant referred to its shops as "Dundee Country" and used images obviously derived from the movie. The Court found in favour of the plaintiff in passing off (there was an implied representation of association).

In the second case of *Hogan v Pacific Dunlop (Pacific Dunlop Limited v Hogan* (1989) 87 ALR 14) the defendant used a spoof or parody of the famous "knife scene" taken from the movie to promote the sale of its leather shoes. Whilst it seemed that few viewers thought that the person in the defendant's advertisement was actually "Crocodile Dundee" nevertheless the trial Judge (who was confirmed on appeal) was satisfied from the evidence that there was a reasonable likelihood that a substantial number of persons would have formed the impression that Paul Hogan and/or

the film makers had some type of commercial association with the producer of the advertisement.

These cases, as does the *Gloss* decision in New Zealand, at the very least illustrate how far passing off has extended beyond its "classic" or narrow form (the palming off of one's goods or services as those of a competitor in the same field of business), into an extended form where "promotional goodwill" is recognised as warranting protection. (See S K Marumba, *Commercial Exploitation of Personality*, Law Book Co, Sydney 1986.)

But the cases may be more significant. There is an indication, particularly in the *Pacific Dunlop* decision, that what the Courts are recognising is that in certain circumstances the mere misappropriation of valuable goodwill rights are sufficient to warrant the granting of relief. In other words the element of misrepresentation is downgraded and the emphasis placed upon the unfair taking of valuable "property" – a defendant, in short, reaping where she has not sown. A phrase given prominence in the landmark United States decision on unfair competition: *International News Service v Associated Press* 248 US 215 (1918). Further, by recognising that goodwill rights exist in such ephemeral "indicia" as the imagery of a movie, the personality of an actor and so on there is some resemblance to cases in the United States and Canada where there has developed a separate tort of appropriation of personality. (See R G Howell "Personality Rights: A Canadian Perspective" Commonwealth Law Conference Papers.)

Some might suggest that if the cause of action is to be extended this far there should be a re-examination of the precise rationale for the action. Whether or not it is known as passing off or unfair competition probably matters little but a clearer understanding of the justification and parameters of the legal remedy may be in order.

The argument concerning "unfair competition" has received little specific attention by New Zealand Judges. (See however *McBean's Orchids (Australia) Pty Ltd v McBean's Orchids Limited* (1982) 1 NZIPR 406.) Indeed with the passage of the Fair Trading Act, in some respects amounting to a customer's unfair competition law, the need to do so might seem to have been diminished. (See the comments by Cooke P in *Taylors Textiles Services Auckland Limited v Taylor Bros Ltd* (1988) 2 NZBLC 103, 032 at 103, 039 (passing off likely to be replaced by Fair Trading Act).)

But it is interesting to note that in recent Australian decisions (for instance the *Hogan* cases, supra) the Courts decided that relief was available in passing off rather than pursuant to the trade practices legislation. There is therefore some indication that passing off seems to have more flexibility or is somehow wider in its application than the relevant trade practices provisions prohibiting "deceptive or misleading conduct in trade". Indeed in one recent New Zealand decision concerning the word "Champagne" (*Comite Interprofessionale De Vin v Wineworths Group Limited* (1990) 3 NZBLC 101 851) the Judge decided that the conduct of the defendant in seeking to import bottles bearing the word "Champagne" (having decided on the evidence that the word was not generic in New Zealand) was guilty of passing off but not of deceptive or misleading conduct under the Fair Trading Act.

The *Gloss* case is of considerable interest in so far as it might be said to:

- represent a beginning for "character merchandising" cases in this country,
- confirm the flexibility of the traditional tort of passing off to meet new market trends,
- illustrate that underlining such cases is a notion of "unfair competition".

Paul Sumpter
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"Survivorship" of debts on cancellation of contract

In September of 1990 the Court of Appeal gave judgment in *Brown v Langwoods Photo Stores Ltd* [1991] 1 NZLR 173 confirming that debts due and certain that accrue prior to cancellation of the contract under which they arise survive that cancellation.

This "survivorship" question has arisen mainly in cases for the recovery of deposits unpaid at the time of cancellation of agreements for the sale and purchase of land (see *Pendergrast v Chapman* [1988] 2 NZLR 177 for review of area). *Brown v Langwoods* however concerned the recovery of franchise fees due and certain under a franchise agreement. Differences having arisen between the parties it was held at arbitration that the Browns, the licensees, were entitled to cancel the agreement as a result of a breach by Langwoods, the licensor.

In his award the arbitrator ordered Langwoods to repay an amount to the Browns. Langwoods sought to set-off against that amount franchise fees unpaid by the Browns since the relationship deteriorated. The fees were a fixed percentage of gross turnover payable monthly.

The Browns having given notice of cancellation argued the claimed set-off amounted to requiring them to further perform the contract. They sought summary judgment on the award and relied on s 8(3)(a) of the Contractual Remedies Act 1979 to resist the set-off. That section and s 8(4) provide:

> 8(3) Subject to this Act, when a contract is cancelled the following provisions apply:
> (a) So far as the contract remains unperformed at the time of cancellation, no party shall be obliged or entitled to perform it further.
> (b) . . .
> (4) Nothing in subsection (3) of this section shall affect the right of a party to recover damages in respect of a misrepresentation or the repudiation or breach of the contract by another party.

The Browns argued the only relief available to Langwoods was under s 9 as s 8(3)(a) barred a claim to recover the fees and s 8(4) damages should not be available where the sole effect of granting damages was to enforce a term rendered unenforceable by s 8(3)(a).

In the summary judgment proceedings Master Hansen rejected the Browns' arguments and held the fees were recoverable as did the Court of Appeal in dismissing the Browns' appeal. It is submitted that while this finding is correct the reasoning of the Court invites comment.

The conclusion is correct as a matter of statutory interpretation. While some commentators on the Act concluded otherwise (see p 176 of the judgment) it is arguable that an action in debt is not seeking to *further* perform the contract as it is based on rights that have already accrued. At common law debts due and certain survive cancellation (see Dawson and McLauchlan *The Contractual Remedies Act 1979* p 136). It was contemplated by Parliament that s 8(3)(a) would preserve the common law in relation to pre-cancellation debts.

This is confirmed by reference to the draft bill contained in the 1978 report of the Contracts and Commercial Law Reform Committee which contains s 8(3)(a) as enacted with the comment that it "recasts the substance" of para 18.5(c) of the Committee's 1967 report. That paragraph provided (inter alia) where a contract has been cancelled "all rights based on prior breach or performance survive".

The common law position was therefore "recast" into s 8(3)(a) albeit not as clearly as the 1967 provision would have made it. Cooke P, who delivered the Court's judgment, referred to the reports and uses the words from para 18.5(c). *Brown v Langwoods* could have been decided on this basis but in going further the Court seems to have merged the concepts of an action in debt and an action to recover damages.

In a damages claim it is necessary to establish a cause of action and, to secure anything but nominal damages, to prove actual loss whereas an action on a debt only, involves it being shown that the sum is due and certain (for when a debt is certain see Farmer, *Creditor and Debtor Law in Australia and New Zealand* 84-85).

The merging of these concepts is evident from the way the Court stated its conclusion at p 176:

> In *Pendergrast v Chapman*, Wylie J held that s 8(3)(a) did not prevent enforcement of an accrued cause of action in debt. We agree, but would state the law more broadly. The provision does not abrogate any cause of action accrued unconditionally before cancellation, whether or not for debt.

It was unnecessary to "state the law more broadly" as it renders nugatory s 8(4) which preserves the right to seek damages for other causes of action. The question of whether damages are recoverable for a pre-cancellation breach is distinct from whether an accrued cause of action in debt survives cancellation. Notwithstanding this Cooke P refers to s 8(4) throughout the judgment as supporting the Court's conclusion.

The corollary of this is that s 8(3)(a) is not concerned with damages. Linking the two sections to explain the finding of the Court only serves to muddy the conceptual waters.

However, despite this criticism the case is significant as it resolves the longstanding conflict between the cases on the recoverability of unpaid deposits. It was cited in *Concept Projects Ltd v Enduro Holidays Ltd and Johnstone* (unreported High Court, Auckland, Master Gambrill, 14/12/90, CP 1261/90 as authority for the proposition that unpaid deposits are recoverable as a debt.

Brown v Langwoods is bound to play a significant role being the only Court of Appeal decision on the area since the passing of the Contractual Remedies Act.

Dale Lester,
Judges' Clerk,
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Extent of matrimonial home property under the Matrimonial Property Act 1976.

One of the numerous problems facing Jeffries J in *Besley v Besley* (unreported, High Court, Palmerston North, M84/86, 9 April 1990) was the interesting and important one of what land was to be included in the matrimonial home. The husband owned three contiguous sections in Hahei. The home was erected on one lot, which had been purchased before the marriage. Another lot had also been purchased before the marriage. The third, however, was purchased post-maritally. Construction of the home began before the marriage. There was some dispute as to the state of the construction of the house when the parties moved there to make it their permanent residence and matrimonial home. The Court considered that "the degree of primitiveness" was not of great importance since both parties were inconvenienced by it. Eventually the house was satisfactorily completed.

Counsel for the husband argued that only the lot on which the house was built was the matrimonial home and that the other two lots were his separate property. All three lots, however, were laid out to give the appearance of one large area surrounding the dwelling. The way in which the land was used was seen by the Court "as a pointer in favour of all three titles being for the matrimonial home". A stronger indication was that the husband had included all three titles when he settled the property as a joint family home in December 1982, not long after reconciling with his wife following an 18-month separation. His now seeking to write down this act as a "gesture towards reconciliation" was held not to assist his case, since he had thereby forgone "his right to sell by his own decision the other lots".

It was further argued for the husband that s 14 of the Matrimonial Property Act 1976 was applicable, six separate areas being advanced for consideration. Counsel conceded that each factor in its own right need not itself be enough to justify a finding of extraordinary circumstances. Jeffries J observed that:

> Extraordinary circumstances is largely a factual argument and linguistic suppleness is no substitute for facts.

He declined to apply the section, holding that "an accumulation of smallish points will not amount to extraordinary circumstances so as to make equal sharing repugnant to justice".

P R H Webb
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Law Society President

Interview with Judith Potter, President of the New Zealand Law Society, 1991

Are you an Aucklander by birth?

Yes, I was born in Auckland in 1942 and I have lived here all my life apart from a spell overseas soon after I graduated.

Was this the New Zealander's standard Overseas Experience, your OE?

Something like that, and since then I've had numerous trips overseas; but my home base has always been Auckland.

What parts of Auckland have you lived in?

I live now in Epsom and I have always lived in central parts of Auckland. My grandfather was Mayor of Mount Eden, and my father was Mayor of Mount Roskill. So I suppose we have been an urban family and interested in the development of Auckland.

The existence of those two mayoral offices probably indicates the need there was for an Auckland Regional Authority. It was such a disunited area wasn't it — and still is in some ways?

Well there are a lot of views on the merits or otherwise of the Auckland Regional Council. But those days were very interesting because first Mount Eden and then Mount Roskill were very much developing boroughs, so it was a period of growth. I found it very interesting as a child being involved in that part of my father's life.

In a sense then you have always been involved at least on the borders of politics, and I suppose your Law Society involvement could be seen as an extension of the family interest.

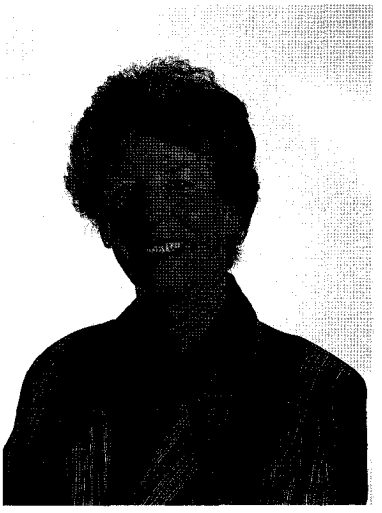
I am sure in a way it is, although I have never regarded myself as a political animal, but from very early in my life I was used to having a lot of people in the home, meetings, and my father making speeches. I can remember long periods of listening to father's speeches and trying to encourage him not to jingle the coins in his pocket as he spoke, delivering circulars, and those things. So it was part of our life.

It obviously involved you in a sense of community responsibility, and in your case eventually responsibility to the profession?

I think it has had an important influence in that from the word go you are thinking not just of yourself or just of your own family. You are really always thinking of things in the broader sense. Where you fit into a whole rather than just where you are.

Where did you go to school?

My secondary education was at Epsom Girls Grammar and then Auckland University. I had only four years at secondary school and then went straight to University. I think I felt at that stage that having made up my mind to pursue a law degree I wanted to get on with it. I found it difficult to make up my mind what I wanted to do.



Did you have any legal background in the family, any relations who practised the law?

Not in the immediate family, though my father tells me that my grandfather would have loved any of his four sons to be lawyers. They all thought it might be too much hard work. So there was a real appreciation of what the law was about, but my only relative was Ronald Potter who was a cousin of my father who practised in Rotorua. I didn't really know him until after I qualified. He was one of the old practitioners in the very real sense in that he did conveyancing, he did Maori Land Court work, he appeared in murder trials, he covered the whole gambit. I got to know him quite well towards the end of his life. He was a very colourful personality, but he really had little

influence on my decision or my career because he was too far removed.

Why did you decide to take up the law? Can you remember now what it was that attracted you?

It was certainly not a burning ambition, but it was my own decision. I wanted to go to University. It is hard to realise it now, but in those days the limitations were considerable for a girl who wanted to go to University.

What year would this have been when you actually went there first?

1960 was my first year at University so it is over 30 years ago, I hate to say that but it is over 30 years ago. I didn't think I wanted to teach, although many thought I should, so I looked at the alternatives. They were quite limiting. Even the idea of doing law was very strange and a number of people just looked at me and said what on earth would you want to do that for, it takes a long time, what are to going to do with it, women don't practise law. That sort of comment.

Although there would have already been some women practising in Auckland?

There were. Anne Massey, and Anne Gambrill who is a Master of the High Court. Then there was Pam Mitchell who died a few years ago, and of course Judge Augusta Wallace. So there were those women for instance, but of course I didn't know of them. They were not well publicised and it was still a pretty unusual thing to do. But having got to University and having started my legal studies I felt right from the beginning that may be I had got it right.

Who was on the staff at the time you were there? Jack Northey would have been the Dean I presume?

No, he wasn't when I started. Professor Davis was, of *Davis on Torts*, and he taught me Torts. Then of course Jack Northey took over as Dean and rather changed the style of the Law School which was an interesting development.

In what way?

Well he went to Canada and he came back with a lot of different ideas about how to teach so the case book method was introduced to Auckland Law School and we were expected to participate rather than sit and absorb which had been the traditional style, and of course the style of Professor Davis. So it was a bit of a turn around. We also were allocated seats in class and if we didn't appear in them by 10 minutes past the hour we were marked absent. I had great difficulty with that because 8 o'clock lectures followed by days in the office, which was the programme after a year full-time, was quite demanding.

Was there anyone else on the staff who you particularly remember?

Professor Coote was there and he taught Contracts. You don't realise as a student just how fortunate perhaps you are to be taught by these people who become household names as far as the legal profession is concerned. So we had some interesting classes and an interesting variety of lecturers. George Hinde I remember taught Land Law.

Were you working at the same time as you were doing the course? Was it full-time or part-time?

One year full-time, and at that stage people were just starting to consider doing two years full-time. I didn't. I got a job in the Companies Office because I was told that if I wanted to practise law being a woman, I would almost certainly have to work for the Government. I accepted that because I knew no different. I got myself a job in the Companies Office where I stayed a year. That was pretty handy because it paid considerably more than did the legal offices. It was a worthwhile year. I learnt a lot and once again I don't think I realised until later in my practising life how much I did learn in that year. The extra bit of money it paid was useful because my brother and sister were younger than I and keeping me at University was not particularly easy. Having gone to University with just University Entrance the amount of assistance I got was very minimal.

Anyway after that did you go into a law office?

Yes at the end of my first year I decided that if I was going to do law I wanted to be in a legal office, so I applied for a job as a Junior Law Clerk with Wallace McLean Bawden and Partners. Again it is one of those things that you look back on in life as being a really fortunate experience because I was interviewed for that job by, as he then was John Wallace, now Mr Justice Wallace, and of course he was the second Chief Human Rights Commissioner. He was your successor but the first one in Auckland. So I had the great fortune I think to be interviewed by a person who was ahead of his time then, as he has remained since in matters of human rights, who didn't find it incredible that one of his very many applicants happened to be a woman, and who was prepared to give me a chance. It was perhaps also significant that one of the other partners was Neil McLean who had a daughter studying law at that time, Pam. She was subsequently tragically killed in a parachute accident and never did practise; but because he understood about women wanting to do law I got a very significant break, and I have remained with Wallace McLean Bawden & Partners ever since, apart from my period overseas when I actually left. I returned to the firm, and that firm after a couple of mergers is part of Kensington Swan.

Well what has been the nature of the work you have done over the years? Presumably it has changed somewhat. What did you do to start with? Did you start in a law office before you were qualified?

Oh yes, I was about 18 or 19 I think and I did a year being junior Law Clerk which I just loved, getting to know all about the Land Transfer Office and the Courts and the coffee bars of Auckland, search fees, oath fees, all those highly individualistic things that are part of the legal profession, or were then. Then I did common law, for at that time Wallace McLean Bawden & Partners acted for NIMU [North Island Motor Union]. It was pre-accident compensation days, so we had endless personal injury files and

a very large litigation practice. So I was involved in that in the early days. After I qualified I spent a year appearing very regularly in the Magistrates Court, as it then was. I did some defended hearings and even got reported in the District Court Reports on contributory negligence.

Really a step up in the world!

It was pretty major stuff.

You've got to put your foot on the bottom rung of the ladder if you really want to get to the top rung.

That's right, and then of course I did vary my practice after that. I did estates, conveyancing, and a bit of family law.

Conveyancing? That would be house property transactions mainly?

Initially yes, and then into more commercially based conveyancing. The business scene was changing dramatically at that time too.

What time are we talking about now, the 1970s?

Yes into the 1970s, and I became more and more involved in the commercial side of the practice. Really from that time on, the late 1970s, I practised predominantly in the commercial and corporate law fields.

Well at some stage in all this you got involved in District Law Society activities. How did that happen, and when?

It happened in 1977 that I was first elected to the Council for the Auckland District Law Society, aged 34. It would not have occurred to me to stand for the Council but I received a great deal of encouragement. The suggestion first came from Howard Keyte, one of my partners, then some very firm encouragement from John Wallace who was then a Queen's Counsel practising in Auckland, and Bruce Slane, and the combined effect was to give me enough courage to put my name forward. I didn't think I would be elected. I was, and I have really been involved in Law Society affairs ever since.

When you were on the Auckland District Council in those days I take it that it would have been like it was in Wellington, that if you stayed then after a certain period there was the opportunity of becoming one of the officers and eventually President. Was that the way the system worked?

Yes, basically.

So when did you become President?

I was President in Auckland in 1988.

Well during the time you were in the Auckland District Law Society, both while you were President and before, what were the most momentous events? There must have been some.

Momentous events, well let me think.

To put the question differently were there any really significant changes in either the Law Society itself or in the decisions made that may have affected practice?

Practice changed considerably. The make-up of the Council changed considerably. When I went on, it was comprised predominantly of Queen's Counsel and Barristers and this was a complaint levied against it by the profession. Now the Auckland District Council spans a very wide representation. During my time on the Council special places on the Council were created for a young person's representative and a suburban representative to try to make sure that the Council was more representative and perhaps meet the complaints levelled at it by some of the members. I think the work the Council does has expanded enormously during that period, particularly its education role and unfortunately its disciplinary role. I think there is a real problem that the Law Society faces, and it's one that I want to try and tackle very early in my term as President. This is that District Councils are supposed to be both policeman and friend, and I think that role has become increasingly difficult. "In the good old days" if I may use that phrase, wayward practitioners were substantially kept on the strait and narrow by peer pressure, by the small closed community that forced them to operate in a way that might not otherwise have been the case.

If they didn't behave in a way that was acceptable then of course the effect was that they had great difficulty practising at all.

Yes. Now that doesn't exist any more. There are 5900 practitioners in New Zealand, about one third in the Auckland district with a wide variety of types of legal practice from the very large firm to the sole practitioner, many more Barristers practising on their own account, some legal firms specialising predominantly in family law or corporate law, and so on. A very wide divergence of practitioners. And the peer pressure groups can no longer hope to be as effective. As well as that I think that temptation has increased, particularly in the halcyon days that preceded 1987.

One aspect of that is also the expectations that people have going into the legal profession as to what they can expect to get out of it, I don't mean get out of it in a bad sense, but the expectations of remuneration that everybody has when they start.

Yes, I am sure you are right. That might be changing now. Because there are so many lawyers who are not earning very much money, and I think young people starting off today are understanding that. I sincerely hope they are because the ticket that one gets to practise law is not a ticket to wealth; it is a ticket to a lot of hard work and concentration on the maintenance of professional standards with huge responsibility.

Is there anything else about your experience on the local scene that you recall?

Well I enjoyed it. I enjoyed very much working with the people who are Council members and with the profession and seeing change not just from the narrow confines of one's own practice.

As far as being directly involved in the District Law Society and then eventually being President, this must have also involved you in relations with the Judiciary that is

Magistrates Court, District Court as it became, and Supreme Court — High Court — running through a whole list of titles aren't we? Was that an interesting aspect of Law Society work for you, seeing the Judiciary in a more direct manner than just appearing in front of them?

Yes it is, because it is very important for the Judiciary not to be too far apart from the legal profession, and I think that the Judiciary, the members of the Judiciary themselves, are extremely conscious of that. They want the opportunity to meet with the profession outside the Bench and Bar context.

I assume that the formal structures of the profession are one of the ways in which this can be a very real interchange. The Law Society as such or the District Law Society in this case, it must be so much better for them to deal with matters through an institution rather than just be matey with individual practitioners?

Of course it is, and the Law Society makes an effort to see that there is that sort of conversation going on between Council Members, and particularly the President, and the Judiciary because there come those very important times when the Law Society has to act as a buffer between the Judiciary and the outside world. So that is a very important relationship.

From your own experience did you find District Law Society involvement satisfying?

Oh yes, it is. It is a lot of work. It is work that you have to tack on to an ordinarily full work load, but I think one of the most encouraging things about it is that you are working with a group of people who are doing exactly the same thing. You are all pulling together. You are all contributing that little bit extra and you usually find, don't you, that it is the busy people who make the best and greatest contribution. So those are the sort of people you are working with. As a result you learn a lot from them and the little bit that you are required to give seems little enough when you look at the sacrifice that other people are making and the enormous contribution they make.

During the time that you were on the District Council did it ever develop into conflict groups on the Council itself, was it so large that it could do that?

It never did.

Did it become in the vaguest sense of the term, politicised?

It never did, and I must say that one of my clearest memories of the operation of the Council of the Auckland Law Society was the ability of Council members with opposing views to accept a democratic solution or conclusion when it was reached. Also the ability of those same individuals to change their views during debate and maybe this is the strength of the lawyer. We are told sometimes that lawyers are arrogant, determined to have their point of view prevail. I guess that is certainly true to some extent.

You have got to start off on that basis or be useless to your client.

Exactly, but around the Council table there would be strenuous debate on a topic and then I would hear somebody who had debated extremely well for a point of view say, having heard what others have said, I would like to change my view. I think that is a tremendous strength because that is the way to govern if you can not divisively but by consensus. But consensus reached in a very healthy manner, and that is one of the strongest memories I have of the operation of the Auckland Council.

Well, through involvement with the Auckland District Law Society you would have become aware of what was going on in the New Zealand Law Society, and eventually have taken part in it yourself?

Yes.

When did you first become directly involved in the affairs of the New Zealand Law Society?

It was four years ago — 1985, I started to attend New Zealand Council meetings.

Did you find the wider responsibility of the New Zealand Law Society noticeably different from the sort of issues that had to be considered at District level?

The issues are broader. One of the real difficulties I think that any District Council of any size has is disciplinary matters, and of course you don't have those at New Zealand Council level, because the New Zealand Council is not a direct part of the disciplinary process. So you have more time to discuss national issues affecting the profession, and it is very refreshing.

So from 1985 until now you have been involved in one form or another with the New Zealand Law Society?

With a break in 1990, because I was President of Auckland in 1988 and then I was Vice-President of the New Zealand Law Society 1989. In 1990 I took a holiday.

You were given a year off were you?

My holiday in 1990 was short-lived because in July of that year I was elected President-elect of the New Zealand Law Society, and so I started to pick up the cudgels again.

You are following on from Graham Cowley. Graham interestingly enough was the first President from a provincial centre, and you will be breaking new ground again being the first woman President. So first a general question, do you think that those two events indicate a greater widening of the people who can now get to the top of the legal profession in New Zealand?

I expect it does. Once upon a time it was thought that the New Zealand President had to come from Wellington.

Yes I can remember those days well, I remember what happened.

S W W Tong was the first out-of-Wellington President. If you look back on that it is almost laughable isn't it, to think that the New Zealand President had to come from Wellington?

Not if you're a Wellingtonian!

You can phrase that as you will! I think equally in another five or ten years we will look back and think it rather remarkable that there was anything particularly significant about a woman being President of the New Zealand Law Society. I happen to be the first for 120 years. I certainly won't be the last. Yes, the legal profession is broadening in many ways.

You spoke earlier on of the relative size of the Auckland District Law Society as a third of the profession. Of the four last Presidents counting yourself, three have been Aucklanders, Bruce Slane, Peter Clapshaw and now yourself, with an outsider, as it were, from the provinces. Is it now going to become an Auckland office?

I sincerely hope not.

I asked the question specifically because there are some who are beginning to scratch their heads and look at it the same way as Auckland did when Wellington had a stranglehold on it.

Well it seems to be par for the course that when anything happens for a little while it becomes criticised, such as once upon a time the Auckland Council was criticised for having too many Barristers on it. On the New Zealand Law Society Council there are excellent people from all over New Zealand with whom I have served over the years. No doubt they will continue to be there, and I am quite sure that there will be Presidents of the New Zealand Law Society from outside Auckland and outside Wellington.

About the changes in the legal profession that you have been aware of in the time you have been involved in it, do you consider technology to be one of the important recent developments?

Yes, I think technology has been extremely significant, because the legal profession if you like is custom made for technology. We produce so many words and we repeat so many things that any mechanism to do it for us has to be a great boon. Technology can become a burden, it can be incorrectly used; but my belief is that correctly used it is extremely important to the lawyer because it can then release the lawyer to do what the lawyer is best at.

And what would you say the lawyer is best at?

I think the most important contribution a lawyer can bring to any matter or any event is his or her independence and judgment. They are the things that distinguish the legal profession, that give it its importance, its difference, its identity and which make it the important factor in any society that the legal profession always has been and always will be. As far as a marketing projection is concerned I think independence, judgment and integrity are the three factors that we as lawyers must keep always in the front of our thinking.

What other developments have you noted in the profession in the time that you have been working in it?

The other important development is change. The need for the legal profession to adapt to change of course is self-evident.

This would be true as much in England and overseas countries as here?

Yes, but what we are seeing in other jurisdictions I think is that governments are taking the lead because the legal profession has declined to act rapidly enough in response to a need for change. I think in New Zealand we have done better than that; in fact the legal profession in New Zealand has really done quite well. From within our ranks there has been criticism at times as we have made dramatic changes such as abolishing the scale in conveyancing matters. But when you look back on it those changes were absolutely essential – otherwise they would have been forced on us by outside agencies and we would have been worse off. There will be more change which we have to assess, and again try to be in the vanguard of the change. Otherwise we will see it forced upon us. I think one of the very important areas here is our own disciplinary process. We carry out that function well, but we need to look at it very hard right now to make sure that we are doing it well enough so that government agencies or the Government doesn't feel inclined to step in and try to have it done differently.

It is one of the hallmarks of a profession that it is self-disciplinary. If it fails to do that adequately it is putting its professionalism at risk.

Indeed, yes. You get bought off as it were. I think we have done well. For example there are lay members on the New Zealand Law Society Practitioners Disciplinary Tribunal and also on the local tribunals. The medical profession is only now following suit after a good deal of resistance. Thank goodness we did it when we did.

If we can now just talk for a minute about the New Zealand Law Society as such. You will have been aware of it ever since you have been in practice and certainly ever since you have been involved in District Society affairs. What major changes have you noticed in the time that you have been there? You have referred to the profession and changes in it. Has the New Zealand Law Society been particularly active in bringing those about?

I think the New Zealand Law Society has participated significantly in certain aspects of change. For example continuing legal education. The programme mounted now is radically different from that of ten years ago. Twenty years ago, there wasn't one. It is now sophisticated, it is very well presented, it could probably be even better and there will be future change in that area. You would not have seen seminars on stress management or how to use your time even five years ago. I think there has been a greater awareness that legal practice is not just a purely professional activity, that it has to do with managing a business, the lawyer's practice, and managing the lawyer himself or herself. So in the educational scene the Law Society has veen very active. I think also that it is a much more political animal than most people realise.

Political in what sense?

In its relationship between government and the profession, and also the community at large.

Is this a public relations function, or more than that?

It is a public relations function essentially. I believe, that the New Zealand Law Society and the profession through it, greatly assists government in some areas. For example, as most of the profession know, every Bill, other than fiscal legislation, is vetted by the Legislation Committee. That is a totally voluntary contribution made by members of the practising profession who are members of the New Zealand Law Society's Legislation Committee. As well as that there is frequent communication between the President, the Minister of Justice, the Attorney-General, and any other minister who has a direct interest in any matter on hand.

That would also be true of the relationship with the Judiciary presumably through the Chief Justice?

Yes, and through the Chief District Court Judge and through other arms of the Judiciary. There is a constant communication there. Communication is very time consuming and very demanding, but it is a very necessary function.

Looking to the future, which is always a dangerous thing to do, how do you see the next few years from where you sit or stand at the moment with the responsibilities you have?

Well, firstly, more of the same. New Zealand is in a recession. These are difficult times, and I think we will have to deal with difficulties similar to those we have experienced over the last few years. But as well as that I would like to see the Law Society restructured in a way that makes it easier to reach good decisions quickly. I think that is essential because of the rapidity of the change that surrounds us. It is essential to be democratic, it is essential for lawyers throughout New Zealand to be represented; but I think even more now than has ever been the case, it is necessary for decisions to be able to be made, and to be implemented at least as fast as the pace of change around us. We can no longer simply react, either at Law Society level or as legal practitioners in our everyday practice. If we rely simply on reacting to change we will get left behind quite dramatically. So I would like to see a streamlining of the structures of the New Zealand Law Society. We have a Structure Committee which has had several very interesting meetings. I hope to progress with that during the course of my first year in office.

Anything else then about the taking on of this responsibility that is particularly in your mind?

I am very much aware, Pat, that I take on the Presidency after it has been in the hands of Graham Cowley. Graham has been an extremely hard working President and I know that everything that could have been done will have been done. In that sense I am very very fortunate. That might have been able to be said of every predecessor because there have been some excellent people there. So one of my main objectives I think will be to do the job as well as it has been done in the past. If because I am a woman, or because I am me, I can bring to the position a different perspective, I would like to do that. I would like to feel that as President I can communicate openly both with the profession and with the community at large. It is not always easy as a spokesperson on matters legal to use friendly terminology and to be readily understood. But I will be trying very hard to make lawyers and the law seem more accessible to the community at large. I think we have a lot of work to do in that area, and I'll be trying to help. □

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Alternative Dispute Resolution: The advantages and disadvantages from a legal viewpoint

By Hon W P Jeffries, Barrister of Wellington, formerly Minister of Justice

This article was delivered as a paper at an Alternative Dispute Resolution Seminar held at the James Cook Hotel Wellington on 13 March 1991. Mr Jeffries looks at the matter of dispute resolution through the Court system and the other alternatives such as negotiation, mediation and arbitration before the need for the extreme of adjudication. He suggests that alternative dispute resolution methods complement the formal apparatus of the Court system by widening the range of choice available to those who seek finalised conflict.

I was Minister of Justice between August 1989 and October 1990. In that capacity I held ministerial responsibility for the administration of justice in New Zealand. There is great wisdom in the adage that what you think depends on where you sit. In that spirit, let me admit that in my discussion as to the relative merits of the alternative dispute methods approach to which this Institute is dedicated, I have respect for the state alternative to those private arrangements. Apart from administration, I was responsible for a Bill presently before Parliament which significantly strengthens by a better reallocation of Court work, the Court system of New Zealand. The primary point is that alternative dispute resolution techniques are not incompatible with a successful and capable state system. There is room for both in the service of justice in New Zealand.

The scheme of this address is to describe the basic features of the state system, to note the points of possible comparative advantage for you, to identify the opportunities I see emerging for alternative dispute procedure and hopefully to impart a positive note that gives you confidence in your personal choice to specialise in this particular form of peace-making with honour.

It is a fundamental obligation of a sovereign nation to provide for its citizens a legal system, accessible, effective and worthy of respect embodying as it should the basic values of the society within which it serves. Governments appoint suitably qualified men and women to occupy judicial office at the various tiers of the system. Provision is made for a network of Court buildings throughout the country supported by an administrative infrastructure. The ultimate power of the state, the defining characteristic of sovereignty, is available to enforce the judgments of the Court.

In the criminal jurisdiction, a police force is empowered to bring people before the Courts. A prison service takes those duly convicted and so sentenced away to penal institutions in accordance with the sentences imposed by the Judges.

In the criminal jurisdiction it should be observed immediately that there is no alternative to the state system of determination of criminal liability. There have been some voices raised seeking a separate criminal justice regime for Maori based upon the argument that cultural considerations have not been taken into account sufficiently to justify confidence that justice has been awarded properly. This call for separation has been firmly rejected. After conviction, some District Court Judges have, with approval, chosen to exercise their discretionary powers of sentence in ways which take into account cultural considerations affecting the offender and perhaps, the victim and the respective families. The Children and Young Persons Act creates a specialist regime for dealing with criminal offending by the young. There have been some considerable successes. But generally, the establishment of criminal guilt occurs on the procedural foundations developed over hundreds of years and which generally delivers a very high standard of justice.

In the industrial relations jurisdiction, the state system for the resolution of industrial disputes has until the present Contracts Employment Bill, before Parliament at the moment, been a distinctive feature of our labour market. Both Australia and New Zealand have created a state sponsored industrial relations system based upon union registration for the purpose of recognised representation and the provision of specialised arbitral labour institutions mandated to rule and determine on a range of labour related matters. The basic philosophical approach of these labour relations regimes has been a preference for mediation, conciliation and arbitration rather than strikes, lock-outs and secondary industrial actions which can cause damage. The state has funded to a considerable extent, this alternative to industrial disruption. In New Zealand this system is now under direct legislative challenge and if the present legislation is enacted, the state will retreat from this area.

Those of you practising in the field of providing arbitration services can expect an increase in demand as industrial relations disputants will seek to replace the facilities of the present service, the Arbitration Commission and the Labour Court

with private arrangements.

In the civil jurisdiction, the proceedings issued by the Court must be respected. Subpoenas must be obeyed. A range of procedural obligations can be imposed which have to be met. Ultimately, the judgment of the civil Court can be enforced by officers of the state. Force if necessary, can legitimately be used to guarantee that the will of the Court prevails, if challenged in any way.

In the family jurisdiction the state Court system is involved in the resolution of disputes and in the enforcement of judgments. Every society requires its own system of arbitral institutions carrying powers of final determination and enforcement. The extreme alternative is violent anarchy. The essence of civil society of civilisation itself, is a formal state system with provision for the peaceful resolution of disputes.

Because New Zealand, like other countries, has inherited these fundamental elements of its legal and constitutional system from Britain, our society has developed along broadly similar lines to the predominantly English-speaking nations such as Canada, the United States of America and Australia. In all these countries, as in New Zealand, a new phenomenon has arisen. It has been called a movement. This has been the tendency for those involved in disputes of every character, to choose alternative methods of resolution – separate and apart from those provided by the state.

The movement to provide private mediation, conciliation and arbitration and other alternative dispute resolution methods, challenges the public sector to respond to the diverse demands of the market place as well as meeting the elementary obligations of the sovereign state.

The state system in recent years has moved to meet the demands of expanding commercial litigation. In Auckland, the commercial list management granting priority to cases involving sums of magnitude, stopped the flow of criticism which began to build towards the mid-1980s concerning delay. When the Court re-structuring bill I presented to Parliament in September 1990, is enacted, there will be a more rational re-allocation of all forms of litigation as between the High Court and the District Court which is under-utilised as a resource in the justice system. The proposed liberation of the Court of Appeal from considering the large mass of criminal appellate work by the establishment of a Criminal Appeal Division of the Court of Appeal, will enable New Zealand's leading Court to develop further its role as a setter of high judicial standards. These statutory changes coupled with the likelihood of the Department of Justice comprehensively adopting the new information technology systems for the administrative infrastructure supporting the Courts, will ensure that New Zealand has a more capable legal system to meet the demands of these times. Other responses have been the development of the small claims tribunals which permit flexible and inexpensive disposal of disputes.

Finally, the Judges themselves have taken a lead. Pre-trial conferences often avoid the final step into full scale litigation. So we see emerging a stronger and more effective state system challenged to some extent by the movement to alternative dispute methods of an essentially private character. The widening of choice for professional advisers is a good thing.

The two great enemies of any system of administration of justice are cost and delay. Let me deal with costs.

A feature of the credit and corporate expansion of the mid-1980s, is that some of the larger firms of professional advisers became tenants as well as advisers of commercial property developers forming their client base. With the global change in the equities market of the late 1980s and the consequent drop in real estate values, firms have been left caught in long term leases at high fixed rates of rent. The expected revenues from the corporations have not been maintained. As with the banks which many accuse of attempting to recover bad debts in the form of interest rates enacted upon the whole community, there is a view that these high accommodation costs are inflating fees. Others are just charging too much. An English newspaper reported that at the 1990 International Bar Association conference in New York, the director of the legal division of a Malaysian Bank, Public Bank Berhad, Kuala Lumpur, said that private practice lawyers were pricing themselves out of the market. The speaker, Professor Syed Ahmad Idad noted that there was such a huge differential between the cost of lawyers in private practice and in-house that he predicted the role of corporate law departments would increase significantly during the decade.

> Unfortunately, some firms view banks and finance companies as a bottomless well of revenue. And they bill us high.

Those responsible for the public provision of legal aid also complain about the explosion in the gross amount appropriated for legal aid out of taxation funds. In New Zealand, the legal aid vote has increased dramatically again reflecting a common development of similar countries to our own. The Lord Chancellor, Lord Mackay of Clashfern told the 1990 annual Bar Conference in London that it was his intention to ensure that legal services were cost efficient, cost effective and gave the taxpayer value for money.

> Resources are finite; and legal aid is not and cannot be, an unconditional blank cheque from the taxpayer.

One of the perceived disadvantages of alternative dispute resolution is the fact that the litigants have to meet the full costs of the adjudicator and the consequential administrative support. This fact coupled with high professional fees appears to be an obstacle to your cause.

This may not continue to be the disadvantage in comparative terms it has been in the past. The reason is the general trend of transferring the general liabilities of the state, funded almost entirely by the New Zealand taxpayer, on to the specific industry or profession benefiting in a direct way from the state provision of services.

The twin economic requirements of lower income and corporate taxes with lower governmental deficits mean more "user pays" policies. The costs of Court administration will increase over the next decade and

will have to be met by the litigants themselves. Already there has been a significant increase in the cost of services provided by the Justice Department. But there will be more to come as successive Ministers of Finance struggle with the tyranny of inflation and high interest creating internal governmental deficits.

It follows that the present providers of professional services for the litigation process are going to be squeezed between their own high administrative costs and the newer and higher costs exacted by the state for its services.

Inevitably the drive will be on for more cost-effective resolution of disputes. Consumer militancy will demand alternative and cheaper ways of having their problems solved without loss of basic quality in decisions or determinations. If you can meet the challenge of containment of litigation costs, it is likely you will be rewarded in terms of greater turnover of work.

The next enemy is delay. More eloquent men than I have condemned the law's delay. What you think depends on where you sit. If you sit under a coconut tree on a Pacific Island, there is a particular set of rewards associated with that environment. There is also a philosophical approach to the concept of time that differs from those who sit in an urban commercial environment in a highly developed country. There is no need for me to further elaborate to an audience such as this, the desirability for economic reasons, to expeditiously conclude disputes so that the parties can resume more constructive tasks.

Speed of resolution is a potential comparative advantage for you. The state system has responded to this challenge. The Judicature Amendment (No 2) Act, 1985 created a long awaited new set of rules for the High Court of New Zealand. An innovative development was the formation of summary judgment procedures. Proceedings can be swiftly brought before a Master of the High Court, "on the papers". This means that where appropriate the case can be dealt with on the basis of written affidavit evidence, without time consuming cross-examination. In terms of factual issues, there is usually no dispute. In the Auckland High Court, claims for sums in the vicinity of $20 m are being processed by this summary judgment procedure method. This procedure is effective in circumstances where there is no defence to the claim. The Court of Appeal has directed that a robust approach be taken in the High Court to proceedings of this character. Where there is an arguable defence, the proceedings are transferred over to substantive judicial determination with procedural entitlements of interrogatories, discovery and a full hearing being available. These proceedings prevent defendants without a defence from using the inertia of litigation to unreasonably delay the day of judgment when they have to pay.

Not all participants in the legal system support alternative or private dispute resolution methods. The remarks of the Chief Justice of British Columbia, Mr Justice Allan McEachern, in Canada have already been published in the *New Zealand Law Journal* [1989] NZLR 229. Speaking about personal injury litigation, he observed that non-judicial settlements

> tend to favour the unreasonable and the stubborn and the dishonest at the expense of the decent people.

His criticisms are reported in the Canadian publication *The Lawyers Weekly* for 24 February 1989 at p 2. The following extracts set out the criticism of the Chief Justice. Describing alternative dispute resolution as nothing more than a trend of the 1980s – replacing the 1960s and 1970s love for law reform – he said arbitration "sometimes becomes just another layer of expense in an already too-expensive procedure". Putting on his "black hat" to talk about the undiscussed disadvantages of conciliation and mediation, the Chief Justice warned that alternative dispute resolution is often supported by "earnest, well-intentioned people who, for a variety of reasons, are anxious to re-organise society and procedures of Courts with naive, theoretical concepts of humanity and efficiency".

Speaking in Vancouver BC the Chief Justice of the Province is reported to have delivered a hard-hitting attack on the trend toward alternative dispute resolution. Social workers think they can resolve social problems best, while engineers feel they are best equipped to handle construction disputes he noted. "The problem with all these theories" the Judge said, "is that they never recognise the human element. They assume that all people in disputes are honest, decent, rational, understanding people who are anxious to compromise".

According to this Judge, alternative dispute resolution ignores the fact that not all disputants are interested in settlement or honesty and that some do not even have valid claims. He also noted alternative dispute resolution emphasises compromise while there are some cases that cannot be compromised. "We will have a very soft and compliant society if no one is allowed to say 'no'," he said. Non-consensual litigation, on the other hand, puts each side on an equal footing and the parties do not have to put up with posturing and bluffing.

The Chief Justice noted that cross-examination often brings out the truth. "I don't think alternative dispute resolution is a successful device for discovering or uncovering the truth. I think it starts with a bias towards compromise". Good counsel, he said, can do just as good a job as a social worker or an engineer in dispute resolution.

He claimed alternative dispute resolution proponents often ignore conventional litigation's tremendous settlement rate: "Lawyers doing what they do best and for which they seldom get much credit, are able to resolve huge volumes of litigation using the Court process but without requiring trials".

I said that I wished to impart a positive note. As people involved in litigation, you know the value of assessing the case against you so that you can answer it.

Credibility is often determined by the degree of the claim. It is wise for the proponents of alternative disputes procedures to limit and condition their claim. I think recognising the fact that private litigation can never be a full substitute for the state system, but is a valid and complementary provider of service for those in

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Fairness and the criminal standard of proof

By Don Mathias, Barrister of Auckland

Fairness, in a criminal trial, usually concerns the question of the admissibility of some particular evidence. In this article Dr Mathias considers the standard of proof of unfairness and other related matters. He concludes with a comment on the applicability of the Bill of Rights Act 1990, and he draws an analogy to liken reasonableness to fairness.

Finding facts and finding fairness

Whether an item tendered as evidence is admissible in a criminal trial does not always depend solely upon findings of fact by the Judge. Usually, of course, a straightforward objection to an item of proposed evidence, for example on the grounds that it is hearsay, will be determined in a direct way on the simple factual issue of whether it is actually hearsay, and there will be no call for any exercise of judicial discretion once that finding is made. But when it is objected that it would be unfair to admit the item as evidence the Judge must make, in addition to certain findings of fact, a qualitative evaluation of the circumstances in which it was obtained. The exploration of the relevant circumstances will be undertaken in voir dire, whether the trial is on indictment or by summary prosecution: *Police v Grootjans* [1989] 3 NZLR 587; *Police v Kidwell* [1989] 3 NZLR 594; and in the case of a retrial or rehearing the issue may be raised again: *Fatu* [1989] 3 NZLR 419. This may occur not only where it is an alleged confession to which objection is taken, but also where illegality taints the circumstances in which the proposed evidence was obtained.

It is possible to paint a spectrum of circumstances in which evidence may be excluded at the discretion of the Court: [1990] NZLJ 25. The criterion for exclusion can be expressed variously as unfairness, prevention of abuse of process, or the need to avoid the bringing of the administration of justice into disrepute. The central concept is fairness: *Webster* [1989] 1 NZLR 129, *Walters* [1989] 2 NZLR 33. In *MacFarlane v Erber* [1990] 2 NZLR 69 unfairness was equated with an affront to the administration of justice. It may be asked whether the ordinary citizen would regard the proposed course as a fair and common sense one: *Re Kestle (No 2)* [1980] 2 NZLR 353. Whether it would be in the interests of justice to exclude the proposed evidence will always be a question of degree: *McClintock* [1986] 2 NZLR 99. This much is now well settled. Less certain is the standard to which the Judge must find that no such unfairness would arise from the admission of the proposed evidence as would require the discretion to be exercised in favour of its exclusion.

Standard of proof of unfairness: variations

There appears to be a conflict on this. In *Dally* [1990] 2 NZLR 184, Eichelbaum CJ held that once the accused has established circumstances raising a case for unfairness, the burden thereafter rests on the Crown to negate unfairness to the exclusion of any reasonable doubt. On the other hand, in *Williams* (Court of Appeal, 25/89, 18 May 1990) the Court of Appeal made the following obiter remarks in a judgment of the Court delivered by Somers J:

> The final point under this head [discretionary exclusion of a statement] does not really fall to be decided. It is the submission made by Mr Rogers that where a statement is claimed to have been unfairly made it will be excluded unless the Crown establishes the contrary beyond reasonable doubt. We are disposed to regard the issue as not one to be determined by reference to onus of proof but as one of judgment. The discretion to

continued from p 158

dispute is the best way to deal with the trenchant criticisms of the Canadian Judge.

The central issue is how do you know what dispute resolution process is appropriate for which dispute?

The *American Bar Association Journal*, June 1989 proposed a method of classification of dispute resolution alternatives which I think deals with the major issue. The key consideration is, what amount of control do the disputants have over the process and outcome. Viewed in this way, the processes conceptually can be lined up from left (much control) to right (very little control). At the extreme left is negotiation. In the middle of the spectrum is mediation; then arbitration. At the extreme right is adjudication. The answer to the British Columbia Chief Justice is that the characteristics of the case itself will probably dictate the type of process that can be suitable for the determination. Alternative dispute resolution methods complement the formal apparatus of the state, widening the range of choice available for those who seek to finalise conflict.

The *American Bar Association Journal* argument sums up the matter by stating that it is a question of "fitting the forum to the fuss". If you can do that in appropriate ways that reduce cost and delay and deliver quality determinations, expanding commercial opportunities will be available to challenge your professionalism and skills. □

> exclude only arises when the evidence is admissible. Whether what has been done is so unfair as to call for the exclusion of admissible evidence will involve the ascertainment of the facts and a conclusion as to their quality. That conclusion is one which reflects the public interest. Such matters do not readily succumb to evidentiary rules about onus or standards of proof.

If this means that a Judge may rule evidence admissible although there is a reasonable possibility that to do so creates unfairness then surely it is unsatisfactory. While the process of decision may not be capable of reduction to rules which have certain consequences, that does not mean that the result of the process is incompatible with measurement against the criminal standard of proof. In *Marsh* (Court of Appeal 142/90, 19 September 1990) the Court repeated the above dictum from *Williams* and simply said that it declined to interfere with the exercise by the Judge of his discretion.

Measure of a discretion against a standard of proof is not unknown to the law. In Australia the standard of proof is the balance of probabilities, but the onus shifts according to whether the issue is the voluntariness of a confession, in which case the prosecution has the onus of proving that it was voluntary: *Lee* (1950) 82 CLR 133, or whether it is unfairness to the accused, in which case the accused has the onus of proof, or (thirdly) whether it is general unfairness arising from improper conduct by officials, in which case the onus is again on the accused: *Cleland* (1982) 151 CLR 1, 19-20; *Van der Meer* (1988) 35 A Crim R 232, 239. The case usually cited as the origin of the requirement for proof of fairness on the balance of probabilities is *Wendo* (1963) 109 CLR 559: see Cross (3rd Australian ed, 1986) p 8, but it should be noted that in *Wendo* Taylor and Owen JJ held (at p 573) that if the Judge decides that there is a prima facie reason for admitting the evidence it then is admitted so that the tribunal of fact may assess its weight. Dixon CJ concurred, emphasising (at p 562) that in this context the issue of admissibility is independent of the probative value of the evidence.

Policy and the criminal standard

A consequence of a balance of probabilities standard is that where there is a subtantial possibility, just falling short of the balance, that there was unfairness, the evidence will nevertheless be admitted. As a matter of policy the higher standard of beyond reasonable doubt was adopted in relation to the voluntariness of confessions in New Zealand: *McCuin* [1982] 1 NZLR 13. McMullin J traced the emergence of the same standard in England, noting that the Courts there were slow to deal with this topic (see pp 20-21). Somers J, in the absence of binding authority on the point, said that the appropriate standard must be related to the reasons for, and the values sought to be protected by, the rules that exclude involuntary statements and cast an affirmative burden of proof on the prosecution (see p 23). The other three Judges of the Full Court, Cooke, Richardson and Holland JJ, considered that the fact that in 1982 the point remained unsettled in New Zealand indicated that its importance is usually more theoretical than practical. This is because, even where the civil standard of proof applies, the degree of satisfaction required varies with the gravity of the subject-matter (see p 14). So if a Judge simply said that he or she was "satisfied" that the confession was voluntary, the context would have meant that the benefit of any real doubt would have been given to the accused.

An intermediate standard?

That there may be an intermediate standard of proof between balance of probabilities and beyond reasonable doubt has been recognised by the Tasmanian Supreme Court in *Askeland* (1983) 8 A Crim R 344 which concerned the issue of voluntariness. Cosgrove J noted *Cleland* but did not accept that the authorities cited therein (including *Wendo*) established the standard as proof on the balance of probabilities. He did not regard the matter as settled law, and held that he must be "satisfied" of the voluntariness of the confession before it could be admitted:

> That satisfaction requires a standard of proof, perhaps variable in content, but always intermediate between proof beyond reasonable doubt and proof on the balance of probabilities. Both counsel have expressed their agreement with this proposition. (ibid, p 347)

The editors of the third Australian edition of *Cross* say (p 8, fn 32) that this view ccannot be correct. In citing only *Wendo* as authority for the balance of probabilities standard they seem to have read too much into that decision. For present purposes it is sufficient to note that an intermediate standard of proof has been found acceptable in practice, although it is suggested that such a description of the standard is not desirable in the context of discretionary exclusion of evidence. This is because in the interests of predictability the discretion should be confined within clear limits (cp the use of the Judges' Rules as guidelines in the discretionary field of fairness: *Convery* [1968] NZLR 426). Furthermore a Judge who bears in mind a clear standard of proof is likely to adopt a rigorous approach to the question of fairness. Simplicity is also desirable. The Australian law on discretionary exclusion is rather complex as a result of the distinction between fairness to the accused, and improper conduct of officials: See *Duke* (1989) 38 A Crim R 305, and *Dally* at p 192 where a simpler approach was preferred in New Zealand. The possibility of an intermediate standard for proof of voluntariness was considered and rejected by McMullin J in *McCuin* at pp 21-22 where the interests of certainty favoured the standard of proof beyond reasonable doubt. His Honour noted that the matter may be one of semantics as a reasonable doubt would leave the Judge not satisfied that the confession was voluntary. The judgment of Cooke, Richardson and Holland JJ contains the following comment at p 15:

> Adopting the criminal standard should not cause any harm to the public interest. Perhaps juries may sometimes be persuaded too readily that a far-fetched or fanciful doubt is a reasonable one. Judges are not usually so vulnerable.

Merely semantics?

If there therefore appears to be a choice of either the criminal standard, as used by Eichelbaum CJ in *Dally*, or the judgment of the Court as to what is fair, as preferred by the Court of Appeal in *Williams*, it can be said that there may be little if any practical difference in resulting rulings on admissibility. A sceptic might argue that one may as well do away with the criminal standard of proof on the question of guilt and simply say that an accused may be found guilty if it seems to the Court that he is guilty.

In *Rakena* (High Court, Auckland, T 126/89, 7 November 1989) Chilwell J found it unnecessary to resolve the question of onus in relation to discretionary exclusion of confessions. Instead he adopted the advice of Cooke J in *Horsfall* [1981] 1 NZLR 116, 122: "it would seldom be helpful to approach this discretionary question in that way".

On the question of whether different formulations of the standard of proof really mean different things, it is interesting to consider how the Courts treat the admissibility of hearsay evidence in cases of conspiracy. The Court of Appeal sat as a Full Court in *Buckton* [1985] 2 NZLR 257, and Woodhouse P, Richardson and McMullin JJ held that the existence of the requisite common intention must be established on the balance of probabilities before the hearsay evidence is admissible. Cooke J preferred to describe the standard with the word "reasonable", and similarly Somers J preferred the expression used in *Humphries* [1982] 1 NZLR 353, namely "reasonable evidence". Again, in *Wrenn, Ross, and Thomas* (1989) 4 CRNZ 165, the requirement of "reasonable evidence" was taken to mean to the standard of the balance of probabilities (p 172). Shortly afterwards, in *Walters* [1989] 2 NZLR 33 the Court of Appeal said that in essence what the Judge has to decide is whether it is "safe" to admit the hearsay evidence, that is, whether the non-hearsay evidence is "sufficient" (pp 37-38). Again, nearly eight months later in *Uea* (1989) 4 CRNZ 703, the standard was said to be whether it was "fair and safe" to leave all the evidence to the jury. This has been interpreted by Thorp J in *Flickinger v Superintendent of Mt Eden Prison* (1990) 6 CRNZ 552 as adhering to the *Humphries* and *Buckton* standard.

For present purposes three points emerge from this. The first is that these various choices of descriptions of the standard are taken by the Courts (so it is said) to mean the same thing. That should be reason enough to call a spade a spade. The second point which emerges from this is that the apparent discretion which arises from the need to be satisfied that it would be "safe" to admit the evidence is illusory: the reason for the standard being proof on the balance of probabilities is that the Court must be sure that it would be safe to admit the evidence and yet the higher standard would render the hearsay evidence otiose and the conspiracy would be proved on the non-hearsay evidence. So "safety" is simply a justification for the rule about the standard of proof and does not indicate a discretion.

Thirdly, failure to recognise the second point could lead to a confused application of the standard of the balance of probabilities to discretionary exclusion. This confusion could occur if the passage in the 4th New Zealand edition of *Cross on Evidence* (1989), para 3.12, p 81 is not confined to its context. There we find a discussion under the heading "The burden and standard of proof at a trial within a trial". The discussion is not concerned with discretionary exclusion of evidence, even though discretionary exclusion will usually be considered by way of voir dire. The subject of this paragraph of *Cross* is (as its first sentence indicates) the burden and standard of proof of facts which are conditions precedent to the admissibility of an item of evidence.

The reference therein to *Police v Anderson* [1972] NZLR 233, in which it was decided that on an allegation that the defendant drove with excess blood alcohol it is only necessary for the prosecution to establish on the balance of probabilities that the enforcement officer had good cause to suspect that the defendant had committed the offence, has nothing to do with discretionary exclusion of evidence.

Proof of incidental or procedural matters

In *Anderson*, supra, Turner J (at p 249) said:

> It is not every fact necessary to be proved in the course of criminal proceedings which must be proved beyond reasonable doubt. Of course, all facts forming part of the definition of the crime, and of the participation of the accused in it, must so be proved. But in the course of criminal procedure other matters of fact may arise for determination, which are not required to be proved to this standard. This situation arises when questions of fact incidental or even necessary to the *procedure* of the prosecution require to be proved before that prosecution can proceed.

In *R v Gallagher* (Court of Appeal, 387/90, 18 March 1991) the issue was (in general terms) to what standard failure of the defendant to request a blood test had to be proved. Under s 58(4) of the Transport Act 1962, the result of an evidential breath test (in the relevant circumstances) is inadmissible if such a request was made. The Court unanimously applied the general principle stated by Turner J in *Anderson*, supra, and held that the request was an incidental matter and proof to the standard of the balance of probabilities was appropriate. Each Judge was careful to state how *McCuin* was distinguishable: Richardson J on the special public policy considerations which apply to the voluntariness of confessions and which require "the constitutional protection of proof beyond reasonable doubt"; Casey J similarly, and treating *McCuin* as "an exception" to the general requirement of no more than a standard of balance of probability for the admissibility of evidence needed to prove an essential ingredient; Thorp J similarly, pointing out that *McCuin* is the only exception to the general rule in *Anderson* recognised so far although "special cases may arise in the future involving important issues of public policy" and requiring extension of the *McCuin* exception. In the result, the proof of failure to request a blood test was not like a failure to establish that the breath

test had been correctly carried out. As North P noted in *Anderson*, supra, at pp 241-242, a line of authority supports the view that the way the test is carried out, while not an essential ingredient of the offence, nevertheless does require to be strictly proved.

Gallagher is not authority on the standard to which fairness must be established when otherwise admisible evidence is subject to challenge on the discretionary ground of unfairness. The thesis of this article is that fairness is akin to the voluntariness of a confession: the Courts must be just as vigilant to ensure fairness as they are to extend "constitutional protection" against official coercion. It would be unsatisfactory for Judges to allow evidence, the admission of which can only be said to be "probably fair". However if Courts insist that they cannot decide fairness on the criminal standard of proof, then it is suggested that the balance of probabilities standard is applied in this context strictly, so that in reality when the discretion is exercised in favour of admission of the evidence there could only be at most a very low probability of unfairness.

Further support for the criminal standard of proof is found in the following argument. It would be wrong to say that on a standard of proof of the balance of probabilities the Court is admitting evidence which may very possibly be inadmissible. This is wrong because once the precondition for admissibility is established according to law, the evidence is "admissible", not "probably admissible". But a similar rationale cannot be used for fairness. Fairness is only relevant in relation to evidence which is in other respects admissible, and it is relevant in a negative sense: if there is a basis for concluding that admission of the evidence would be unfair, then unfairness must be negatived before the evidence is admitted. If that were not the case, it could be said that the Courts were allowing evidence although its admission might well be unfair.

The New Zealand Bill of Rights Act 1990

Central to the present inquiry is whether there are cases where admissibility is discretionary and which carry a standard of proof on the balance of probabilities. Apparently in Australia there are: *Cleland, Lee* supra. Here we must bear in mind the New Zealand Bill of Rights Act 1990, particularly in this context s 25(a): "The right to a fair and public hearing by an independent and impartial Court", and (c) "The right to be presumed innocent until proved guilty according to law". These provisions echo those of s 11(d) of the Canadian Charter of Rights and Freedoms which provides for the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". Of this, Lamer J has said in *Collins* (1987) 56 CR (3d) 193, 211:

> The trial is a key part of the administration of justice, and the fairness of Canadian trials is a major source of the repute of the system and is now a right guaranteed by s 11(d) of the Charter. If the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would *tend* to bring the administration of justice into disrepute and, subject to a consideration of the other factors [those relevant to the seriousness of the Charter violation and to the effect of excluding the evidence on the repute of the administration of justice], the evidence generally should be excluded. [His italics]

The fundamental consideration here is whether the administration of justice would be brought into disrepute by the admission of the evidence. This is a matter for judicial determination (not for public opinion, but see the description of a survey in (1990) 69 *Canadian Bar Review* 1) and the Supreme Court of Canada uses the standards of a reasonable person, dispassionate and fully apprised of the circumstances of the case and founded in long term community values rather than the passing stresses and passions arising from current events: *Collins*, pp 209, 210 and see [1990] NZLJ 25.

The standard of proof which has to be satisfied by the person seeking to have the evidence excluded is proof on the balance of probabilities: Lamer J, p 205. This is a consequence of s 24(2) of the Canadian Charter which provides that where a Court concludes that there has been a breach of Charter rights the evidence so obtained shall be excluded "if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute". The New Zealand Bill of Rights Act 1990 does not contain an equivalent provision and its absence is not a particularly sad loss, as the difficulty which the Judges of the Supreme Court of Canada have in agreeing on its application to particular cases shows: see eg *Greffe* (1990) 75 CR (3d) 257 and *Leclair* (1989) 67 CR (3d) 209. In the absence of such a provision the common law must be interpreted consistently with the Act, and it might be concluded that where there is evidence which raises the issue of a violation of the Act and consequent unfairness it is for the prosecution to prove that there was no such violation or, if there was, that no unfairness arises from it. In other words the discretionary exclusion of evidence obtained illegally remains governed by the common law. There is no provision in the New Zealand Bill of Rights Act 1990 which provides for any remedy for breach of the rights and freedoms recognised in it. Legislation is unaffected except to the extent that s 6 requires interpretation consistent with the rights and freedoms where that is possible, and the rights and freedoms are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (s 5). All this is consistent with preserving the common law, but s 5 may imply that the onus is on whoever would seek to limit a particular right or freedom to "demonstrably justify" that limitation, and those words indicate a high standard of proof. Presumably if the Court was left in a reasonable doubt about whether the limitation was justified, that limitation could not be said to have been "demonstrably" justified.

However it must be acknowledged here that in relation

to the corresponding provision in Canada, s 1 of the Charter, the Supreme Court of Canada has held in *Oakes* (1986) 50 CR (3d) 1, 29 that the standard of proof is the civil standard, as the alternative of proof beyond reasonable doubt would be too onerous a burden on the party seeking to limit:

> Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to [the criminal standard of proof]. Nevertheless the preponderance of probability test must be applied rigorously. Indeed the phrase "demonstrably justified" in s 1 of the Charter supports this conclusion . . . a very high degree of probability will be, in the words of Denning LJ [in *Bater v Bater* [1951] p 35, [1950] 2 All ER 458 at 459] "commensurate with the occasion".

In assessing the relevance of this approach in New Zealand it should be remembered that in Canada if legislative limits on the rights and freedoms are not demonstrably justified, the Courts can hold the relevant part of the enactment unconstitutional. In those circumstances it might not be appropriate to place an onerous burden on the party seeking to uphold the legislation. The purported difficulties in applying the criminal standard of proof to concepts such as reasonableness arise from a mistaken attribution of difficulties in describing the decision process to the resulting decision itself. That a Court can readily handle this sort of decision can be seen from the following analogy: a jury deliberating upon a count of rape decide that D had an honest but mistaken belief that V was consenting; they then have to decide whether his belief was unreasonable, and if they find D guilty they have found unreasonableness beyond reasonable doubt. Applying this analogy: if reasonableness can be likened to fairness, a Court should be able to decide whether fairness is proved beyond reasonable doubt. Similarly, a Court may accept evidence or argument advanced by the Crown to the effect that a particular limitation of a right is demonstrably justified in a free and democratic society, and the Court can therefore say (beyond reasonable doubt) that such is the case.

From this discussion the following reasons for supporting a standard of proof of beyond reasonable doubt can be advanced: (1) It is possible to measure a discretion against a standard, as the Australian approach shows. (2) The standard should be the same as applies to voluntariness; in Australia the Courts apply a uniform standard but they have chosen the civil standard. In New Zealand the *McCuin* standard should apply. (3) Any reasonable possibility of unfairness should be unacceptable as tending to bring the administration of justice into disrepute. (4) Doubts should be minimised to foster uniformity. (5) There already is potential for uncertainty arising from differing analyses of what is in issue, whether it be the admissibility of an item of evidence of the standard of proof in respect of that item. (6) The New Zealand Bill of Rights Act 1990 should not be undermined by tolerating the reasonable possibility of unfairness at trial. □

A letter from Melbourne

By A O Ferrers, formerly an Auckland practitioner and now of Queensland

I am on circuit, as it were, having abandoned the Gold Coast temporarily for a swing through New South Wales and Victoria. You will know I am sure that Australia is a big country. Now I have proved it to myself, the drive being a little over 1800 kms to reach Melbourne. Despite all the floods Australia has suffered in recent months, our way led through countryside where the grass was the colour of straw for practically the whole of the distance.

Cash Transactions Reports Act

This time I shall tell you something about the Cash Transactions Reports Act 1988. The various sections have come into force at different dates, with the last commencing only in February this year.

The purpose of the Act is to assist in the detection of tax evasion and money laundering from the proceeds of drugs and other crime. The information gathered is made available to the Australian Taxation Office, the Police and the National Crime Authority.

Financial institutions and cash dealers (defined terms which include casinos, the TAB and bookmakers) have to report substantial movements of cash: $10,000 or more domestically; $5,000 or more moved offshore. The mind boggles at the thought of a sketch by Benny Hill complying with the Act as a bookie!

There are also provisions that such cash dealers have to report to the Cash Transactions Reports Agency any cases of suspicious transactions. This gives plenty of room for action – and could produce another hilarious sketch.

So far the Tax Office has been having a ball and has brought several successful prosecutions. Tax recoveries and the penalties could prove a bonanza.

In one case police raided the home of a tax evasion suspect and found cash in caches of some $200,000. There were also passbooks for savings accounts in more than forty fictitious names. Reconstruction of the tax returns will be an interesting exercise.

It is an offence to open an account in a false name. The most recent provisions to come into effect, 1 February 1991, reinforce this. They concern verification. The Costigan and Stewart Royal Commissions (which were the genesis of the legislation) recommended –

> That there needs to be a uniform and controlled approach when

continued on p 180

Correspondence

Dear Sir,

A New Interpretation Act

Mr D F Dugdale is, as ever, entertaining in his complaint about the Law Commission's Report *A New Interpretation Act* [1991] NZLJ 76). Your readers might be interested in some explanation and relevant facts.

Your correspondent's first complaint is that the Commission should not have prepared the Report. The first answer to that is that the Commission had a reference from the Minister of Justice requiring the review of the Acts Interpretation Act 1924 and the recommendation of appropriate changes. Other answers are that the 1924 Act is essentially that imported from Canada in 1888, that the Canadian model and statutes based on it have been substantially rewritten since, as have Australian federal and state statutes and the United Kingdom Act (mainly within the last 10 to 12 years), the great changes in the statute book over the last 100 years, significant changes in judicial approaches to legislation and its interpretation, and the central importance of legislation in our legal system. The opinion that major change is needed or at least desirable is also reflected in submissions and comments on the preliminary papers and drafts which many people in New Zealand, Australia, Canada, the United Kingdom and the United States have made. That appeared as well from Law Society and Commission seminars and meetings. The overwhelming balance of the comment made since the report was published also supports that opinion.

Your correspondent proposes five priority items for review. Let me note in respect of them that

> The Commission has helped the Justice Department with proposed legislation on the international sale of goods,
>
> It is reviewing the Property Law Act (some of that review is important for any later work on the Land Transfer Act),
>
> It is about to report on arbitration,
>
> Members of the Commission participated in a working party which reported to the Minister of Justice in 1988 on the application of the Matrimonial Property Act after death, and
>
> It has recently been involved in discussions about how insurance law might be reviewed, not to mention other work which bears on the concerns of the insurance industry.

The work on legislation and its interpretation has to be put in the context of a varied and highly relevant programme.

Enacting formula

The first of the five criticisms of the quality of the report concerns the enacting formula to be found at the beginning of statutes. Should it read (as it does at present) "BE IT ENACTED by the Parliament of New Zealand as follows" or (as the Commission proposes, reflecting practice in several Canadian and Australian legislatures) "The Parliament of New Zealand enacts . . ."? For your correspondent the present form is good current idiomatic English. To us it appears outdated.

Marginal notes

The second matter concerns "marginal notes" to sections (which since 1956 have in fact been printed as shoulder notes). The 1924 statute says that they shall not be deemed to be part of the Act. It does not in terms say that they are not relevant to the interpretation of the Act; and the Court of Appeal has in fact used a marginal note in the way indicated by the proposed cl 9(3) of the Commission's draft Bill: that "all the indications provided in the enactment as printed or published under the authority of the New Zealand Government" can be considered in ascertaining the meaning of the enactment: see *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 142.

Your correspondent's reason for opposing the perceived change is that the wording of marginal notes is not determined by Members of Parliament but is ultimately settled by the Clerk of the House in consultation with Parliamentary Counsel after a Bill has had its third reading but before Royal Assent. That is an incomplete description of the process. Bills as introduced do of course already have marginal notes, the notes are often amended in the course of the parliamentary process by the decisions of the House taken on amendments to Bills proposed both by select committees and by Supplementary Order Papers, and the changes made at the final stage are relatively few and minor. More important, if there is no longer an express provision on the statute book that marginal notes are not part of the enactment and there is instead a provision allowing them to be considered in the process of interpretation, those changes can be expected to have an effect on the already confined practice of the Clerk.

Statements of principle

The third criticism, one of greater moment, is that it is "bizarre" to have a statement of principle in a statute. (The particular statement reads "In principle an enactment has prospective effect only"). It is said that while it may be helpful to have the principle in a preamble or "other introductory part of a statute", only the precise rule and not the justification for it should be set out in the operative part of the statute. As the Report itself recognises, the usual legislative practice is not to state principles or underlying purposes. But the practice is not invariable and there are many examples to the contrary (some disguised). This matter requires fuller treatment than can be given here, but consider for instance the broad prohibitions in Magna Carta on deprivation of liberty or property without due process, or in the Bill or Rights of 1688 on excessive bail and cruel and unusual punishment. Or the proposition included in our guardianship law since at least 1926 that the welfare of the child is the paramount consideration (now obscured under "miscellaneous" near the end of the statute). Or the various statements of purpose and principle included in the Children,

Young Persons and their Families Act 1989, the Contractual Mistakes Act 1977, the Labour Relations Act 1987 and the Employment Contracts Bill, and other statutes ancient and modern mentioned in the Report.

There is as well good authority for such legislative statements of principle. Lord Wilberforce put the point this way:

> . . . by presenting to the courts legislation drafted in a simple way by definition of principle, we may restore to judges what they have lost for many years to their great regret: the task of interpreting law according to statements of principle rather than by painfully hacking their way through the jungles of detailed and intricate legislation. (264 HL Debs (5th Ser) cols 1175-6, 1 April 1965)

Preambles are an awkward means of stating the principle or purpose which is motivating the lawmakers. The "introductory part of a statute" is not easily to be distinguished in fact or in purpose from later parts (and the provision in question is in fact the first in the part of the draft Act concerned with the prospective application of legislation). The alternative in the particular case would be to leave the matter to be dealt with in the heading to the section.

The Crown

Your correspondent's fourth complaint is also about an important matter. He says that the reversal of the rule that the Crown is not bound by a statute unless the statute so provides is no more than a change in form and not a change in substance. The change, he says, will have an effect only in the "unlikely event of an oversight by a particularly absent-minded draftsman". That is wrong. As the Report mentions, about 420 out of 620 public Acts have no express provision stating that the Crown is bound. Omission is not at all unlikely, and the cases indicate that the omission can have unjust consequences. Certainly recent practice is more commonly to include an express provision, but the Report lists significant recent Acts which do not. The present law is uncertain and contrary to principle. There was almost unanimous support for the change we proposed.

Definition of North and South Islands

Your correspondent's final point concerns the omission of the definition of "North Island" and "South Island" from the list of defined words. He mentions just one of the two reasons the Commission gave for omission (what else could the expression mean?), calls attention to the inclusion in each definition of islands "adjacent" to each island, and refers to Stewart Island.

The Commission also gave as a reason for the proposed omission the fact that the expression was rarely used in the statute book. If the expression is used in an Act, we said, a definition (if required) is better placed in the particular Act. Our research has identified only two public Acts in which "North Island" and "South Island" are used and no others were reported in response to our questionnaire. The Casino Control Act 1990 provides for casino premises licences in the North Island and in the South Island. Would there be a practical problem? If there were both doubt about the statute's scope and a real prospect of a casino on Stewart Island the particular statute could address that. And in any event is the definition adequate? For instance are the Chatham Islands "adjacent" to the South Island? The Electoral Act expressly deals with that question by saying that they fall within *both* the South Island (the Lyttelton general electorate) *and* the North (the Western Maori electorate). That Act deals with the political representation of all the people of New Zealand. It is hard to imagine it being read as excluding a part of New Zealand or some of its residents. But if that were feared, the Commission's alternative is available – appropriate provision in the particular enactment (as also found in the particular enactment in respect of residence on Campbell and Raoul Islands, again islands which are hardly "adjacent" to the North Island).

I do not (dear reader who has lasted so long) respond to your correspondent's final sentence. I suggest his literary tastes differ from ours and his complaint may be the opposite.

K J Keith,
President,
Law Commission

Mr Dugdale comments:

All those rhetorical questions and sentences beginning with "And" whenever the reasoning gets a bit shaky should have told me that Report No 17 was from the pen of Sir Kenneth Keith. Sir Kenneth tells us and I of course accept that his Commission embarked on its examination of the Acts Interpretation Act on the direction of an (unnamed) Minister. It would in practice be unusual for such a direction to be given without consultation with the Commission. Sir Kenneth tells us nothing of that. The point to emphasise however is that the decision whether of the Minister, the Commissioners or all of them to fiddle with the Acts Interpretation Act in preference to dealing with matters which practising lawyers know to be more pressing demonstrates a cock-eyed sense of priorities. I endeavoured in a mild-mannered way to make the same point at the stage of the paper preliminary to Report No 17 (see [1989] NZLJ 93) without at that stage attracting Sir Kenneth's thunderbolts.

As to the quality of the report, it would be possible but tedious to respond point by point to the President's letter. On the matter of marginal notes for example he should not have advanced the argument which he describes as important but which seems to me lame that the proposed changes "can be expected to have an effect on an already confined practice of the Clerk" without disclosing that his draft bill would apply to existing as well as future legislation. It is odd of Sir Kenneth to advance the fact that 420 existing public Acts have no express reference to the Crown being bound as evidence of the likelihood of oversight when the far more likely explanation is that the draftsmen relied on the existing s 5(k) which provides that the Crown is bound unless the contrary is stated. I regard Report No 17 as a poor thing. Sir Kenneth disagrees. I am quite happy to leave the verdict to those sufficiently interested to read the report for themselves.

D F Dugdale

Apple Fields and the Privy Council: s 43 of the Commerce Act 1986 revisited

By Yvonne van Roy, Senior Lecturer in Commercial Law, Faculty of Commerce and Administration, Victoria University of Wellington

This article is a follow up to that published at [1990] NZLJ 164 which considered the decision of the Court of Appeal in the Apple Fields *case. In the opinion of the author the decision of the Privy Council provides a clear and easily workable interpretation of s 43 of the Commerce Act 1986 and is also more consistent with the view taken by the full Federal Court of Australia in the case of* Ku-ring-gai.

Introduction

The Privy Council decision in *Apple Fields Ltd v The NZ Apple & Pear Marketing Board* [1991] NZAR 145; (1991) 3 NZBLC 101,946 gives New Zealand a clear and workable test to determine what is or is not "specifically authorised" for the purpose of exemption from the trade practices provisions of the Commerce Act 1986.

This exemption is provided in s 43, for "any act, matter or thing that is, or is of a kind specifically authorised by any enactment or Order in Council made under any Act". The words "specifically authorised" were chosen to bring this statutory exemption into line with that in s 51(1) of the Australian Trade Practices Act 1974, and to move away from the interpretations given by the Courts to the words "expressly authorised" in the New Zealand Trade Practices Act 1958 and Commerce Act 1975! These interpretations had provided no clearly definable tests or guidelines for future cases.

When the Commerce Act 1986 was passed, the words "specifically authorised" had already been the subject of a leading precedent from the Full Federal Court of Australia – *In re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) ATPR, 40-094. Although the three Judges in that case did not come to any conclusions as to the precise meaning of the words "specifically authorised", it is clear from the judgments in that case that a very narrow meaning was adopted by the majority. On the basis of this decision, "specific authorisation" probably required a clear description of the practice to be contained in the authorising section.

Since then, s 43 and the words "specifically authorised" have been considered by the New Zealand Court of Appeal in *New Zealand Apple & Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158; (1989) 2 NZBLC 103,741. Although all four Judges in the Court of Appeal decided that the practice at issue was specifically authorised by s 31 of the Apple and Pear Marketing Act 1971, they each had somewhat different views about the requirements of s 43, and the meaning of "specifically authorised" and "of a kind, specifically authorised". The Privy Council, in a very short judgment, overturned the Court of Appeal decision. It addressed the issue as "purely a matter of interpretation" (p 101,950), and provided a very narrow view of the words in a test which is not only clear and easily workable, but is also more consistent with the view taken by the Australian Court in *Ku-ring-gai*.

The Court of Appeal in *Apple Fields*

The New Zealand Apple and Pear Marketing Board, a monopoly created by statute, had imposed a new levy of $1.35 per tray carton of apples (referred to as "the 2nd tier levy"). This was to be paid by new growers, and by existing growers for production in excess of what each had sold to the Board in the past. The levy was introduced in order to ensure that these growers would contribute appropriately to the added capital facilities which the Board had to provide as a result of the increased production. Holland J, in the High Court, had found that the levy contravened s 27 of the Commerce Act in that it was an arrangement which was likely to have the effect of substantially lessening competition in the wholesale market for apples ((1989) 2 NZBLC 103,564, at pp 103,579-103,580). No case had been put forward under s 43 in the High Court. Section 43 was however argued in the Court of Appeal, and this Court, although agreeing with Holland J that the levy breached s 27 (and maybe ss 29 and 36 also), decided that the levy was "of a kind, specifically authorised" by s 31 of the Apple & Pear Marketing Act 1971.

Section 31(1) and (2) enables the Board, with the approval of the Fruitgrowers Federation, to "impose on growers levies of such nature and incidence as the Board thinks fit", and that such levies can be "imposed on all growers, or on any specified class or classes of growers . . ." Subsection (4) enables the proceeds of these levies to be paid into a Capital Reserve Fund, the money in that fund to be applied by the Board in the acquisition, development, and improvement of capital assets.

Cooke P emphasised the importance of the purpose of the Commerce Act (ie to preserve competition), and the need to be

sure that Parliament had intended that this purpose be overridden before exemption could be given. He stated:

> The reasonable inference is that the exception in s 43 is meant to cover cases where the actual terms of an enactment show that limits on competition are inevitable or at least likely, if the authority given is exercised. If the terms of the authorising enactment leave no doubt that anti-competitive measures were in contemplation, it will fall within the exception to the general regime of the Commerce Act intended to preserve competition. (NZLR 165; NZBLC 103,748)

In order for a practice to be "specifically authorised", or "of a kind, specifically authorised" Cooke P seemed to require that it be either precisely described in the authorising section, or that the practice contemplated by the authorising section should be anti-competitive, or there should at least be a high degree of likelihood of it being anti-competitive.

Richardson J seemed to be concerned more with the authorising Act (the Apple & Pear Marketing Act), and the importance of the practice to the scheme of this Act. With respect to the words "of a kind, specifically authorised" in s 43 of the Commerce Act, he stated:

> To come within the expression there must be sufficient particularity so that it may fairly be said that what has been done comes squarely within the contemplation of the statute. There is no litmus test. Whether a statutory authorisation is sufficiently direct to constitute the specific authorisation of an act of that kind must, I think, involve questions of degree and in the end depend on the impression the Court forms of the character of the Act in question and the significance of that Act in the statutory scheme. (NZLR 174; NZBLC 103,756)

Therefore, in order for a practice to be "specifically authorised" or "of a kind, specifically authorised", Richardson J seemed to require that it be either precisely described in the authorising section, or that it should be able to be seen as clearly contemplated by the authorising section, and have sufficient significance in the statutory scheme (of the authorising Act).

It is perhaps unfortunate that a single clear view did not emerge from the Court of Appeal decision, and that the tests or views put forward by Cooke P and Richardson J were not really put to the test before they were made redundant by the Privy Council decision.[2]

The Privy Council in *Apple Fields*

The Privy Council did not address any specific test put forward in the Court of Appeal judgments. It chose instead to challenge what it considered to be a predisposition by the Court of Appeal with respect to the producer board, ie:

> . . . a predisposition to believe that the legislature, when enacting the provisions of Pt II of the Act of 1986 which outlaw restrictive trade practices, cannot have intended that they should apply to inhibit the Board's exercise of its powers under s 31 [of the Apple and Pear Marketing Act] (p 101,950)

It found nothing which should predispose the interpreting Court to approach the issue in this way, and gave the following reasons for this finding:

- Section 6 of the Commerce Act negated any intention that producer boards should enjoy any general exemption from its provisions. (Section 6 makes Crown corporations engaging in trade, subject to all the provisions of the Act).

- The Australian Trade Practices Act 1974, on which New Zealand's Commerce Act is based, contains an express power (in s 172(2)(a)) to make Regulations which may provide that all or any of the provisions of that Act shall not apply to "conduct engaged in by a specified organisation or body that performs functions in relation to the marketing or primary products." The Privy Council noted that "there is conspicuous absence from the New Zealand Act of any provision corresponding to [this provision]. (p 101,951)

- It is possible to seek authorisation (under Part V of the Act) for proposed practices which would contravene any of the trade practices provisions in Part II (except ss 36 and 36A), and there is opportunity then for factors may benefit the public to be considered. (If these factors outweigh the detriments arising from the lessening of competition, authorisation will be given by the Commerce Commission).

It considered that the purpose of the levy (which was for the acquisition, development and improvement of capital assets, as described in s 31(4) of the Apple and Pear Marketing Act), is not relevant to specific authorisation under s 43, and that the Court of Appeal was wrong in attaching such relevance to this purpose. The authority to impose the levy is given in s 31(1) and (2) of the Apple and Pear Marketing Act, and if this authorisation is not of itself sufficiently specific to satisfy s 43 of the Commerce Act, the provisions of s 31(4) can not satisfy s 43 either (p 101,953). Rather the Board's purpose would have been relevant to a determination under s 27 of the Act, or authorisation of the levy under Part V of the Act. While it is clear that the Privy Council wished to emphasise the importance of the actual words of the authorising provision, it is difficult to see how the purpose of a practice can be other than relevant to the second part of the test which the Privy Council went on to set down for s 43, (ie in determining whether the whole or a preponderant majority of a class of practices would contravene the Act).

The Privy Council adopted a very narrow focus when it considered the way in which the issue of statutory exemption should be approached. It stated:

> . . . when an issue is wholly governed by statute, its resolution must be purely a matter of interpretation (p 101,950) . . . . The issue raised turns simply upon a narrow point of

> construction. What amounts to a "specific authorisation" under section 43 of the Act of 1986? Does section 31 of the Act of 1971 provide such a "specific authorisation"?" (p 101,951)

The Privy Council agreed with the Judges of the Court of Appeal that the effect of the language of s 43(2) of the Commerce Act was to reverse the decisions under the 1958 and 1975 Acts and "to ensure that the new statutory exemption is significantly narrower than the old" (p 101,951). It noted:

> Express authorisation is the antonym of implied authorisation; specific authorisation is the antonym of general authorisation. (p 101,951)

Section 43(2) states that "an enactment or Order in Council does not provide specific authority for an act, matter, or thing if it provides in general terms for that act, matter or thing . . ." The critical question is, what distinguishes a provision which provides *specific* authority from a provision which provides authority only in *general terms*? The Privy Council stated:

> Section 43(2) makes it abundantly clear that a statutory authorisation embracing a class of acts which may or may not amount to restrictive practices is not a specific authorisation which will satisfy section 43(1). This is so even if, as here, the particular act in question is not only authorised generally by the statute, but also requires under the statute, and has obtained, the specific authority of the Minister. This seems to their Lordships to indicate that nothing less will do than either a statutory authorisation of the very act in question or, if it is one of a class or kind of authorised acts, that the whole authorised class would, if not so authorised, fall foul of the prohibitions in Pt II of the Act of 1986. (p 101,953).

The Privy Council was however prepared to relax the requirement that the *whole* class of acts be anti-competitive (and therefore in beach of the Commerce Act), because of the ingenuity that could be put to the finding of exceptions. It was prepared to permit a relaxation to the extent only "that the statute authorises acts of a kind of which the preponderant majority will certainly operate in an anti-competitive way . . ." (p 101,953)

The tests by which a practice may be found to be "specifically authorised", or "of a kind, specifically authorised", may therefore be described as follows; either:

(1) a statutory authorisation of the very act in question, or

(2) a statutory authorisation of a class of acts of which the whole or a preponderant majority of those acts would contravene the trade practices provisions of the Commerce Act if not for the authorisation.

With respect to the levy at issue in the case, it is clear that this did not fall within the first of the tests noted above (ie there was no "specific authorisation" of the precise levy in question). It was necessary then to look at the class of levies which was authorised by s 31(1) and (2). The Privy Council did not think that all the levies or even a preponderant majority of the levies, which could fall within this class would contravene Part II of the Commerce Act. It stated:

> In the absence of the evidence it seems to their Lordships that classification of growers by reference to new or increased production is the only one of a number of possible classifications for the purpose of a class levy under section 31(2) which is likely to have any anti-competitive effect. Thus a class levy is the genus of which a new and increased production levy is the only offending species and the relevant authorisation is general rather than specific. (p 101,953)

Having found that the levy breached s 27 of the Commerce Act and was not exempt from that Act under s 43, the Privy Council then set aside the order of the Court of Appeal and restored that of Holland J in the High Court.

Conclusion

The decision of the Privy Council in the *Apple Fields* case has provided a very narrow test for determining whether or not a practice is "specifically authorised" by an Act or Order in Council. It is probably this narrowness which makes it clear and workable, for little room has been left for subjective factors, such as the importance of the authorising statute, to enter the equation. Only the words of the authorising provision are relevant. These must describe the precise practice proposed, or if a class of practices is described, the whole or preponderant majority of practices in that class must be such that they would contravene the Commerce Act (if not for the authorisation).

It is clear that with the introduction of the Commerce Act 1986, the statutory exemptions in the 1958 and 1975 Acts and the interpretations of these by the Courts, were no longer desired. New Zealand adopted the words "specifically authorised" from the Australian Trade Practices Act and with them the restrictive view taken in the leading Australian case, *Kuring-gai*. If Parliament had wished to avoid the restrictive view taken in that case it would not have chosen to use the words "specifically authorised" in the statutory exemption provision of the Commerce Act (s 43). The test put forward by the Privy Council is quite consistent with these changes, and as it has provided a test which is clear and workable it is to be welcomed. □

1 Section 19(4) of the Trade Practices Act 1958, and ss 22(7)(a), 27(2)(c) and 28(5) of the Commerce Act 1975 – see *His Master's Voice (NZ) Ltd v Simmons* [1960] NZLR 25; *ABC Containerline NV v New Zealand Wool Board* [1980] 1 NZLR 372, and *Stock Exchange Association of New Zealand v Commerce Commission* [1980] 1 NZLR 663.

2 In *Glaxo NZ Ltd v Attorney-General* (unreported, High Court, Auckland, CL 6/90, 9/3/90), a case which was decided in the period between the Court of Appeal and Privy Council decisions in *Apple Fields*, the Judge simply decided that s 99 of the Social Security Act (the authorising section at issue) was even more specific and of greater particularity than s 31 of the Apple and Pear Marketing Act, and therefore the actions of the Minister under s 99 of the Social Security Act should be exempt also.

Relevant interests and nominee shareholding disclosure

By Andrew Hames, a practitioner of Auckland

This article deals with some issues of interpretation under Part II of the Securities Amendment Act 1988. He points out that the definition of "relevant interests" is central to the interpretation of the amendment. He looks at Australian case law which he considers provides the basis for practical advice on the New Zealand legislation but adds that that needs to be treated with some caution.

A discussion of some practical issues which arise under Part II of the Securities Amendment Act 1988.

Part II (except s 36) came into force on 1 July 1989.

Roughly speaking, the effect of the legislation is to require certain notices to be given to a public listed company, and the New Zealand Stock Exchange, by any party who holds or controls 5% or more of the voting securities of the company. In fact, the scope of Part II is somewhat wider.

Part II also provides for a wide range of court orders.

This article is not intended to provide a comprehensive survey of Part II. Instead the writer wishes to comment on some unresolved issues of interpretation.

A person who has a "relevant interest" in 5% or more of the "voting securities" of a "public issuer" (as defined) is a "substantial security holder" in the public issuer; s 2 of the Amendment Act. As such, a duty to notify arises under s 20(1) or (3) of the Amendment Act, unless an exception in s 23(2) or (3) applies.

The Securities (Substantial Security Holders) Regulations 1989 prescribe, amongst other things, the form and content of the various notices that are to be given.

The expression "public issuer" is defined in s 2 of the Amendment Act, as a company or person that is, "or that was at any time", a party to a listing agreement with a stock exchange. In turn, "stock exchange" is defined to mean the New Zealand Stock Exchange, and to include a stock exchange registered under the Sharebrokers Act 1908.

Incidentally, it is difficult to know why the Amendment Act did not provide that a company or person ceases to be a "public issuer" (say) 6 years or (say) 12 years after it ceases to be a party to a listing agreement with a stock exchange. Perhaps the legislation intends that former listed companies (or substantial security holders in them) should be required to seek an exemption from the Securities Commission. Exemptions may be granted in the discretion of the Commission, under s 5(5) of the Securities Act 1978 (as amended).

To be a "substantial security holder" in a public issuer, one must be a person who has a relevant interest in 5% or more of the voting securities "of" that public issuer. The word "of" appears to equate with "issued by" and would therefore not extend to voting securities which will be issued in the future under existing contractual arrangements.

Support for this view is found in s 24, which sets out a means to ascertain the "total number of voting securities issued by" a public issuer.

A "voting security" of a public issuer is defined in s 2 of the Amendment Act as a security of the public issuer which confers a right to vote at general meetings of members (whether or not there is any restriction or limitation on the number of votes that may be cast by or on behalf of the holder of the security), not being a right to vote that, under the conditions attached to the security is exercisable only in one or more of certain specified circumstances, *"and includes a security which, in accordance with the terms of the security, is convertible into a security of that kind"*. (Emphasis added.) In turn, for this purpose, "security" is given the wide meaning which it bears in the Securities Act 1978.

The ordinary meaning of convertibility involves some kind of exchange of one form of security for another form of security. Options to acquire ordinary shares would not usually be regarded as "convertible" into ordinary shares, if the exercise of the option necessarily involves an extra payment by the party who exercises the option. On the other hand, an option to acquire unpaid voting shares without the need to make a payment or contribute property on the exercise of the option, could be regarded as "convertible" into shares. If the option is exercisable upon on a merely nominal payment, there might be a possibility that a Court would treat the option as "convertible" for the purposes of this definition.

It is not clear whether the definition is intended to be confined to presently convertible securities.

Support for a restrictive interpretation can be found in the Australian case *W P Keighery Pty Limited v The Federal Commissioner of Taxation* (1957) 100 CLR 66 (Full High Court). The High Court there considered the phrase "a company which is capable of being controlled by any means whatsoever" in the context of s 105(1) of the Australian Income Tax and Social Services Contribution Assessment Act 1936-1952. Mr and Mrs Keighery held, together, four ordinary shares and 20 other persons each held one redeemable preference share. The preference shares had equal voting rights at a general meeting of shareholders but could be redeemed in accordance with their terms. The

Keigherys were the only directors of the company and, practically speaking, could have ensured control of a general meeting, by causing the company to redeem the preference shares. Although, if notice was given, the preference shares would be redeemable before a general meeting could be held, the High Court, in effect, held that this was not sufficient in order to describe the company as "capable of being controlled". Instead, a presently existing power of control would be required:

> . . . capable of being controlled connotes the existence of either one person whose enforceable and immediately exercisable rights enable him to control, or a number of persons whose enforceable and immediately exercisable rights enable them, if they act in concert, to control. (Dixon CJ, Kitto and Taylor JJ, ibid at 87).

However, the words "in accordance with the terms of the security" may have been included in s 2 in order to extend convertibility to future and contingent convertibility. Thus non-voting shares upon the happening of an uncertain future event (such as the obtaining of a statutory approval) would appear to be potentially within the definition of "voting securities".

If "convertible" were regarded as ambiguous in this context, one might expect a Court would be likely to have regard to the purpose of the legislation, which is apparently to remedy the perceived "mischief" of secret acquisition of significant listed company holdings.

In *Re The News Corporation Limited* (1986-87) 70 ALR 419 the Federal Court of Australia distinguished *Keighery* and considered that the purpose of the foreign ownership restrictions in the Broadcasting and Television Act 1942 (Cth) pointed to an expansive interpretation of the restrictions on "control". Bowen CJ was able to rely on a Hansard reference to the legislation as being intended to extend "not merely to legal control or control by voting power, but practical and commercial control by any means" (p 430).

A New Zealand Court, faced with a difficult point of interpretation of the Amendment Act, may consider the apparent purpose of the legislation dictates an expansive interpretation more allied to *The News Corporation* than *Keighery.*

Relevant interests

The definition of "relevant interests" is central to Part II:

5(1) For the puroses of this Act a person has a relevant interest in voting security (whether or not that person is the registered holder of it) if that person—

(a) Is a beneficial owner of the voting security; or
(b) Has the power to exercise any right to vote attached to the voting security; or
(c) Has the power to control the exercise of any right to vote attached to the voting security; or
(d) Has the power to acquire or dispose of the voting security; or
(e) Has the power to control the acquisition or disposition of the voting security by another person; or
(f) Under, or by virtue of, any trust, agreement, arrangement, or understanding relating to the voting security (whether or not that person is a party to it)—
  (i) May at any time have the power to exercise any right to vote attached to the voting security; or
  (ii) May at any time have the power to control the exercise of any right to vote attached to the voting security; or
  (iii) May at any time have the power to acquire or dispose of, the voting security; or
  (iv) May at any time have the power to control the acquisition or disposition of the voting security by another person.

5 (2) Where a person has a relevant interest in a voting security by virtue of subsection (1) of this section and—

(a) That person or its directors are accustomed or under an obligation, whether legally enforceable or not, to act in accordance with the directions, instructions, or wishes of any other person in relation to—
  (i) The exercise of the right to vote attached to the voting security; or
  (ii) The control of the exercise of any right to vote attached to the voting security; or
  (iii) The acquisition or disposition of the voting security; or
  (iv) The exercise of the power to control the acquisition or disposition of the voting security by another person; or
(b) Another person has the power to exercise the right to vote attached to 20 percent or more of the voting securities of that person; or
(c) Another person has the power to control the exercise of the right to vote attached to 20 percent or more of the voting securities of that person; or
(d) Another person has the power to acquire or dispose of 20 per cent or more of the voting securities of that person; or
(e) Another person has the power to control the acquisition or disposition of 20 per cent or more of the voting securities of that person—

that other person also has a relevant interest in the voting security.

5(3) A body corporate or other body has a relevant interest in a voting security in which another body corporate that is related to that body corporate or other body has a relevant interest.

5(4) A person who has, or may have, a power referred to in any of paragraphs (b) to (f) of subsection (1) of this section, has a relevant interest in a voting security regardless of whether the power—
(a) Is expressed or implied;
(b) Is direct or indirect;
(c) Is legally enforceable or not;
(d) Is related to a particular voting security or not;
(e) Is subject to restraint or restriction or is capable of being made subject to restraint or restriction;
(f) Is exercisable presently or in the future;
(g) Is exercisable only on the fulfilment of a condition;
(h) Is exercisable alone or jointly with another person or persons.

5(5) A power referred to in subsection (1) of this section exercisable jointly with another person or persons is deemed to be exercisable by either or any of those persons.

5(6) A reference to a power includes a reference to a power that arises from, or is capable of being exercised as the result of, a breach of any trust, agreement, arrangement, or understanding, or any of them, whether or not it is legally enforceable.

5(7) For the purposes of this Act, a body corporate is related to another body corporate if—

(a) The other body corporate is its holding company or subsidiary within the meaning of section 158 of the Companies Act 1955; or
(b) More than half in nominal value of its equity share capital (as defined in section 158(5) of that Act) is held by the other body corporate and bodies corporate related to that other body corporate (whether directly or indirectly, but other than in a fiduciary capacity); or
(c) More than half in nominal value of the equity share capital (as defined in section 158(5) of that Act) of each of them is held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or
(d) The businesses of the bodies corporate have been so carried on that the separate business of each body corporate, or a substantial part thereof, is not readily identifiable; or
(e) There is another body corporate to which both bodies corporate are related.

Obviously "put" options, which give rise to the power to dispose of shares, can create "relevant interests". Substantial security holders who have the benefit of put options must, in effect, furnish a copy of the put option agreement to the public issuer and stock exchange, together with the appropriate notice prescribed by the Regulations. Extraneous commercially sensitive material should therefore be excluded from such agreements (ie placed in a separate document if necessary) in order to maintain confidentiality; or else an appropriate exemption should be sought from the Securities Commission under s 5(5) of the Securities Act 1978.

It appears that the granting of put option can also given rise to a relevant interest on the part of the grantor, namely the party to whom the shares can be "put". In *Nicholas v Wade* [1983] 1 VR 703, (1982) 1 ACLC 459 the Supreme Court of Victoria (Marks J) held a put option created a relevant interest for the purposes of s 6A of the Companies Act 1961 (Vic) through two separate routes. One route was said to depend on treatment of the put option as a conditional sale rather than a mere irrevocable offer to buy for valuable consideration. The Court also relied on the interrelationship of the same shares. The overall effect was "a type of carousel" in which one party "sold" the shares to another party who could compel their sale to a third person who could in turn compel their sale back to the first party. The likelihood of exercise of the options was said to be enhanced by the financial arrangements with which they were enmeshed. The second route relied less on the surounding arrangements, and more on the extent to which a put option as such could be said to create "a right [of the grantor] relating to a share whether the right is enforceable presently or in the future and whether on the fulfilment of a condition, the condition being the acceptance by notice in writing by the grantee, of the offer by the grantor to purchase. Although not explicit in the reasons for judgment, this route to the decision might be argued to rely also upon treatment of a put option as a conditional agreement rather than an irrevocable offer. There are broad similarities between the legislation considered in that case and the New Zealand definition of "relevant interest." Therefore parties to whom shares in a New Zealand public issuer can be "put" need to carefully consider the nature of the put option and the possible need to notify under Part II.

The concept of "control" assumes importance in s 5.

The News Corporation case (supra) concerned a shareholder which was, by the articles of association of the company, effectively in a position to appoint sufficient directors to assume a power of veto over management decisions.

One question before the Court was whether the shareholder was, by reason only of the articles, "in a position to exercise control" of the company.

Bowen CJ (with whom Lockhart J agreed) and Beaumont J both discussed the "common law test of control" of a company laid down in various cases (chiefly revenue cases). This test requires absolute control in the sense of "the capacity to carry on an ordinary resolution at a general meeting". But "control" is an ambiguous term, described in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 as "an unfortunate word of such wide . . . import that it has been taken to mean something weaker than 'restraint', something equivalent to 'regulation' ". In the context of the legislation in question, Bowen CJ considered (at 433) "in a position to exercise control of a company" meant "the power to direct or

restrain what the company may do on any substantial issue."

This accorded with the interpretation which the New South Wales Court of Appeal in *North Sydney Brick and Tile Co Ltd v Darvall* (1986) 10 ACLR 837; 4 ACLC 539 (following *Re Kornblum's Furnishings Ltd* [1982] VR 123) placed on "control" in the context of the Companies (Acquisition of Shares) New South Wales Code.

If s 5 of the Amendment Act is similarly construed, it may embrace not only powers of veto and pre-emptive rights but also lesser forms of regulation such as "standstill" agreements and also agreements which regulate in other ways the disposal of shares in public issuers (eg agreements designed to prvent the "dumping" of shares in an unregulated manner).

There is a difference in terminology which might lead to a less expansive interpretation being placed on the New Zealand legislation. Both s 9 of the Companies (Acquisition of Shares) Code 1980 and s 8 of the Companies Code 1981, judicially considered in Australia, referred to a power to "exercise control over" suggests a lesser measure of control than is required by s 5 of the Amendment Act, which is phrased in the more absolute terms of the power "to control the . . . disposition".

In *Re Kornblum's Furnishings Limited* (supra at 133) Beach J compared two similar phrases:

> . . . the relevant words are "has power to exercise control over the disposal of that share". I can find no justification for holding that the expression "to exercise control" means "to exercise substantial or absolute control . . .". Had the legislature intended only to cover a situation where a person had substantial or absolute control, s 6A(1)(a)(ii) would surely have read "to dispose of or *control the disposal of that share*". (Emphasis has been added to the words which are analogous to the New Zealand s 5(1)(e)).

However a Court could still justify an expansive meaning of control in s 5(1)(e) and (f) by invoking a combination of s 5(4)(e), (f), (g) and (h), which potentially have very wide effect.

For instance, s 5(4)(f), which provides that a person who has, or may have, a power in question has a relevant interest in a voting security regardless of whether the power is "exercisable only on the fulfilment of a condition", might apply even where the fulfilment of the condition is outside the control of the person concerned and may be only remotely likely.

Powers exercisable jointly with another person or persons are deemed to be exercisable by either or any of those persons (s 5(5)).

Take, therefore, the case of a discretionary trust with a limited number of beneficiaries, each of which are of full legal capacity. The trust owns (say) 5% of the voting shares of a public issuer. The beneficiaries can jointly, presumably, control the disposition of the trust property and can each therefore have a relevant interest in the shares.

Also, if the trustees of a discretionary trust are accustomed to act in accordance with the wishes of any other person in relation to voting the shares held by that trust, that other person will also have a relevant interest in the shares by virtue of s 5(2)(a).

Section 5(1)(f), read in conjunction with s 5(4), might also, arguably, have the effect that discretionary beneficiaries have relevant interests in voting securities held by the trust.

However, this might depend on the facts of the particular case. It may be that the Courts will read some kind of "real connection" test into s 5.

Some dicta in the Australian "takeover" cases may support the development of such a doctrine; eg the comments of Marks J in *Elders IXL Limited v NCSC* [1987] VR 1 at 15:

> The purpose of the Code is to regulate takeover activity. The purpose of s 7 is to identify the size of a relevant shareholding for the purposes of the restriction imposed by s 11. Necessarily, s 7 is concerned with real combinations and real aggregations which, one way or another, truly exist. It is not concerned to phantasize combinations by adding to a holding that of another person, who has no real connection, potential or otherwise, with the first. Thus, s 7(4) is to be understood in combination with s 7(1), (2) and (3) and s 11 as furthering the purposes of the Code to monitor the holding of a person or persons who, alone or together, has or have or will have the power sought to be regulated. In summary, the Code is to be understood as dealing with combinations of persons which might fairly be regarded as in existence, no matter what arrangement or device is employed to disguise the fact of combination.

Section 5(2) provides for imputed relevant interests. For instance, if party A holds 20% of the voting shares in company B which, in turn, acquires a relevant interest in voting shares in company C, the result is that party A acquires the relevant interest also.

Exceptions

Section 6 of the Amendment Act provides:

> 6(1) For the purposes of Part II of this Act notwithstanding section 5 of this Act, no account shall be taken of a relevant interest of a person in a voting security if—
>
> (a) The ordinary business of the person who has the relevant interest consists of, or includes, the lending of money or the provision of financial services, or both, and that person—
>
> (i) Has the relevant interest only as security given for the purposes of a transaction entered into in the ordinary course of the business of that person; and
>
> (ii) Has been designated by the Commission, by notice in the Gazette, as a person to whom this paragraph applies or is a member of a class of persons designated by the Commission, by notice in the Gazette,

as a class of persons to which this paragraph applies, as the case may be, and that designation has not been revoked by the Commission; or

(b) That person has the relevant interest by reason only of acting for another person to acquire or dispose of that security on behalf of the other person in the ordinary course of business of a sharebroker and that person—

(i) Is a member of a stock exchange; or
(ii) Has been designated by the Commission, by notice in the Gazette, as a person to whom this paragraph applies and that designation has not been revoked by the Commission; or

(c) That person has the relevant interest by reason only that he or she has been authorised by resolution of the directors or other governing body of a body corporate to act as its representative at a particular meeting of members, or class of members, of a public issuer, and a copy of the resolution is deposited with the public issuer not less than 48 hours before the meeting; or

(d) That person has the relevant interest solely by reason of being appointed as a proxy to vote at a particular meeting of members, or of a class of members, of the public issuer and the instrument of that person's appointment is deposited with the public issuer not less than 48 hours before the meeting; or

(e) That person:

(i) Is a trustee corporation or a nominee company; and
(ii) Has the relevant interest by reason only of acting for another person in the ordinary course of business of that trustee corporation or nominee company; and
(iii) Has been designated by the Commission, by notice in the Gazette, as a person to whom this paragraph applies and that designation has not been revoked by the Commission; or

(f) The person has the relevant interest by reason only that the person is a bare trustee of a trust to which the voting security is subject.

6(2) For the purposes of subsection 1(f) of this section, a trustee may be a bare trustee notwithstanding that he or she is entitled as a trustee to be remunerated out of the income or property of the trust.

The Securities Commision has designated various banks and other persons for the purposes of s 6(1)(a). Section 6(1)(b) and 6(1)(e) designations have also been issued by the Commission.

The "financing" exception in s (1)(a) is one of great practical importance.

Given New Zealand's recent corporate history, it might almost be argued that for a designated bank to take an equity position in the course of a loan workout is for it to do so "in the ordinary course of business". The bank would need also to hold its equity position as "security" if it is to qualify for the exception. In view of the draconian Court orders which may be made for breach of Part II, it is suggested banks should err on the side of caution in this regard, and give notice in the case of any doubt.

Corporate representatives and proxy holders of substantial security holders, if authorised in relation to a public issuer, need to ensure that they observe s 6(1)(c) or (d).

The authorisation should be specific to the particular meeting. Failure to observe this might result in the corporate representative or proxy holder being injuncted from voting at the meeting in question. A notice would need to be given by the authorised person "as soon as that person knows, or ought to know, that the person is a substantial security holder in the public issuer": s 20(4).

The corporate representative or proxy must deposit a copy of the authorising resolution with the public issuer not less than 48 hours before the meeting. Typically, the articles of association will require deposit of the proxy not less than 48 hours before the meeting. It is less common for the articles to make a corresponding stipulation in relation to resolutions appointing corporate representatives, thus effectively providing a trap for those substantial security holders who do not take account of s 6(1)(c).

A company has a relevant interest in voting security in which another company that is related to the company has a relevant interest (s 5(3)). To prevent the need for a useless multiplicity of notices by related companies, s 23(3) has been enacted.

Section 23(2) is based on the same idea.

Practitioners will note that the key word in each of those subsections is "only":

23(2) A person who would, but for this subsection, have to comply with any of sections 20, 21 or 22 of this Act does not have to comply with any of those sections if—

(a) The requirement to comply arises by reason only of the fact that by virtue of the application of any of paragraphs (b), (c), (d) or (e) of subsection (2) of section 5 of this Act that person, as well as another person, is a substantial security holder in a public issuer; and
(b) That other person complies.

23(3) A person who would, but for this subsection, have to comply with any of sections

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Some legal terms

By D F Dugdale, of Auckland

The Defamation Bill (introduced on 25 August 1988, reported back from the Select Committee on 3 October 1989 but currently it seems lost in some sort of Parliamentary limbo) as introduced adopted the McKay Committee recommendation to rename the defence of *justification*, calling it *truth*. The select committee seems to have been infected by this lust to tinker with established nomenclature, and would retitle *fair comment* as *honest opinion*. (The McKay recommendation like that of the Australian Law Reform Commission was a change to *comment*.)

The wisdom of these proposals is not obvious. It is doubtful whether they will make the task of explaining the law to jurors any easier. As the McKay Committee expressed it "Regardless of whether the defence is entitled *justification* or *truth*, both will require explanation in identical terms to juries". The volume of defamation litigation in this country is so slight that great reliance is placed on the jurisprudence of other common law countries so that New Zealand lawyers will still need to understand the terms *justification* and *fair comment* if only to find the right place in *Gatley*. The urge to leave a mark on established legal concepts by rechristening them is a sort of vandalism like carving initials on the Sphinx.

Equally unfortunate perhaps is the situation where one term has two distinct meanings. That is the position with the word *security* which is used to mean both the rights over property created to secure performance of an obligation and in the sense in which it is employed in the Securities Act 1978. If the Law Commission's recommendations as to a Personal Property Securities Act are adopted a similar situation will arise with the word *collateral* which in addition to its familiar meaning of "parallel but subsidiary" will have the meaning ascribed to it by the proposed legislation of the personal property subject to the security. This is of course a North American usage deliberately employed because the ancestry of the scheme is likely to lead to a reliance on Canadian and US authorities which will be made easier if New Zealand has a corresponding terminology.

When the Contracts and Commercial Law Committee came to settle the recommendations which led ultimately to the enactment of the Credit Contracts Act 1981 they needed to find a word for a professional provider of financial accommodation. Although historically usury was the lending of money at any rate of interest, *moneylender* was thought to have acquired a corresponding taint. I reminded the Committee of the existence of the word *fenerator* which seemed to capture precisely the meaning they wished to convey. The Committee rather cravenly rejected this proposal in favour of *financier*. I still think *fenerator* would have been more fun.

Writing in *The State of the Language* (1990 edition) Professor Garner of the University of Texas School of Law complains of the absence from general dictionaries of such legal terms as *conclusory, quashal, ancillarity, asylee, benefitee, certworthy, condemnee, conveyee, discriminatee, embancworthy, enjoinable, litigational, nonrefoulment, pretextual, reclusement* and *venire-member*. Lexicographers in the good professor's view do not know what they are missing when they ignore such neologisms.

Quashal was coined by the Florida Supreme Court in 1887 and is said to be the noun corresponding to the verb *to quash*. Now it is true that the suffix *al* has been used to create nouns from verbs that reached English through Old French (*arrival*), that this process has occurred as late as the nineteenth century (with *dismissal* for example displacing the earlier *dismission*) and that the verb *to quash* is of Old French origin. But it is difficult to see what need there is to replace *quashing*. In Florida, we must assume, real men don't say quashing. In New Zealand we can be content with the gerund.

Conclusory it appears means "expressing a mere conclusion of fact or a factual inference without stating the underlying facts upon which the conclusion or inference is based". Up to April 1988, Professor Garner, computer-assisted, tells us, it had been employed in the opinions (judgments) in more than 21,000 US cases since its first recorded use in 1923.

There is a well-authenticated tale, dating from the days when it was believed that the peace, order and good government of New Zealand required the Judges of the Supreme Court to concern themselves in such matters, of Mr Justice Moller presiding on undefended divorce day. He stopped an enquiry agent from saying in evidence that from his position crouched beneath the sill outside the bedroom entered by the respondent and co-respondent he had heard the sounds of sexual intercourse. "No, no, no, no, no!" said His Honour "*You* describe the noises. *I* will draw the conclusions". The word he needed was of course *conclusory*.

So we must fight to the death to resist *quashal*. I've never seen a *venire-member* and never hope to see one. But for *conclusory* perhaps there is a place. □

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20, 21 or 22 of this Act does not have to comply with any of those sections if—

(a) The requirement to comply arises by reason only of the fact that that person is related to another person who is required to comply with any of those sections; and

(b) That other person complies.

The Amendment Act has brought the concept of "relevant interest" to New Zealand company law. Australian case law provides the basis for practical advice on the New Zealand legislation, but needs to be treated with some caution. □

The future of Maori representation in Parliament

By R J O'Connor, LLB, of Wellington, Parliamentary Researcher

The author has written earlier articles for the New Zealand Law Journal *on questions of electoral reform [1988] NZLJ 4 and [1991] NZLJ 6. In this article he looks at the historical basis for separate Maori representation in Parliament and the alternative form that this might take in the future. He deals particularly with the possible effect of the introduction of proportional representation or the establishment of a new Second Chamber.*

1 Introduction

Electoral law reform remains a live issue. The new Government was elected on a platform of electoral reform, and more particularly on a promise to conduct before the end of 1992 a binding referendum on the proportional representation and Second Chamber questions. Popular opinion would appear to support at least some change to New Zealand's electoral and Parliamentary system and it is expected that the promised referendum will provide some definition to that opinion. Whilst it is yet to be fully considered by the wider electorate the introduction of proportional representation, if that is the result of the referendum, will have implications for the current system of separate Maori representation. The Royal Commission on the Electoral System, in its report of 1986, recognised that the introduction of proportional representation may involve the abolition of the Maori seats. It is therefore appropriate at this time, as the Government gives thought to its promise to hold a referendum, to consider the future of Maori representation in Parliament.

2 The history and statutory basis of Maori representation in Parliament

The New Zealand Constitution Act 1852 granted the franchise to all males over the age of twenty one years who owned a freehold estate within an electorate valued at fifty pounds or a leasehold estate with an annual value of ten pounds, or a tenement with an annual rental of ten pounds in a town or five pounds in the country. In terms of these provisions all males who qualified, including Maori males, were entitled to vote at elections for the House of Representatives. This spirit of equality between the races was also applied when Maori obtained the full adult franchise along with the European in 1893.

However, notwithstanding the spirit, this equality was more apparent than real in quality. The fact that most Maori land was communally owned and was unregistered meant that most Maori were effectively excluded from the franchise under the provisions of the New Zealand Constitution Act 1852. It was considered by colonial politicians, as Sorrensen writes, "that elected Europeans could represent Maori who were not yet sufficiently educated to take their place in Parliament". Whilst paternalistic this concept is not dissimilar to the current view that a Member of Parliament when elected represents all the people in his or her electorate, not only those who voted the Member into office.

Even those contemporary politicians who considered that Maori should be permitted representation in Parliament considered that the individualisation of Maori land titles through the process provided by the Native Land Court was the most appropriate method of effectively enfranchising the Maori. Only by the individualisation of Maori land titles could Maori obtain the necessary property qualification for the franchise. It, however, became increasingly apparent that the process of individualising Maori land titles was not proceeding with sufficient haste to satisfy the political aspirations of Maori. In 1862 the House of Representatives debated the first of a number of measures proposed in the 1860s to deal with the question of Maori representation. Nothing became of these proposals until the Maori Representation Act was passed in 1867.

The preamble of the Maori Representation Act explained that owing to the peculiar nature of the tenure of Maori land

> . . . the Native Aboriginal inhabitants of this Colony of New Zealand have . . . been unable to become registered as electors or to vote at the election of members of the House of Representatives and it is expedient for the better protection of the interests of Her Majesty's subjects of the Native race that temporary provision should be made for the special representation of such of Her Majesty's subjects in the House of Representatives.

The Act defined a Maori as a "male aboriginal native inhabitant of New Zealand of the age of twenty one years and upwards and shall include half castes". Under s 3 of the Act four Maori seats were created by dividing New Zealand into four geographic regions. In the light of contemporary examples of special representation the creation of separate Maori seats would not have appeared unusual. Separate representation already existed for special interest groups in the form of the Goldfields electorates in the South Island and the Pensioner Settlements electorate in Auckland. In any event the Maori seats were expected to be a temporary expedient, and one to be abolished when the process of individualising Maori land titles was completed.

The Act was therefore initially intended to remain in force for only five years.

Notwithstanding the supposed privilege of special representation it is as well to note the disparity that existed from the moment of the creation of the Maori seats between the quantity of Maori representation when compared with the quantity of European representation. Some fifty thousand Maori were given four seats whereas their two hundred and fifty thousand European contemporaries had seventy two seats. This disparity in numbers, although proportionately decreased, has continued down to the current day.

The Maori seats were continued beyond their originally intended five year lifespan and in 1876 were made permanent. Maori representation is presently governed by s 23 of the Electoral Act 1956. Notwithstanding population changes the number of Maori seats is permanently set at four, although the boundaries between them are adjusted after each census to ensure that the populations of each are approximately equal. The Maori seats are, of course, subject to the same provisions in the Electoral Act and the general law concerning the conduct of elections as apply to the General seats. Section 41 of the the Act prescribes that "a Maori who possesses the qualifications prescribed in that behalf by this Act shall have the option of being registered either as an elector of a Maori electoral district or as an elector of a General electoral district". This option is to be exercised periodically in terms of ss 41A and 41B of the Act. The details of the difficulties that have been encountered in the administration of "the Maori option" are beyond the scope of this article but were discussed at length in *Re Hunua Election Petition* [1979] 1 NZLR 251. Finally s 23 is not one of those provisions of the Electoral Act entrenched by s 189 and therefore could be amended by a simple majority of the House of Representatives.

3 The case for the abolition of separate Maori representation

When considering the future of separate Maori representation in Parliament it is important to remember that the question is not one of whether Maori should be represented in Parliament, because they certainly should, it is rather a question of what form that representation should take. This question of form has provoked the articulation of much argument and debate over a considerable period of time.

To some Maori, according to Tauroa, separate Maori representation in the form of the Maori seats presents a source of cultural pride and stimulation and forms part of the total Maori cultural identity. Tauroa has also noted that the Maori seats may contribute in some way to New Zealand's international standing as an example of a positive account being taken of the contributions made by its indigenous people. The most significant argument, however, for the retention of the Maori seats is that they "guarantee" a Maori voice in Parliament and ensure that a Maori perspective is applied to Parliamentary debate and to governmental decision making. However while the Maori seats indeed "guarantee" that a Maori voice is heard they in effect safely restrict Maori views to a tiny minority of Members of Parliament as members representing General seats do not need to reflect Maori concerns to ensure their political survival. The effectiveness of this "guaranteed" voice is also to be questioned when it is considered that history has established that the Maori seats since 1943 have traditionally been won by the Labour Party, whether that Party has been in Government or not. The consequence of this trend, in terms of Maori representation, has been that as the Labour Party has been in opposition for twenty eight of the last forty years Maori members have often been denied a direct influence over Government.

In Tauroa's view "there has been a very supportive climate of sensitivity and activity towards Maori needs from Government and other Pakeha members of the House. . . A similar climate has developed community wide . . . It is this proved climate that needs re-emphasis as proposed changes are contemplated." We should be willing to alter our constitutional structures if circumstances demand change of us. Some would argue that the failure of successive Governments to attain at least fifty percent of electoral support necessitates a revisiting of the method by which votes are counted at elections. Proportional Representation is therefore proposed by some to provide the structures that they consider New Zealand should adopt to account for these altered circumstances. In the same way this new found tolerance of Maori values precipitates the creation of new constitutional structures to provide for Maori representation. Simpson has noted that, for some, "the practice of separate representation is seen as a stumbling block to political maturity" for the Maori. It is paradoxical that a fundamental tenet of our electoral system, equality, should be violated by the existence of two distinct forms of representation, one based on universal suffrage and the other on ethnic consideration.

In practical terms also are the arguments strongly in favour of the abolition of separate Maori representation. The low numbers of Maori registering on the Maori Roll and voting in Maori electorates indicates a lack of interest and confidence in the present system of Maori representation. In 1984 of an estimated total Maori voting age population of 209,000 only 77,500 were registered on the Maori Roll. In that same year there were only 59,000 valid votes cast by persons registered on the Maori Roll, representing only 28.2% of the total eligible Maori voting population. If the integrity of our Parliamentary representative system is to be preserved then this trend will need to be arrested. A second practical indicator favouring abolition of separate representation is the current geographic size of Maori electorates compared to General seats. By way of example the Member for Southern Maori is required to service an area approximately forty times bigger than that required to be serviced by a General member in the area covered by Southern Maori. As a consequence the practical link between Maori members and their constituents is very tenuous indeed.

It is clear from the arguments articulated that the question of the form of Maori representation requires close examination. Maori representation is not best or equitably served by the current

Maori seats structure. The editor of the *New Zealand Herald* said that

> the continued maintenance of separate Maori rolls could be attributed to the political circulation of both [political] parties, as well as the general inertia and indolence on behalf of the voting public. Inertia promoted convenience or advantage to [political] parties and indolence allowed the general public to evade issues of major principle and subordinate matters of logic. (20 November 1979)

In the light of the conclusion that the question of Maori representation needs to be revisited it is appropriate to consider the various alternative forms that Maori representation in Parliament might take.

4 Alternative forms of Maori representation

(a) An increase in the number of Maori seats

Within the confines of the present plurality ("first past the post") electoral system it is often argued that the practice of limiting the Maori seats to four in number is discriminatory. On the face of it such a practice fails to account for the size and variations that inevitably occur in the Maori population. According to s 23 of the Electoral Act the number of Maori seats is fixed whereas under s 16 of the Act the number of General seats is gradually increased in accordance with the formula prescribed in that section as the "General" population increases. For example at the 1984 General Election the average population of the General seats was 32,491 whereas the average population of the Maori seats in the same year was 72,475. On this basis it is argued that the number of Maori seats should be significantly increased in order to achieve population parity with the General seats.

This apparent population inequality between the Maori and the General seats has existed since the Maori seats were created in 1867. In 1975 an attempt was made to deal with this issue with the passage of the Electoral Amendment Act. That piece of legislation sought to apply the formula used to calculate the number of General seats to the Maori seats. The official view of this legislation was that it permitted Maori the choice of whether to retain separate Maori representation in the form of the Maori seats or not. Maori who wished to retain the Maori seats were given the ability to express this by registering on the Maori Roll, whereas those who did not could register on the General Roll. The legislation effectively permitted the number of Maori seats to increase or decrease according to the level of registrations on the Maori Roll. Theoretically it was to be possible for the Maori seats to disappear if that was what the Maori people indicated by their support or otherwise of the Maori Roll. However after the Government changed later in 1975 the Electoral Amendment Act was repealed and the number of Maori seats reverted to being set at a constant four, notwithstanding the numbers registered on the Maori Roll.

However if it is considered that separate Maori seats are not the most effective and equitable method of achieving Maori representation in Parliament then a proposal to merely increase the number of Maori seats is therefore fundamentally flawed. This was recognised by the Royal Commission on the Electoral System in its report of 1986.

(b) Incorporation of the Maori Roll into the General Roll under the current plurality electoral system.

The Maori Representation Act 1867 was designed to ensure that a form of Maori representation was implemented at a time when Maori were unable, for practical reasons of land ownership, to participate in the general representation system. With the abolition of the old property qualification and the introduction of universal suffrage the disability that separate Maori representation under the Maori Representation Act sought to circumvent has long since ceased to exist. That Act anticipated that when individual Maori were able to qualify for the franchise that they would then participate on an equal basis with individual Europeans who also qualified under the general representation system and that the Maori seats would then be abolished. By applying the philosophy of the Maori Representation Act the Maori seats should be abolished. Under the current plurality electoral system the persons previously registered on the Maori Roll would simply then transfer to the General Roll.

Such a move would probably necessitate significant boundary changes to the General seats in some areas to account for the incorporation of persons previously registered on the Maori Roll. In those areas of greatest Maori population Maori could therefore expect to have a significant electoral impact as General Members of Parliament would be forced to be sympathetic to Maori issues and viewpoints. Political parties would be forced to develop policies attractive to Maori voters and to select Maori candidates in winnable seats. In this way the propensity of separate Maori representation to restrict Maori views to the four Maori Members would be broken and Maori views would gain a wider currency amongst Members of Parliament generally. This process of integrating Maori views into the general system, instead of isolating such views to one side, would be assisted by the increased access Maori would have to their Member of Parliament as a result of the reduced geographical size of electorates. It would no longer be possible for an electorate to cover the entire South Island, and half the North Island as well, as does Southern Maori currently. The difficulties of administering "the Maori option" and the Maori Roll generally would also be avoided by the incorporation of the two rolls. This might also assist Maori confidence and participation in the electoral system by removing an unnecessary and somewhat arbitrary barrier to Maori involvement.

The Royal Commission on the Electoral System quite correctly articulated what it saw as the disadvantages of incorporating the Maori Roll into the General Roll under the current plurality system of voting. The most significant of these concerned the relationship between the Member of Parliament and his or her Maori constituents. In this context it is unclear as to what extent a Member, whether Maori or non Maori, would concentrate on Maori issues when such issues would almost certainly

be only one of many issues facing an electorate. Incorporation into the General Roll would also eliminate one certainty for the Maori people of the current system, that is the guarantee of at least four Maori being returned to Parliament.

Nevertheless in terms of the question of equality between ethnic groups in our electoral system there is a strong argument for the abolition of the Maori seats and the incorporation of the Maori Roll into the General Roll, either under the current plurality electoral system or another electoral system.

(c) Incorporation of Maori Roll into the General Roll under a Proportional Representation system.

However, it might also be thought that the simple abolition of the Maori seats and the incorporation of the Maori Roll into the General Roll without at the same time altering the plurality electoral system would not provide a sufficient guarantee that the quality of Maori representation would improve. As has already been referred to incorporation under the plurality system would offer no guarantee of a Maori Member being returned to Parliament. Further, under the plurality system, it would only be remotely possible for a Maori party to gain seats in the House of Representatives. It is an important tenet of representative democracy that minority groups are adequately represented. While it is true that a Member of Parliament theoretically represents all the people within his or her electorate, whether they be Maori or non Maori or whether they voted for the Member or not, it may be important for the representation of minorities to be more visible. It is therefore arguable that Maori need to be represented in Parliament by Maori. Proportional representation offers the means to achieve this by facilitating the entry of Maori parties into the House. It is important to note at this point that such a scheme would not amount to a repetition of the current system of separate Maori representation. Under any system of proportional representation, and they are many, only one electoral roll would be maintained, whereas under the present system two rolls are kept. Where only one roll is kept there can be no allegation made of separate representation. Therefore under proportional representation the important requirement of equality in the electorate system can be satisfied whilst at the same time the conditions necessary for Maori parties to gain Parliamentary seats can be created.

In view of the expectation created by one hundred and twenty four years of separate Maori representation in the form of the Maori seats it may be reasonable to waive any minimum vote requirement or threshold for Maori parties attempting to win seats under a proportional representation system. This possible concession would, however, need to be considered in the context of the position of other ethnic groups in relation to the electoral system. As to the form of proportional representation most applicable to maximising the effectiveness of Maori representation it is beyond the scope of this article to examine that question in detail, other than to record that the Royal Commission on the Electoral system recommended the adoption of the Mixed Member Proportional Representation (MMP) system in this context.

(d) Accommodation of Maori representation in a Second Chamber

Elsewhere in this *Journal* (at [1988] NZLJ 4 and [1991] NZLJ 6) the author has advocated the introduction of a Second Chamber of the New Zealand Parliament to act as a control on Executive power. It is possible that in the context of achieving the most equitable and effective form of Maori representation that a new Second Chamber may possess some utility.

Any consideration of the role that a new Second Chamber might perform with respect to Maori representation in Parliament must be seen in the context of the 1992 referendum. If as a result of the referendum a new Second Chamber is formally established then the role that it might play in terms of Maori representation will be determined by the changes, if any, that are implemented to the wider electoral system. Any abandonment of the current plurality system and introduction of proportional representation would logically necessitate a review of Maori representation. If this should result in the abolition of the separate Maori seats in the House of Representatives, as logically and philosophically it should, then, in addition to the increased opportunities for Maori representation created under proportional representation, some pragmatic guarantee of representation might be offered to Maori in the form of reserved seats in a Second Chamber.

However, such a solution of creating reserved seats in a Second Chamber would merely transfer the inequality of separate Maori representation in the Lower House to the new Upper House. A new Second Chamber should be elected under a proportional representation system. Maori representation in a new Second Chamber should be encouraged under proportional representation rather than by the creation of separate Maori seats. As in the Lower House Maori representation in the Upper House should rise and fall according to the level of support afforded to Maori representatives. Only in this way can electoral equality between the various ethnic groups be achieved.

5 Conclusion

The arguments present themselves in favour of abolishing the separate Maori seats and for accommodating Maori representation by way of a wider introduction of a system of proportional representation. Therefore, whilst the issue of separate Maori representation is not proposed to be the subject of a direct question as part of the referendum in 1992 on electoral reform, the result of that referendum will be critical for the future of Maori representation. If, as a consequence of the referendum, a form of proportional representation is introduced then the position of the one hundred and twenty-four year old Maori seats will be challenged. The purity of representation that proportional representation would bring to the electoral system would logically demand the abolition of the Maori seats. The question is not one of whether Maori should be represented in Parliament, for they certainly should, but rather the question is as to what form that representation should best take. The

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Practice management and computer systems

By Peter Isaac, a Consultant of Wellington

In this article Mr Isaac looks at developments subsequent to the introduction of the wordprocessor. He points out that current computer systems enable a single input of information which the system itself will then apply to the appropriate files.

A transition by law firms from their traditional job costing or scale fee charging to time assessment means a gathering focus on integrated computer systems that provide overall practice management.

Lawyers in the mid-seventies pioneered word processing applications, and now they are being watched closely as they apply their second wave of data processing in terms of computerised charging and budget control.

The transition to business status has been underlined, of course, by the increasing size of practices through mergers and also because of practice branch networking such as Lawlink.

All these trends, needless to say, have meant that management control responsibility has devolved away from a few partners and moved under computer financial management.

One reason for this is that individual members of a law practice no longer tend to devote their entire career to one partnership.

Legal firms over the past five years have had to accommodate themselves to the floating population problem, which has long been a fixture in the world outside the profession.

Indeed, the changing faces syndrome so relatively new to New Zealand practices has meant that individual staff members/partners can no longer have their traditional personalised individual responsibility for the financial systems.

This last factor is underlined by Guy Galipienzo, who is one of the leading developers of computer-based practice management systems.

His company, CABS – Computer Automated Business Systems Pty – based in Sydney, was established on the concept that partners in both New Zealand and Australia could no longer handle their accounting management economically by either a manual or even a stand-alone single purpose computer system.

Today, he insists that even a modern integrated practice management system is not enough without detailed and codified implementation and training procedures.

Indeed, he underlines the virtues of technology partnerships between specialist organisations such as his own and the practices they serve.

"It is not uncommon for legal practices to purchase and instal a new computer system, complete with user-friendly software tailored for the individual firm, and expect staff to change their entire working habits immediately", said Mr Galipienzo.

"Such expectations are inviting disaster. With no consultation and only enough training to satisfy the adventurous, a practice's staff come into their office on a Monday morning and must embark on what seems to them to be almost a new career", he said.

Aside from integration and the implementation of the actual system, with closely defined formatting so that specific milestones in commissioning the system are passed on time, another key in today's world is systems standardisation.

One of the other founders in these latitudes of a systematised approach to legal practices' computer management systems is BHL Systems, founded by New Zealander Len Bryson-Haynes in partnership with Dr Herman Lang.

Len Bryson-Haynes of BHL, emphasises that it is essential in the increasingly seamless world of Australasian business, to implement legal systems that are valid in both countries and which also conform to the requirements in each Australian State.

In particular, he emphasises, trust rules must be defined as part of the package.

Thus, in addition to the accepted trend of catering for interchangeable software and hosts that are compliant under the broad headline of Open Systems, he is emphasising that the packages and the system as a whole must be powerful enough to mesh with all the strictures of individual country and state requirements

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introduction of proportional representation offers the opportunity to enhance Maori representation in terms of both quality and quantity. If a new Second Chamber should be established then this also offers Maori the opportunity of an enhanced role in New Zealand's system of government. It will take political courage to hold the promised referendum in 1992 and it will take even more to be obedient to its results. However the referendum offers the opportunity to reform New Zealand's antiquated system of separate Maori representation. It is an opportunity that should not be wasted. □

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without having to be especially adapted.

In New Zealand, traditional office automation imperatives have centred on trust accounting, time and disbursements, and then the overall financial management of the practice including wages, banking and investments.

A decade ago, when the larger practices began their move into computer practice management, the emphasis was on a mini-computer which in those days cost in the several hundred thousand dollar category.

The Open System era merging with PCs means that total integrated practice management in today's terms need not amount to more than $50,000.

The local area network approach within offices, along with a relational database keyword search facility, allows a borderless shared approach to information accessible through a file number or even someone's name.

All these factors now merge with another gathering trend, in which data and word processing applications interface with data processing in terms of the relational database fourth generation language or SQL technology.

For example, with the BHL product, the result of this merging of applications is that all relevant data can be accessed using fourth generation software and enquiry facilities. BHL "E" series core product was written in the "C" programming language. All important data files are created using Relational Database Technology, while C-ISAM, an industry standard index sequential file accessing method, is used to access the date.

The result is that all relevant data can be accessed using fourth generation application software and enquiry facilities.

The 4GL interface enables the user to quickly build sub-systems which make use of the BHL data and create their own reports.

SQL enables the user to formulate screen based ad hoc enquiries.

For example, the user can make ad hoc screen enquiries using SQL, as well as compiling information from the BHL files with other information, eg personnel or client profile data, to produce corporate reports.

In human terms, the current thrust of systems development is to achieve a single input of information which is updated to the appropriate transaction files.

This can be illustrated, for example, by the Softlog series of disbursement systems that can integrate into the practice management system to automatically record and apportion PABX calls, fax messages and photocopies for billing purposes. □

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dealing with verification of identity of persons opening and operating accounts with financial institutions and other cash dealers.

These verification procedures apply to:

each signatory to a new account or deposit;

each new signatory to an existing account;

arranging safe custody facilities.

To pass the screening test, a signatory to an account has to score 100 points. If a new signatory does not do so nor provides an identification reference, the funds in the account will be blocked. The Act requires the cash dealer to notify the Agency within fourteen days of this blocking. The Agency then has the right to request the cash dealer to close the blocked account and remit the proceeds to the Agency at any time.

These draconian powers indicate a substantial mischief had to be addressed.

Recently I placed some funds on fixed deposit at the bank and also became a new signatory to a youth orchestra account. In both instances I needed 100 points. The requirement was satisfied by my passport (70) and driver's licence (40). Points may be scored in a variety of other ways. For instance, a birth certificate is worth only 40 as is having been a known customer of that bank for at least 12 months.

One other new rule on banking accounts comes into force on 1 July 1991. That is that depositors are asked to supply the institution with their tax file number. It is optional and not mandatory. If the tax file number is supplied, no tax will be deducted at source from the interest, but if not supplied, tax will be deducted at the maximum rate. The same rule will also apply to shares and other similar investments.

These fiscal measures are designed to stop the holes in what has been a very leaky tax sieve. The proposed Australia Card was to be the original fix but fell by the wayside as unacceptable. Whether the new rules are an effective substitute only time will tell. But at this stage it can be said that they require a vast amount of form-filling which is necessarily a time consuming business and causes much ill temper in the customers. It can be seen as the price which has to be paid to catch the crooks.

War crimes

I read the Auckland District Law Society Public Issues Committee report with interest. The first case here is in South Australia. The defendant is an Adelaide pensioner, Ivan Polyukhovich, who has been shot and there is some suggestion it may have been a suicide attempt.

The legislation is subject to attack in the High Court of Australia as unconstitutional and a decision is awaited. Last September Justice Gaudron of the High Court put the South Australian criminal proceedings on hold until the High Court challenge has been decided. She mentioned in passing that she felt that challenge had "some prospect of success".

There are said to be over twenty prosecutions in the pipeline and the present decision may give the Federal authorities cause to pause. The Judge reached her conclusion, since to do otherwise "might be serious and irreparable prejudice".

There was a surprise recently when Robert Greenwood QC resigned as director of the special investigations unit into war crimes. His successor says the unit's work will still carry on.

Mark Aarons has explored the issue of war criminals in Australia. *The Australian* has reported him as saying it would be a minor miracle if six prosecutions finally took place. Over 570 cases have been investigated and discounted. As Aarons says, "The trail is pretty cold on crimes done 40 to 50 years ago."

This and the high cost may be powerful arguments, in addition to the constitutional one, why these matters ought not to be pursued any further. □