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Sovereignty, the Common Law, and the Treaty of Rome

The Dicey concept of the sovereignty of Parliament, by which he referred expressly to the Queen in Parliament and not the Prime Minister in Parliament, has been one of the catch-phrases of constitutional discussion for over a century. It was a term extended by left-wing radical democrats like Harold Laski, into the concept of what he called "the omnicompetence of Parliament". Experience of course would now lead one to alter that to "the omni-incompetence of Parliament". However, be that as it may.

The British constitution is undergoing quite substantial changes, not dramatically but incrementally of course, with an inevitability of gradualness to use another phrase that was so beloved of Laski and the earlier Fabians. The Treaty of Rome, and the subsequent agreements and political and legal institutions that have been established, have effected this profound change without its implications necessarily being acknowledged. One of the incidental effects will be on our own legal categories and legal thinking. We will have to discern the new European element in English law, in English legal practice, and in constitutional discussion even when traditional terms might still be used. To some extent the changes will have a flow-on effect in our political debate and our legal concepts here in New Zealand. Consequently we need to be conscious of the changes that are occurring in that country from which we have been fortunate to have derived our legal system, our community standards, and our constitutional arrangements.

A recent article in *The Economist* for 23 May 1992 at p 64 set out in simple journalistic terms the reality about sovereignty that English politicians are still obscuring.

> Soothing and creamy-smooth, the prose of John Major's speech to the Commons on the bill to ratify the latest European treaty was a masterpiece of Whitehall tact. Westminster remains sovereign. Nothing has changed. England stands where it always did.
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> And then, as tiresome people will, a Tory backbencher and Brussels-baiter, Sir Teddy Taylor, asked him what he would do if Britain were taken to the European Court of Justice for retaining immigration checks at ports – and lost. Oh, said the Prime Minister, Britain would argue its case forcibly. Up jumped Peter Shore, a Labour pendant to Sir Teddy Taylor. No, said he, the Prime Minister had not answered the question. What would he do if the court ruled against him? The blunt and honest answer from Mr Major would have been: "Her Majesty's Government would immediately cave in." For some reason, he did not say this.
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> The smooth surface had, however, been punctured. Sir Russell Johnston, a Liberal Democrat, who also intervened in Mr Major's speech, used to say he looked forward to the day when Westminster had no higher status than Ohio's State House. That day is rolling nearer, even if it is still considered unacceptably impolite to mention the fact in the Commons itself. Compared with the importance of their European policy, most of the rest of what Mr Major and his ministers do is mere administration.

The legal change has of course already taken place. The House of Lords in the *Factortame* case [1991] 1 All ER 70 effectively held that the provisions of an English statute were not conclusive in case of a conflict with European Community law. The case involved the registration of fishing vessels, and statute law so defined those that could be registered as to exclude an English company owning fishing vessels unless at least 75% of the beneficial ownership of such vessels was vested in British citizens or companies. Factortame Ltd had a majority of Spanish shareholders and directors. Factortame sought, by way of application for judicial review, to challenge the validity of the legislation as contravening the Treaty of Rome. The company was granted interim relief disapplying Part II of the Merchant Shipping Act 1988 and the regulations made under it. On appeal the Court of Appeal held that such orders could not be made against the Crown. The House of Lords then sought a preliminary ruling from the Court of Justice of the European Communities. In its judgment the European Court, as quoted at p 105 of the Report, said:

> 19. In accordance with the case law of the Court, it is for the national Courts, in application of the principle of co-operation laid down in art 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law (see, most recently, the judgments in *Amminstrazione delle Finanze dello Stato v Ariete SpA*

Case 811/79 [1980] ECR 2545 and *Amministrazione delle Finanze dello Stato v Sas Mediterranea Importazione Rappresentanze Esportazione Commercio* (MIRECO) Case 826/79 [1980] ECR 2559).

20. The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national Court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law (see the *Simmenthal* case Case 106/77 [1978] ECR 629 at 644 at (paras 22-23)).

21. It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a Court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a Court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

The House of Lords duly followed this decision, and after allowing for the balance of convenience on any application for interim relief ordered that the Secretary of State be restrained from withholding or withdrawing registration by reason only of non-British ownership. The actual terms of the order of the House of Lords, are set out at p 106 of the Report.

An interesting aspect of this whole issue is contained in an article comparing common law and civil law, and the experience of English lawyers who practise in the European Community jurisdiction. The article is by Peter Stein and is published in *The Cambridge Review* for October 1990.

At p 103 Peter Stein comments that English practitioners who have been appearing before the European Court have had to come to terms with the Civil Law methods and procedures of that Court. He argues however that the understanding or acceptance of different legal styles does not necessarily involve mutual rejection of diversity. He suggests that lawyers on each side must be ready to see attractive features on the other side of the fence. He then goes on to say in the following paragraph that he thinks there will be a degree of legal pluralism. He refers to the Law of Scotland in relation to English law as an example.

> As the experience of England and Scotland within the United Kingdom has shown for the last three hundred years, political union can exist side by side with legal diversity. Many civil law countries are quite familiar with legal pluralism in terms of substantive law. If they command the loyalty of society, different legal traditions can be maintained indefinitely. As already stated, we already have uniformity in certain areas, and often the individual has found himself better protected under the European law than he had been previously under national law. Few people are going to the stake to maintain "national sovereignty" to legislate in those spheres of life. But there are other areas, such as the family and inheritance, where people feel much more strongly about giving up what they have come to regard as part of the fabric of their particular culture. It is unlikely that there will be attempts to interfere substantially with these parts of the law, even though the diversity will increasingly produce issues of conflict of laws.

Overseas trends in jurisprudence and in academic teaching will inevitably affect our law here. Whether in individual cases this will be a good or a bad thing may be open to argument. We should however at least be aware of what is happening and be able to recognise the nature of the changes, so that what we adopt or adapt we do so knowingly and not from oversight.

P J Downey

Recent Admissions

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Greig K H	Wellington	22 May 1992	Long M C	Wellington	22 May 1992

Case and Comment

Correction

In the Case and Comment section of the *New Zealand Law Journal* for May 1992 there was a piece at p 155 under the heading "Some relaxation for the banker" concerning the decision in *Goddard v DFC New Zealand Ltd.* Regrettably the case note as printed omitted two paragraphs. The publishers apologise for this error. The piece is accordingly reprinted in full.

Some relaxation for the banker

The decision of Gallen J in *Goddard v DFC New Zealand Ltd* [1991] 3 NZLR 580 prompted a paper from myself and a colleague, in which we criticised various aspects of the rather loose reasoning employed by his Honour, partly because of its potential consequences for the security of the banking industry: see C E F Rickett and P S Zohrab, "Trusteeship and Proprietary Remedies – Let the Banker Beware!" [1991] *NZ Recent Law Review* 202. It is perhaps worthy of note that an important part of Gallen J's decision has been overturned on appeal in *DFC New Zealand Ltd v Goddard* [1992] BCL 474, although there is a clear indication in the leading, but rather brief, judgment of Cooke P that he at least would be prepared in the right types of circumstances (which are not elaborated upon) to adopt a flexible and remedial approach to the granting of a proprietary remedy, which might well result in the upsetting of the supposed security of commercial transactions in the banking and investment areas.

The respondents, the trustees of a family trust, deposited $2 million with DFC New Zealand Ltd, an investment banker, which investment was due to mature on 22 September 1989. On maturity, DFC overlooked instructions for repayment to be made to the trust's bank account at a retail bank, and so invested the amount, plus accrued interest (a total of $2.3 million) with itself on call. This on call investment was rolled over several times while DFC made attempts to contact the second respondent trustee to obtain instructions. When the second respondent finally made contact with DFC, in response to various messages left for him, he discovered that DFC had been placed in statutory management. The respondents thus instituted proceedings claiming a proprietary interest in DFC's assets which would take priority over debts owed to unsecured creditors.

Cooke P's succinct summary of what transpired in the High Court is as follows:

> . . . the claim was put on three grounds, in short (i) that DFC had been trustee of the $2 million from the outset; (ii) that DFC became a constructive trustee or trustee *de son tort* of the $2.3 million on reinvesting or rolling it over on 22 September; (iii) a ground based on the contention that DFC could not take advantage of its own default. The Judge rejected grounds (i) and (iii) and they have not been resurrected on appeal. He found in favour of ground (ii) and from that part of his judgment DFC appeals.

The Court was unanimous that Gallen J's finding on ground (ii) could not be sustained. Gallen J had accepted that the primary relationship between the trustees and DFC was one of creditor-debtor (in denying the trustees' ground (i)), but his finding that the "reinvestments" on 22 September 1989 and thereafter amounted to intermeddling with trust funds, and thus raised a trusteeship *de son tort* in DFC, in effect provided a proprietary remedy for a breach of contract. The Court of Appeal's position was essentially to carry through the creditor-debtor contractual relationship to its logical end, which was that only personal remedies would be available in the event of a breach of that contract. Cooke P stated:

> . . . merely by purporting to create a new unsecured debt owed by itself and liability for interest DFC could not confer on *the creditor trustees* any proprietary interests in its assets . . . By merely failing to pay a debt and acknowledging liability for a substituted debt DFC could not convert itself into a trustee. (Emphasis added)

Hardie Boys J stated:

> DFC's failure to comply with the repayment instructions was a breach of contract rendering it liable in damages for consequential loss. The debtor-creditor relationship did not thereby come to an end. DFC remained liable [in simple debt] . . .

Gault J stated:

> The "re-investment" . . . was no more than the making of particular account entries within DFC and did not affect its relationship with the trustees – that of debtor and creditor.

All three Judges apparently accepted that what DFC did after 22 September 1989 did not constitute a rationale for imposing a broader form of constructive trust, than that type which arises in a rather specialised form as trusteeship *de son tort*. Both Hardie Boys and Gault JJ were quick to deny that the so-called "re-investment" was such an activity by

DFC. Cooke P was much more explicit.

> Looking at the case more broadly, the Court should no doubt lean toward holding that the family trustees on behalf of their beneficiaries have a *proprietary interest superior to the rights of unsecured creditors* if DFC had dealt with the trustees in a manner giving rise to an equity against DFC clearly superior to the claims of unsecured creditors. That is to say, *DFC could not deny the existence of such a proprietary interest if it would be unconscionable to do so.* But no solid ground appears for so holding. The fact is that the family trustees relied on DFC in no way significantly different from the reliance of the other unsecured depositors. They all simply relied on DFC to fulfil its contractual obligations, whatever those obligations might be. The family trustees are not in my view entitled to any preference. (Emphasis added.)

This paragraph leaves the door open for future arguments for the imposition of a constructive trust based on "unconscionability" in cases of investment and deposit transactions involving bankers and other investment agencies. This type of argument appears to have been what the respondents originally had in mind when they argued ground (iii). The notion of an "unconscionable retention constructive trust", perhaps arising from reliance of a special sort by the relevant plaintiff on the behaviour, statements or even status or general function of the defendant sought to be bound in this way (see hints of this type in Cooke P's statement), is present in a number of recent decisions (see footnote 115 on p 224 of the article by Rickett and Zohrab cited above) but remains undeveloped. A recent useful attempt to analyse this trust is by S R Scott, "The Constructive Trust and the Recovery of Advance Payments – *Neste Oy v Lloyds Bank Plc*" (1991) 14 NZULR 375. A murky cloud still lingers on the banker's horizon. Hardie Boys J did at least expressly accept that the commercial implications of any such trust liability would need to be faced if (and as) required.

A second strand in the Court of Appeal's rejection of Gallen J's imposition of trusteeship *de son tort* was the important point of principle stressed in Rickett and Zohrab's article and argued by DFC – that trusteeship *de son tort* is a special type of (constructive) trusteeship developed to deal with persons who have control or possession of trust property in some capacity, and then seek to utilise that property in a manner inconsistent with the trust which binds upon it. DFC could not be a trustee *de son tort*, since there was no trust property in its control or possession. All three Judges accepted this contention. Gault J's statement is a clear one:

> . . . a person will not be charged with the obligations of a trustee *de son tort* unless trust property is in his or her possession or control.

Unfortunately, the dicta just quoted, whilst clearing up a confusion introduced into the law relating to trusteeship *de son tort* by Gallen J, were themselves prefaced by other dicta in the same sentence which introduced a further unnecessary infelicity. Gault J's full sentence reads:

> The authorities are clear that in the absence of knowing assistance in fraudulent conduct of trustees a person will not be charged with the obligations of a trustee *de son tort* unless trust property is in his or her possession or control.

His Honour cited, inter alia, as authority for this proposition the locus classicus of the law relating to constructive trust liability of strangers as "knowing assisters" and "knowing receivers" – *Barnes v Addy* (1874) LR 9 Ch 244. This type of liability is not, it must be recognised, the same as liability founded on unconscionable retention. In particular, a knowing assister may never acquire control or possession of the trust property with which the trustee deals fraudulently. Thus, to describe, as Gault J appears to, a knowing assister as a type of trustee *de son tort*, introduces the prospect of such trusteeship *without* control or possession of the trust property! (Knowing receipt liability is not the same as unconscionable retention, since it is arguable that the types of knowledge required for each are different; and, further, the unconscionable retention test might be applied to transform into trust property, property which was originally that of the new trustee, as would have occurred in *DFC v Goddard* had such a trust been imposed on DFC), It is true that both Professor D W M Waters, in *The Law of Trusts in Canada* (1984) at pp 400-401, and Thomas J in *Powell v Thompson* [1991] 1 NZLR 597 at 609, accepted that "trustee *de son tort*" can be and has been used to denote a "stranger" as trustee, but these particular cases are "knowing receipt" cases, where the property is in the control or possession of the trustee, not "knowing receipt" cases, where the property is in the control or possession of the trustee, not "knowing assistance" cases. To use the term "trustee *de son tort*" in knowing receipt cases does not therefore violate the principle fundamental to trusteeship *de son tort*: possession or control of the property.

This minor point aside, and even allowing for some disquiet because of Cooke P's reminder of the haunting spectre of the "unconscionable retention constructive trust", the slaying of "the potentially giant octopus" (see Rickett and Zohrab, p 202 and p 225) of a much extended trusteeship *de son tort* doctrine is to be widely applauded.

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Partnerships and constructive trusts

Estate Realities Ltd v Wignall (High Court, Christchurch, CP 29/86, 31 October 1991, Tipping J; [1991] BCL 2257, and the sequel to [1991] BCL 785) is noted here only upon the partnership aspects of the cases. The basic relevant facts were that W, E and N were partners in a sharebroking firm, EW & Co. It was found that E and N, acting in the ordinary course of the firm's business, had breached their fiduciary duty towards their

client, the plaintiff company. They had, during the subsistence of the broker-client relationship, purchased shares from the company, informing it that they were being purchased on behalf of "a client". They bought the shares for themselves beneficially and did not disclose this. The company did not, as it happened, incur any loss or injury. It did not sue for any loss or injury. It sued for an account of profits, which, to repeat the words of Tipping J "is a different matter." He held that E and N had rendered themselves liable as constructive trustees and so had to account for the profits made.

Although W was a partner in EW & Co at the relevant time, he was not implicated in the breach of fiduciary duty. He was overseas and had no knowledge of the circumstances under which the constructive trust arose. It was held, as will be seen, that he was not to be regarded as a constructive trustee either upon the basis of knowing assistance or of knowing receipt and dealing and that he was not liable to account for his share of the net profit.

The purpose of this note is to show how the Court was able to reach this conclusion. Counsel for the plaintiff company sought to make W liable under ss 12 and 13 of the Partnership Act 1908. Section 13 provides that where by the wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, "loss or injury" is caused to any person not being a partner in the firm or any penalty is incurred, the firm is liable to the same extent as the partner so acting or omitting to act. Tipping J observed that there was undoubtedly a wrongful act of a partner, viz, E's breach of fiduciary duty, and that E had been acting in the ordinary course of the firm's business when he breached his duty. As Tipping J went on to say, the case was not one where "loss or injury" had been caused to the company – because a fair price was paid. The company, as indicated above, did not sue for loss or injury, but for an account of profits. Section 13 was accordingly held to be inapplicable.

Section 12 states that every partner in a firm is liable jointly with the other partners for all "debts and obligations" of the firm incurred while he is a partner. Counsel for the company argued that while the liability to account was not a "debt", it was nevertheless an "obligation." After referring in particular to *Lindley & Banks on Partnership* (16 ed, 1990), paras 13-03 and 13-13, Tipping J held that it was apparent that, when speaking of "obligations," s 12 was referring to contractual obligations. "The section is," he said, "declaratory of the common law on the subject and there is no doubt from the earlier cases that the concept of obligation of which the section speaks is a contractual obligation or engagement. Clearly therefore s 12 does not assist the Plaintiff."

The question of the liability of an innocent partner (here W) for a breach of trust by another partner was viewed by the Court as being "more difficult". His Honour referred to *Finn on Fiduciary Obligations* p 121, para 268, where it is said that:

> Where the money misused by the fiduciary is introduced into a partnership of which he is a member all of the partners will benefit from the profits attributable to that money. The fiduciary's partners, however, can only be made to account for their respective share of that profit if they were aware of, or were implicated in, the fiduciary's breach of duty.

The Court considered the case to be complicated by the fact that E and N (albeit with no complicity by W) committed the breach of fiduciary duty in the course of acting as brokers and as partners in EW & Co. Had E and N introduced a stranger to the partnership as their third equity partner, that third person could not have been made liable to account for the profits he made unless knowingly implicated in the breach or receiving his shares with the requisite knowledge. W, although a partner at the time, had no such knowledge. The question therefore became whether he was caught merely because he was a partner of EW & Co at the relevant time.

This led to a discussion of s 16 of the 1908 Act. It provides that, if a partner, being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein. As noted by the Court, there are two provisos, one of which relates to a partner who has notice of the breach of trust – which W, on the evidence, did not. "The position seems to be," continued Tipping J

> that if money or other property comes into the hands of the firm properly and in the ordinary course of its business and the money or other property is trust property, the whole firm has a liability to account: see *Marsh v Keating* (1834) 2 Cl & F 250 and *Lindley & Banks* at para 12 – 136. However if the trust money or other property does not come into the hands of the firm but simply into the hands of one of the partners then the other partners are not liable to account unless they have notice of the breach of trust or other circumstance which renders the offending partner liable as a constructive trustee.

It was further observed that, at para 12.28, *Lindley & Banks* states with reference to the United Kingdom equivalent of s 16 of the 1908 Act, that, if one partner being a trustee improperly employs trust money in the partnership business, his knowledge will not be imputed to the firm and the other partners will not, without more, be liable for the breach of trust. Further, the learned authors state (ibid) that whether one partner's knowledge that money in the firm's hands belongs to a trust will be so imputed must be determined by reference to the nature of the partnership business and the purpose for which the money was received by the firm. At para 12-29, they go on to say in a passage – which the Court considered to have "some direct relevance to the present case":

> Although a member of a firm of solicitors has implied authority to receive trust money as agent for the trustees, he will not, as a general rule, have authority to constitute himself a constructive trustee thereof. If he does so, his co-partners will not be liable as constructive trustees, if they have no knowledge of the circumstances under which the constructive trust arose.

In support of that statement, as Tipping J mentioned, Lindley &

Banks cite *Mara v Browne* [1896] 1 Ch 199; *Re Bell's Indenture* [1980] 1 WLR 1217 and contrast *Agip (Africa) Ltd v Jackson* [1990] Ch 265. (This last case has been affirmed by the Court of Appeal since *Lindley & Banks* was published: see [1991] 3 WLR 116 and Webb & Webb, *Principles of the Law of Partnership* (5 ed, 1992), paras 70 and 71.) His Honour found further support from the High Court of Australia decision in *National Commercial Banking Co Ltd v Robert Bushby Ltd* (1986) 60 ALJR 379 and Fletcher, *The Law of Partnership* (5 ed, 1987) pp 178 – 179.

The Court considered that it would be wrong to hold that E and N had any implied authority to constitute themselves constructive trustees in relation to the relevant shares. They having done so, W was not liable as constructive trustee if he had no knowledge of the circumstances under which the constructive trust arose. On the evidence, he did not. (Support for this approach was found in the decision of the Court of Appeal in Chancery in *Vyse v Foster* (1872) 8 Ch App 309, at p 333, especially per James LJ. The decision was affirmed: see (1874) LR 7 HL 318.) Tipping J stated that he was "not unmindful" of the fact that the breach of fiduciary duty by E and N which rendered them liable as constructive trustees had occurred during the course of the ordinary business of the firm. However, it seemed to him to be both fair and sound in principle to take the view that W did not himself become a constructive trustee, as their partner, unless and until he had such knowledge of the circumstances as to make it appropriate to tax him as constructive trustee as well. The position was not covered by ss 12, 13 and 16 of the 1908 Act and W should not be regarded as a constructive trustee. Consequently he should not be required to account to the plaintiff company for his one third share of the net profit.

That left E and N liable jointly and severally to account for the remaining two thirds of the net profit. In this regard, Tipping J said that:

> No doubt between themselves they will each be liable for one half of that sum, but as between them and [the plaintiff company] it seems to me that they are each liable for the whole sum being jointly implicated in the breach of fiduciary duty, each having knowingly assisted the other therein and each having knowingly received the property concerned.

The plaintiff company had also sought to recover the brokerage paid to EW & Co on the transaction. Payment of brokerage had resulted, in the Court's opinion, directly from the breach of fiduciary duty and it would be "quite inappropriate" in the circumstances for it to be retained. In this regard, W must be held liable to refund the brokerage as well as E and N. The brokerage had been charged by EW & Co and, no doubt, was received by it as well. Judgment was accordingly given against E, N and W jointly and severally for the amount of brokerage paid, together with interest.

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Sentencing for welfare fraud

Edgar v Police (unreported, High Court, Invercargill, 4 December 1991, AP 53/91, Williamson J)

In recent years, and particularly since the election of the current Government, criminal offences in connection with the receipt of social security benefits have been given much publicity. Political pressure to detect fraud and abuse obviously arises in part from concern at the misuse of public money. Less obviously, but of equal significance politically, the potential exists for widespread publicity of welfare offences to fix an image of beneficiaries in the public mind as belonging to a class of people inclined to engage in dishonesty. In this way, the wider social and political issues relating to the adequacy of benefits – particularly in relation to the sweeping cuts to entitlement in 1991 – can be muddied. The conclusions of the detailed study by the *Ministerial Review into Benefit Fraud and Abuse* in 1986 as to the complex causal factors prompting benefit fraud (and particularly non-disclosure of cohabitation) can also conveniently be sidelined (see generally the discussion at [1987] NZLJ 192).

The degree to which the Courts' behaviour in sentencing ought to be influenced by discerned public concern over the particular type of offence is a controversial issue, particularly where the concern is politically-generated. However, the comments of some District Court Judges – as regularly reported in the press – indicate that their thinking tends overall to be heavily influenced by what they perceive to be strong public feeling on the issue.

The maximum penalty under s 127 of the Social Security Act 1964 (under which prosecutions for welfare fraud are invariably brought) is one year's imprisonment. These being property offences, s 6 of the Criminal Justice Act 1985 is in point. That section provides that where an offender is convicted of an offence against property punishable for a term of seven years or less, the court must not impose a full-time custodial sentence unless it is satisfied that, because of the special circumstances of the offence or of the offender, any other sentence that it could lawfully impose would be clearly inadequate or inappropriate. Under s 11 of the 1985 Act, reparation must be imposed in all cases where such a sentence may be imposed, unless the Court is satisfied that it would be inappropriate to do so.

The summary of policy points provided by Anderson J in *Faiers v Police* (1990) 5 CRNZ 186 is perhaps the best reflection of sentencing policy in the majority of these cases. In *Faiers*, Anderson J suggested that the relevant considerations in imposing custodial sentences for welfare fraud (the "special circumstances" under s 6 of the 1985 Act) were the ease with which this type of offending can be accomplished and the "abundant" rewards; the long period during which it could continue and the difficulty of discovery; the element of breach of community trust; the incentive to commit fraud if the financial gain was seen to be "favourably disproportionate" to the price paid; and the need for deterrent sentencing in cases of repetitive dishonesty.

There is an exhaustive review of the decisions on appeal from sentencing in such cases in the judgment of Penlington J in *R v Goodin* (unreported, High Court, New Plymouth, 15 November 1991, AP 21/91).

In a timely decision, *Edgar v Police* (unreported, High Court, Invercargill, 4 December 1991, AP 53/91) Williamson J has re-examined a number of the assumptions underlying sentencing policy in this area. This note will focus on that decision.

At the time she was convicted Christine Edgar was, in Williamson J's words, "pregnant, destitute, a first offender, mother of five children who had a good record in the community". She was convicted under s 127 of the *Social Security Act* 1964 of wilfully omitting to inform the Department of Social Welfare that she was living in a relationship in the nature of marriage. A relationship had developed between Mrs Edgar and a man who was originally a boarder in her house. In respect of five offences of failing to disclose the nature of the relationship in question (a separate offence being committed each time she was required to complete a statutory declaration), the District Court Judge sentenced her to a total of 15 months' imprisonment, indicating that she could hardly have complained had the sentence been one of 18 months. Reparation was clearly inappropriate as Mrs Edgar had no means, no income and no assets.

The man with whom Mrs Edgar had been living had provided her with emotional support but had not contributed his earnings to the family. A long line of decisions has established that financial support is not a necessary factor in establishing a relationship in the nature of marriage for the purposes of s 63(b) of the 1964 Act. In a careful reconstruction of the financial loss to the Department as the result of the offending, Williamson J came to the significant conclusion that had full disclosure been made, and had the family been claiming unemployment benefit at the married rate together with family support payments and allowable earnings, the family's weekly income would not have been significantly less (and in some periods would actually have been greater) than the amount which the Department of Social Welfare had paid out in domestic purposes benefit. As it was, Mrs Edgar had been required to feed, house, clothe and care for herself and five children (including two teenagers) on a weekly net amount of between $186 to $228.

Because of the reduced real loss to the community, Williamson J held that it would have been appropriate when determining whether there were special circumstances under s 6 of the 1985 Act to have given considerable weight to Mrs Edgar's personal circumstances which "could hardly have been stronger". It could not be concluded that no sentence other than imprisonment would have been appropriate.

Williamson J went on to question and reconsider the principles set out in the earlier cases and which accord with the standard submissions on sentencing made by the Department of Social Welfare in such cases. Noting that the maximum penalty of one year's imprisonment does not put this type of offence into the very serious category, Williamson J went on to observe that there was no legislative provision which treats public funds as being more precious than private funds:

> Indeed it can convincingly be argued that to steal a widow's last few dollars shows more criminality than falsely obtaining money from taxpayer's funds.

Further, the Judge observed that sentencing for other offences involving public funds, such as tax evasion, does not appear to attract a similar policy of deterrent sentences. Offences under revenue statutes also involve trust, are easy to accomplish and are potentially even more rewarding than defrauding the social security fund, but a sentence of imprisonment would be rare in such cases.

On the issue of deterrence, there was no evidence of the prevalence of the offence in the community, judged in the light of the total number of genuine welfare beneficiaries.

In dealing with the concept of "special circumstances" under s 6, Williamson J observed that it is not particular categories of crime which amount to such circumstances under established tests (set out in *R v Sutton* (1989) 4 CRNZ 661). Rather, the Courts have recognised "that the elements of a particular crime together with the aggravating features of that case can constitute special features". Williamson J added that:

> In cases under s 127 the offender tells a lie or lies by way of a written statement in order to obtain a benefit payable fortnightly whereas persons in major fraud cases knowingly and often cleverly misuse money that has been placed in their care. There is a great difference between persons who steal to satisfy greed or facilitate other offending, eg drug dealing, and others who may tell a lie in order to conveniently obtain sufficient money on which to live.

Finally, in the context of s 11 of the 1985 Act, Williamson J held that if it is impossible for an offender to make reparation, then failure to do so cannot be a factor which weighs in favour of imprisonment:

> A trade off between reparation and imprisonment would favour those who have resources and consequently whose need for a benefit may have been slight.

In *Edgar*, the "de facto" husband's offer to pay reparation could not be the subject of a reparation order, since he was not charged (although a charge might lie in such circumstances: see *Excell v Department of Social Welfare*, unreported, High Court, Hamilton, 4 October 1990, AP 98/90).

It is suggested, with respect, that the judgment in *Edgar* provides a welcome reappraisal of principle in relation to sentencing for social security offences, particularly in Williamson J's statement that imprisonment should not be assumed to be the appropriate penalty for a person convicted of an offence under s 127. Rather that, because of s 6 of the Criminal Justice Act 1985, the presumption should be against imprisonment. Whilst this approach is out of step with earlier High Court decisions, it finds support in Australian case law such as *Taormina v Cameron*

(1980) 29 ALR 151, in which the Supreme Court of South Australia stated that non-custodial sentences ought to be the norm for social welfare offences and that fines should be pitched at a level which recognises that social security beneficiaries have few resources (see also *Young v Geddie* (1978) 22 ALR 232; *Winkler v Cameron* (1981) 33 ALR 663 and *Osborne v Goddard* (1978) 21 ALR 189).

The Court in *Taormina* also emphasised that special intent to defraud has a close bearing on questions of penalty. In this context, it remains the case that the scope of offences under s 127 of the Social Security Act 1964 remains unsatisfactorily vague, particularly given that a conviction can (and often does) result in imprisonment. This is particularly so in the case of offences of omission (see the comments of Fisher J in *Excell*). Here the difficulty is compounded by the inadequate guidance within the legislation or in more accessible literature as to the meaning of a "relationship in the nature of marriage" under s 63(b) of the Social Security Act 1964. There is a comprehensive analysis of this issue in W R Atkin, *Cohabitation Without Marriage*, ch 2. If High Court Judges can remark that the concept gives rise to problems of definition and ultimately must be a matter of fact and degree (as Eichelbaum J did in *Police v Meikle* (unreported, High Court, Wellington, 15 February 1985, M 499/84) where does this leave the legally-unsophisticated welfare beneficiary without the leisure or the training to ponder the legal intricacies of the indicia of marriage, lacking the knowledge or confidence to obtain the Department's *Miscellaneous Provisions Manual* (where the only internal guidelines lie) and subject to more pressing problems in any event — such as how to balance the need for food, clothing and shelter in a budget that cannot meet all of those needs.

John Hughes
University of Canterbury

Correspondence

Dear Sir

Re: "The inadequacies of New Zealand's Discrimination Law" by Mai Chen — [1992] NZLJ 137 and 172

These two articles in my view have been published in the wrong journal. They would be better put in a political journal as they are almost entirely about their author's particular political outlook.

Mai Chen says we need to reform our anti-discrimination laws in order to, among other things, "avert the inevitable growth in racial tension and societal disharmony that will come as an increasingly diverse New Zealand population enters the 21st century". She goes on to say "in comparison with countries like the United States, Canada and Australia, with which New Zealand likes to compare itself, New Zealand discrimination law is rather primitive, undeveloped and in a poor state of repair".

So her premise is that anti-discrimination laws somehow reduce racial tension (and "societal disharmony", whatever that is) and that all New Zealand has to do in order to have the marvelous (sic) race relations enjoyed by the United States, Canada and Australia, is to be like them and enact a whole lot more "anti-discrimination law". As it happens though, New Zealand enjoys much better race relations than those other countries despite our awful lack of legislation on the subject. Or perhaps it is because of our lack of legislation? Whereas if you look at countries such as Japan, Malaysia, Indonesia, Thailand, China, India and Pakistan you may find impressive anti-discrimination laws but wide-spread racial and cultural discrimination.

The only aspect of Mai Chen's article that possibly involves a legal point is a commonplace one, that is also better left to the political realm, namely that New Zealand's laws do not necessarily match all the international covenants and conventions it may have acceded to. That is true of most countries. Some may put into their domestic law what they undertake to do internationally, but do not enforce it, or do not provide any means to enforce those internal laws. Italy is an excellent example of that kind of window dressing. New Zealand is more like Britain, it is slow to enact international conventions, but when it does, the laws become real and effective. Maybe New Zealand governments have not enacted more reams of anti-discrimination law quite simply because they wisely feel that such laws will not be *real* and *effective*, or may in fact be counter-productive.

Charles W Etherington

Rent Review and Arbitration seminar

A seminar on rent review and arbitration is being held in the James Cook Centra Hotel at Wellington on Wednesday 1 July 1992. This is being arranged by the Arbitrators' Institute of New Zealand Inc in conjunction with Simpson Grierson Butler White. The seminar is an afternoon seminar beginning with lunch at 12.30. The cost is $95. The speakers are Professor John Baen and Mr Graeme Horsley. The topics covered will include: Rent Reviews; Treatment of Incentives; Ratchet Clauses; Confidentiality Agreements; and Arbitration of Leases. The seminar will focus particularly on the recent *Trust Bank* decision and also the depressed state of the property market. □

Auckland Law School: Speeches from the Opening Ceremony

On Saturday 3 May 1992 the new premises for the Law School at Auckland University were officially opened by Her Excellency the Governor-General. The building had previously been the temporary premises for the High Court while the High Court buildings were being extended and refurbished. The opening ceremony was held in the Davis Memorial Library. The Law School was already in occupation and an open day was held with public lectures and guided tours. The five addresses given are published to mark the occasion and as a recognition of the importance of the Law Schools for the New Zealand legal system.

The Hon Mr Justice R I Barker, Chancellor of the University of Auckland:

Your Excellency, the Honourable Minister of Justice, Your Honours, Distinguished Guests, Vice-Chancellor, Pro-Chancellor and other members of the University, Ladies and Gentlemen.

I welcome you today on behalf of the University of Auckland to the official opening of the new premises for the School of Law. We are very happy to welcome so many people including many who have come a considerable distance for this occasion including representatives of our sister Law Schools in the South.

We have had many apologies, too numerous to mention all: I refer only to two, first from the Chief Justice Sir Thomas Eichelbaum, and second from the Attorney-General the Honourable Paul East, who is especially sad that he is unable to be here. Four out of the last five Attornies-General have been graduates of this Law School. He is one and is very sorry that he is unable to be present.

The ceremony today is of special significance for the University for a number of reasons. First, it represents the first major building development on the city campus site for some years; the fact that it has been achieved in these times of very great economic stringency for universities is a feat of which we can all be proud. Secondly, it represents the extension of our campus, northward into Eden Crescent; it shows that the pressure of numbers is virtually pushing the campus out in at least one direction. And thirdly, and most importantly, it provides the University with the ability to provide suitable premises for what was described in the Council resolution of 1989 as "a Law School of international standing". It is pleasing for the University to provide these premises for its Law School which has been, we think for some years, reasonably outstanding in the Commonwealth context.

Many were sceptical about the ability of these premises to provide anything like suitable accommodation for a Law School of international standing. Some of us, who for some nine years had attempted to dispense justice under conditions of some difficulty, were amongst the sceptics. However, the amazing work of the architects and other professionals and of our own Property and Works Department staff has worked wonders as you can see, if you have the opportunity of looking around the library and the rest of the Law School.

I am old enough to see this as the fourth site for the Law School. Some of you like me may recall the time when the Law School was just a couple of rooms down in the basement of the Old Arts Building; we thought it was "big time" when we moved to Pembridge and had a library I suppose not much bigger than one of those small offices over there: but we thought that was wonderful. Some of you may remember the occasion 23 years ago almost to the day when the Law School was opened in the main library building. It has taken 23 years to move out of the library building. We hope that this building here will last at least that length of time.

There will be three speakers this afternoon. The first is the Dean of the School of Law, Professor Grant Hammond. The appointment of Professor Hammond as Dean coincided with the detailed planning and organisation which of necessity went on in the Faculty to enable this Law School complex to be a reality. Professor Hammond is dynamic and innovative. He has brought his great enthusiasm to the task of fitting out this Law School in an appropriate way. Even looking around the library, you will see many things such as the provision of computers and various other things that show his mark. Professor Hammond came to the University after a distinguished academic career in Canada and prior to that he practised law in both Auckland and Hamilton. I therefore have pleasure in calling on Professor Hammond to address you.

Professor Grant Hammond, Dean of the Faculty of Law:

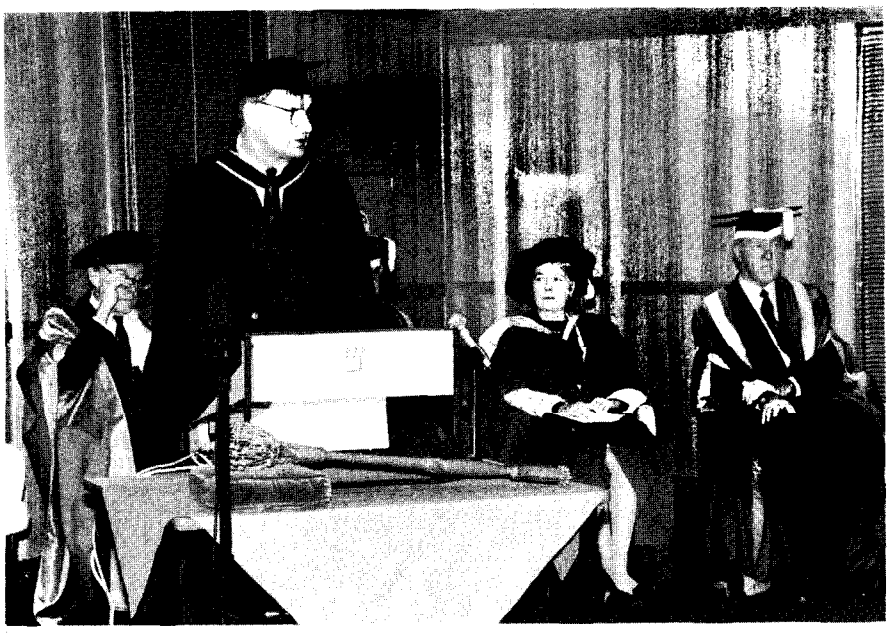
Your Excellency, Minister, Members of Parliament, Your Honours, Chancellor, Vice-Chancellor, Members of Council, Fellow Deans, Ladies and Gentlemen.

Welcome from all of us in the Law School to the ceremony to mark the official opening of this complex. We moved here in February of this year. The complex is the nearest thing the Law School has had to a purpose-built home in the one hundred and nine years that law has been taught in this University.

As the Chancellor has indicated there was a vigorous debate about whether we should come here at all. The day before Council made its final decision I wrote to the Vice-Chancellor and said (amongst other things): "I would prefer Council to resolve that the refit of the Eden Crescent complex be of a high standard and compatible with a Law School of internationally recognised standing. This is not of course to seek a blank cheque, but the Law School should not be left naked to face the chill winds of difficult budgets. If the job is to be done, it should be done properly and Council should say so". In the event Council supported precisely that plea and has been entirely supportive in the development of this complex.

I suspect your Excellency knows a good deal about fast track developments. There is after all a rather big one of yours on the other side of Albert Park. This particular complex was to be very fast, in fact a construction time of around six months. Work started in October of 1991. We occupied the complex and began teaching in February 1992. This placed a great strain on the Works Department, the architects, all the contractors, the staff of the Law School and the Davis Law Library. Most of the people closely associated with this project did not get a break this Christmas, but have worked straight through. To all associated with the project, thank you very much.

There are some individuals I must thank personally. The architect, Bren Morrison of Warren and Mahoney, turned some of our more outlandish suggestions into working realities, and did so very successfully. Mr Maurice Matthewson, as Works Registrar, was in the hot seat at a very difficult time for the University, but kept it altogether. The Vice-Chancellor, Sir Colin Maiden, had to find the money. He also demonstrated a remarkably acute grasp of the whole business. Whenever I agonised he was always accessible and perceptive. Chancellors Brown and Barker offered continual support.



(l-r) Sir Robin Cooke, Professor Grant Hammond, Dame Catherine Tizard, Sir Colin Maiden

The end result of the exercise is twofold. First, we have not gone "off campus", as some have suggested. Eden Crescent now represents the northern edge of the campus. With nearly 2,000 students occupying facilities between here and Waterloo Quadrant, the University took a bold, imaginative and cost-effective step towards solving its accommodation problems. Doing what was done in this block gave us new space and also freed up the premises we vacated for redevelopment. I understand other universities are following this lead and are considering like arrangements. Universities are not just ivory towers. We too have to find practical working solutions to complex financial and other problems in an institution which is the size of many provincial cities. We are doing so. I might mention that shortly we will also be able to landscape the rear of Newman Hall outside the Davis Law Library.

The second broad effect of what has occurred here, is that we now have a modern Law School complex that houses a law library of something around 90,000 volumes, we have a quality set of teaching rooms, the complex as a whole is fully networked, we have our own computer lab, and a fine moot court. The complex is the home for 900 equivalent full-time students. We have 44 full-time academic staff teaching at a ratio of less than 1-20 full-time staff to students. In addition we have a number of part-time teachers, including High Court and District Court Judges. There are 10 general staff and 10 full-time library staff. It is a big Law School by any standards.

I should like to acknowledge the external assistance we have had with funding for books for this library. It may not be known that the Spencer Mason Trust funds the American Case Law Collection at a cost of many thousands of dollars per year. I express our appreciation to the trustees. Also, the Legal Research Foundation has made a substantial bequest to the library in recognition of the long and fruitful association between the Foundation

and the Faculty of Law, and to mark this occasion. The University is deeply indebted to the Foundation.

What now of the future? What does a Law School with an able and dedicated faculty, promising students and these facilities apply itself to? What should be the ghost in the machine — the spirit which animates the workings of this particular academic institution?

I begin by observing that it is curiously appropriate that Law is where it now is, because the dilemma of a modern Law School is that it faces in two directions. It faces inward towards the University, with its interest in the intellectual life and its concern for the transmission and development of knowledge through teaching and research. But it also faces outward, to the world of the law in action. We should never lose sight of the fact that we are *both* a Faculty *and* a professional school.

The cynic might be tempted to observe that that truth merely doubles the problems. I have to confess that there have been times when I have felt that way, but the truth is that there has been a real and necessary ferment in legal education in the last decade. The disagreements, which have been world-wide, have ranged over theoretical versus practice orientated training; traditional classroom instruction versus clinical instruction versus new forms of instruction; over what subjects should be taught and what is core and what is not; doctrinal versus empirical research; and even over whether there is any such discipline as law or whether law is merely derivative of other things, and what the implications of that might be for universities.

Those disagreements tend to mask the enormous strides which have been made. The character of legal education has changed in many ways in recent years, and for much the better. Over eighty percent of the persons who graduate in law from Auckland graduate with a degree in another discipline as well as law. The Auckland LLB now comprises fifty percent of study in core areas and traditional skills. The balance of the degree is made up of the widest range of options offered by any Law School in this country, and comparable to those found in major overseas Law Schools.

In an age when faculty members assess scholarship and define institutional mission in variable ways, though we certainly have a tradition of determined and even robust debate on this faculty, we have in fact achieved much more of a consensus on most of the things we are doing than many overseas Law Schools. I am not suggesting for one moment that we can look about us and reach the degree of exultation expressed by Juliana of Norwich when she exclaimed that "all shall be well and all shall be well and all manner of thing shall be well". But the developments of recent years represent a far cry from the fixed curriculum of even only a few years ago, and the bedraggled squadron of part-time law students (and it might be said part-time lecturers) who shuffled into 8 am lectures or dragged themselves up Albert Park or Shortland Street for 5 or 6 pm lectures, frequently with a pause at that traditional law pit stop, the back bar of the Grand Hotel, along the way. In such places were even sometimes heard the mellifluous tones of those who would later adorn such things as the Offices of Minister of the Crown, the bench and University Chancelleries. Perhaps the jibe of the economist Paul Samuelson, that "the Law School has wormed its way into a corner of the University campus" was once true at several levels. But, with respect, all that statement would demonstrate today is that even a Nobel Laureate may sometimes lose control of his verbs.

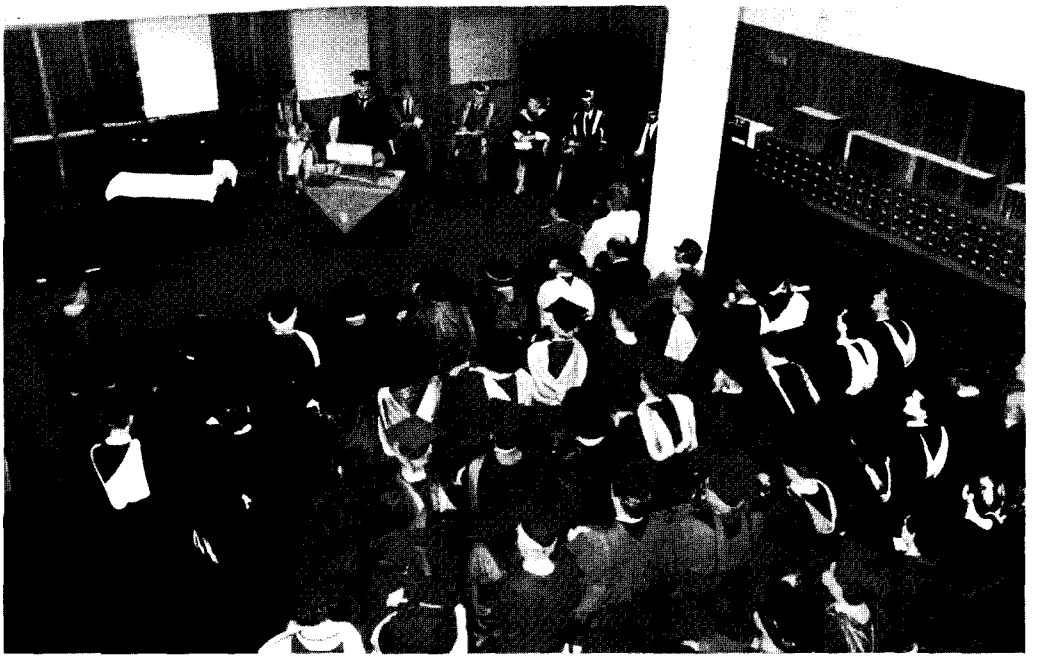
I appear here in a representative character. It is not for me to say what improvements there can and will be in legal education. That is a matter for the Faculty, the University and, where relevant, the Council of Legal Education to resolve. We are all continuously striving to improve our programmes. But Deans are supposed to worry aloud on occasion and I would like to briefly express the five things that concern me most at what might be termed the "macro" level; even if I do not presently see the solution to all or any of them.

First, having got truly onto the campus this century I fear we in Law are still not fully of it. The walls between us and other Departments need to come down more rapidly in this institution, though I fear that could be said throughout the academy in this country.

Second, having got nearer to the legal profession in recent years we in the Law School are still not fully of it either. Of course we should not be, not least because one of our roles is, where appropriate, to be a critic of the profession. But I agree with Lord Goff in his superb Maccabaean lecture to the British Academy, in which he reminded us that although the academic lawyer and the practising lawyer each have distinct roles, ultimately we are both engaged in the same enterprise. I do hope that some of our more recent initiatives with the profession and the judiciary can be maintained and extended.

Third, in that connection I have repeatedly voiced my concern over the question of education in professional responsibility. These are difficult times for the legal profession, and even more so I regret to say for some members of the public. I think the University Law Schools must play a much more significant role here.

Fourth, in the area of advanced legal research there is an acute need for a concentration of resources. Individual research will always be important. But the sort of research that is required today *does* require us to make some collective choices. That is always a painful business, but it is part of the steady movement towards centres of excellence in advanced studies which must surely emerge in this country, as they have elsewhere. It is on that account, as well as other factors, that I welcome the recent initiatives between Law and Commerce to develop a Business Law Centre at Auckland. In my view we in Law need to consider also what other initiatives at the advanced level are appropriate and feasible at Auckland, perhaps also in conjunction with other units of the University. In particular, I regret the lack of operational research currently being undertaken. As I have said in print elsewhere, "if Law Schools separate themselves from operational problems, who will address those problems with the intellectual rigour that characterises Law Schools at their best? Are problems of the profession, problems of delivery of legal services, and problems of delivery of justice less important than the



The Opening Ceremony in the Davis Memorial Library

problems we have been thinking hard about in Law Schools? Who will bridge the gap between thinking and the application of thought? Who will take the thought product out of the sheltered intellectual community and apply it in the world of action? That will be done best surely by someone who has a fundamental understanding of both the product of intellectual inquiry and the world of action towards which it is directed."

Fifth, and finally, as we heard in a moving dawn ceremony this morning there is a need to develop an enlarged sense of what we mean by a truly New Zealand jurisprudence. The profound consequences of allowing two or more solitudes to develop in any jurisdiction is visible nightly on our televisions, as Los Angeles burns.

Mr Chancellor, I thank you for the opportunity to address this gathering. My colleagues and I thank you all for attending, and for offering your support on this occasion.

Chancellor:

Thank you Professor Hammond.

The Right Honourable Sir Robin Cooke needs no introduction to lawyers or indeed to law students, even first year law students. But for those who are neither I point out that Robin is the President of the New Zealand Court of Appeal; he is one of New Zealand's jurists of international repute; this is witnessed by the fact that he has sat on the Judicial Committee of the Privy Council on several occasions. He has the very rare distinction of having honorary Doctorates of Laws from both Cambridge and Oxford.

Sir Robin has been a very good friend to the Auckland Law School over the years: in particular, he has always been ready when requested by the Legal Research Foundation to offer a paper at a seminar. He has given practical encouragement to the *New Zealand Recent Law Review*, published by the Foundation, which provides a vehicle for members of the Law School staff to publish academic writing on legal matters. We are very grateful that Sir Robin has come from Wellington to address us I now invite him to do so.

The Rt Hon Sir Robin Cooke KBE, President of the Court of Appeal of New Zealand:

Your Excellency, Chancellor, Dean, Minister, I think after that I will simply say friends in and of the law.

This is a signal occasion. When invited to take part in it the thought that first crossed my mind was that the invitation might be because I was regarded as the least benighted of the Judges, but a little further reflection demonstrated that that could not be the reason because that distinction is reserved for Mr Justice Barker. And it is a happy coincidence, Chancellor, that the present extension of your own persona coincides with a similar change in the Auckland Law School. It is right that at least some Judge or other should address you on this occasion because of the major contribution that the Auckland Law School has made to the New Zealand bench and the New Zealand practising profession. If I may confuse you with statistics for a moment or two, rather home-made figures, I tried to work out in approximate mathematical terms just

what the influence of this Law School on the New Zealand bench may be said to be and looked therefore at where the Judges have apparently been educated. I've had to make two assumptions: that is to say first that each Judge has indeed received a legal education and secondly that it is probably in the cases which I have enumerated in the University of Auckland. On the basis of those assumptions and at last count it appeared that there were some 34 High Court Judges in active service in New Zealand and of those some 15 emanated from the Auckland Law School. As to the Court of Appeal there have been 16 appointments to the permanent Court of Appeal since it was constituted in 1958 and five of those have been from Auckland. So you can see that the percentages, proportions, roughly correspond to the representation of Auckland in an All Black team, which is as it should be. I have to disclose, however, that of the present six permanent members of the Court of Appeal not one appears to have been educated in the University of Auckland and that lends some force to the view one sometimes hears that there is now some lack of balance in the Court. But I hope it will not last.

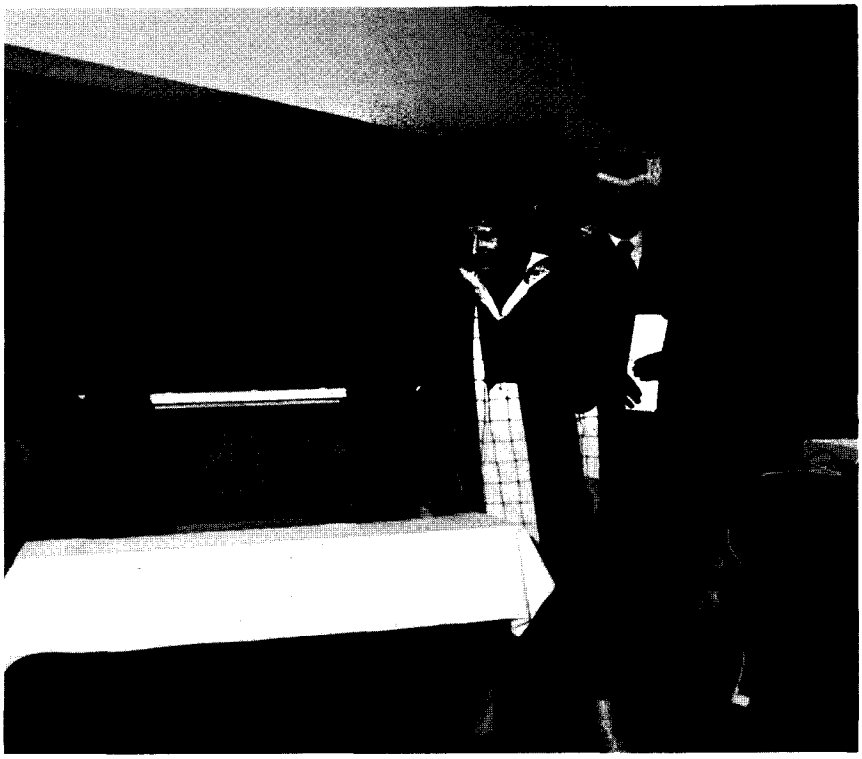
I haven't enjoyed the advantages of an education at the Auckland Law School and the thought running through many minds here will be that that is only too obvious, but, as the Chancellor has been good enough to say, I am not without warm association with the Law School. I knew and was in various ways quite closely associated with your three longest serving professors. Professor Algie, Sir Ronald Algie as he became: I often appeared before parliamentary committees of which he was a member, and later came to admire the adroitness and felicity of language with which he discharged the role of speaker of the House of Representatives. Then Professor A G Davis, Geoffrey Davis, and how rightly he is continued to be honoured by the name of the Davis Law Library: one of his greatest strengths was his continuing interest in his pupils and indeed in all young lawyers. When I was a research student at Cambridge, Davis took the trouble to look me up on one golden summer's afternoon, although we had never previously met. He came to visit me and we spent a memorable afternoon in talk about the law and life, and an association then began and continued for a number of years. Professor J F Northey: I was a fellow member with Jack on the old Public and Administrative Law Reform Committee which, among other achievements, perhaps one can say was really the creator of the Judicature Amendment Act 1972, the practical foundation of judicial review in this country at the present time; and that was very largely the individual work of Northey himself. What always struck me about Professor Northey was his administrative skill and the way he had of achieving what he wanted, and I suspect that he would be more than proud to see that tradition being carried on by Grant Hammond at the present time. It would be invidious to mention other names of those presently serving in the faculty and I do not do so, but I am proud to count a considerable number of them among my friends.

As the Chancellor has said it has been the case that I have had a particular interest in the Auckland Law School and the Legal Research Foundation associated with it, and more recently the *New Zealand Recent Law Review* which in a way one supposes is the flagship of the Law School and fulfils a valuable role in New Zealand law in providing a sort of running commentary on the decisions of the Courts. Of course this sort of thing, of which the *New Zealand Recent Law Review* is a leading representative, wreaks havoc with any attempts that Judges may make to reduce the law to a simplicity and clarity, because the moment one delivers a judgment which one hopes might have to some small degree those effects, some academic lawyer is inclined to say "That overlooks a particular complication in which I'm interested or with which I am able to beguile my students and I now wish to point out that the judgment should be viewed with some reserve". But as against that disadvantage of such a publication have to be balanced considerable advantages: in particular the stimulation of debate, the stimulation among readers and students of genuine interest in the law, and the bringing of a different perspective from that in which cases have been seen — whether by the bench or the practising profession. Moreover, such a publication is an outlet for the pent up energies of the academic lawyers who in the main supply its material, energies which if not directed into that particular activity might be directed who knows where.

But the primary function of a law school is to school its students in the law, and that should never be lost sight of. That was one of the strengths of the three longest serving professors whom I've mentioned. They all stood for that principle and I was struck, realising how the principle is still served, by reading a recent observation by Professor Hammond in the newsletter of this Law School. He said "Trying to remake the world before one has learnt some of its basic features is arrogant." If he and his colleagues are able to convey that message to their students, half the teaching job is done. As to arrogance, or if you like the right to be an iconoclast, ideally that should be reserved for anyone who has 20 years judicial service but I have to concede that that is a desideratum rather than an accomplished fact.

They are the dual roles, teaching and writing, and for those dual roles the Faculty of the Auckland Law School is well equipped. It has this strong and handsome substantially new physical environment. It has a strong staff, probably the strongest that the Auckland law faculty has ever had. Whether they are handsome is more a subjective matter, open to differences of opinion into which I do not venture, but I do congratulate the University of Auckland in general and the Law School in particular on the achievement in status which today's ceremony marks and I wish the Law School every possible good wish in going as it does, with the strengths I have mentioned, into a challenging future.

Her Excellency Dame Catherine Tizard GCMG, DBE, Governor-General of New Zealand:



Her Excellency unveiling the plaque, with Hon Mr Justice Barker

Let me ask you this: Which area of law would you say is most likely to attract the best and brightest from this faculty? Would it be Constitutional Law? Family Law? or is it more likely to be Corporate Law?

The last decade has nourished the growth of juggernaut law firms – mergers, acquisitions, corporate financing, and all the trappings of international business. Of course it is important that we keep up with the way the rest of the world does business. We must have economic security. And you can't be part of the global village without plenty of high-powered corporate lawyers. But international economic trends have social costs. Economic security, in the modern sense of the term, means security for the nation, but not necessarily for its citizens.

The structural, technological change that is transforming the modern world is leaving people behind – the children being born today who are deprived of the education and support they need to share in the coming economic prosperity the western world anticipates – the 45 year old unskilled worker who loses his job to automation. It is a change as fundamental and far-reaching as the Industrial Revolution. The time will soon be here when if you are not highly-skilled, machines or third world labour will have your job.

The effect of this is disenfranchisement. And the effect of that on people is profound. It is no coincidence that voters around the Western world are "sending messages" of discontent to those who run for almost any political office. We have mixed a potent social cocktail for ourselves. We live in a world of diminishing moral and spiritual character. That vacuum has been filled by materialism. Materialism taunts those people who sit waiting for work.

All this upheaval calls for enlightened solutions, and I believe the law has a role to play. It can redress imbalances, it can protect rights, and it can ensure that every member of the community has the chance to say "Hear me, hear my concerns". Without the right to be heard, without the right to influence the affairs of our community, without economic and lawful power, people become frustrated, and violent upheaval can follow.

We see that lesson in the French Revolution and in the contemporary changes in Eastern Europe. Of course some revolutions have unfolded without bloodshed. The Industrial Revolution, with all its consequences, was a more or less peaceful one. And the inequities it created became recognised and redressed through *legal* means such as the democratic process of free speech and universal franchise and the legalising of associations of workers.

The law can be a safety valve for social tension. Law can create new resolutions to competing claims, and create new systems to make resources and opportunities open to everyone.

Common law countries have proudly proclaimed over the centuries the great principle of the rule of law – that no one, not even the sovereign or the highest officer of state, is above the law. That rule of law is enforced in Her Majesty's Courts, which like the Ritz Hotel, are open to rich and poor alike. For those, however, whose budget more easily accommodates the legal equivalent of fish and chips or a Chinese takeaway, more affordable dispute resolution has to be provided. The difficult trick is to find a way of preserving the essentials that have made the common law the quality standard by which other legal systems have been judged, while avoiding the enormous cost of the adversary system. How do you maintain Rolls Royce qualities for those who can barely afford a second-hand Japanese import?

And the cost of common law litigation is not financial only. The adversary system by its very nature polarises the parties to a dispute and makes it even more difficult for them to co-exist and work together after the particular dispute has been adjudicated. That means that in Family Law and in those areas of Administrative Law where the parties will continue to have to deal with each other as in Social Welfare matters and planning, more constructive dispute resolution than the adversary system has to be found.

Affordability, accessibility, the "win-win" mediation model, speedy resolution to avoid entrenched antagonism developing – these are some of the qualities the advocates of alternative dispute resolution look for. But impartiality, thoroughness, independence from pressure by either a powerful party to the dispute or by public authority – these are essential if the credibility of the alternative system is to be maintained.

While judicial determinations with the full panoply of Court procedures remain for many the ideal, cost and time saving alternatives ranging from Small Claims Tribunals, family problem resolvers, review authorities for the myriad administrative issues that arise in a modern state and Ombudsman-type investigation are increasingly utilised to avoid the staggering cost, to the taxpayer and litigant, of recourse to the Courts. I am sure we all noted the recent newspaper headline about the $77 million cost to the taxpayer of the Legal Aid Service. These alternative methods of resolving conflict will be acceptable only if those charged with administering them have credibility through adequate appointment procedures and support, and if Law Schools do their part in training the lawyers of the future to understand that non-adversarial methods are no compromise of the ideals of justice according to the law.

You have a record of sending forth influential lawyers. In 1985 former students of this school held the Offices of Governor-General, Prime Minister, Leader of the Opposition, Chief Justice, President of the Court of Appeal, President of the Labour Party and President of the New Zealand Law Society. Names can be provided if you have forgotten. So to new beginnings, I hope the Auckland Law School goes on sending forth influential graduates, and I hope they leave here with an understanding of the profound changes we are going through, and the legal solutions that might be available in the future. Whether they are in Parliament or a Citizens Advice Bureau, a suburban law practice or a multi-national corporation, they can make a difference.

It is important to send out students properly equipped to become corporate lawyers in high-rise towers. But they must not be so myopic in eye or mind that they lose sight of the importance of those small human figures down on the street.

It has never been more important for practitioners to understand the wider picture: to recognise what law can do to hold our society together and to steer it through conflict and turmoil. You have an opportunity to do great things at a time of great change. I wish you the strength to make the most of that opportunity.

It now gives me great pleasure to declare these new Auckland Law School buildings officially open and I will shortly unveil a plaque to mark this event.

Chancellor:

Your Excellency, thank you for declaring the Law School open. The Duke of Plaza-Toro once said: "Foundation stone laying I find very paying it adds a large sum to my making". Unfortunately, the budget for the new Law School is a little depleted at the moment. We would have to therefore dispense with the payment. With considerable pleasure, I invite you to pull the string and unveil the plaque.

Thank you Your Excellency. I now call on the Vice-Chancellor, Sir Colin Maiden, to propose a vote of thanks to Her Excellency.

Sir Colin Maiden KBE, Vice-Chancellor of the University of Auckland:

Your Excellency, Minister, Chancellor, Sir Robin, Distinguished Guests. On behalf of the University of Auckland I thank Her Excellency Dame Catherine Tizard and Sir Robin Cooke for participating in today's opening ceremony of our new Law School. One of the nice features of Dame Cath's term as Governor-General is that we are seeing a lot of her and, as the Chancellor mentioned, it was only two or three weeks ago that we conferred upon her the Degree of Doctor of Laws. We don't see as much of Sir Robin Cooke, but it was felt most appropriate that Sir Robin, as President of the Court of Appeal, should play an important role in today's ceremony.

I would like to take this opportunity to thank Professor Grant Hammond and the staff of the Law School for their co-operation in moving from the library building to this site. For many years we have had a severe overcrowding situation in the main library and this move will help provide the library with additional and very welcome space. Of course, Professor Hammond was far sighted enough to see that in coming to this site the Law School would gain a library much larger than the previous Law library in the main library building, a computer laboratory and other enhanced facilities for both students and staff.

Also I would like to thank the Works Registrar and his staff, Warren and Mahoney the architects, Mainzeal the project manager and Hawkins Limited the construction contractor for their work in planning, designing and constructing this complex. It amazes me to see what can be done with a former interim High Court, an old ice cream factory and a building in which boat marinas were designed till just a few years ago. We had hoped that the landscaping would be complete for this occasion and, as Professor Hammond mentioned, we will be able to get on with this in the near future and provide a better entrance way from Waterloo Quadrant. At the moment the students come down what is known as the Ho Chi Minh trail!

Dame Cath and Sir Robin we very much appreciate your participation in this ceremony. Ladies and gentlemen would you join with me in thanking them both. □

Judicial review of administrative action:
Some recent developments and trends

By Rodney Harrison, Barrister of Auckland

This is the first part of an article on judicial review. Parts II and III will be published in the July and August issues. In this first part the author deals with the question of justiciability or the reviewability of administrative action. In Part II he will deal at length with the substantive grounds of review. In Part III he will discuss a group of topics concerning the ultimate outcome, the Bill of Rights Act 1990, the Employment Contracts Act 1991 and possible future trends.

I Introduction

> *They sought it with thimbles, they sought it with care;*
> *They pursued it with forks and hope;*
> *They threatened its life with a railway-share;*
> *They charmed it with smiles and soap.*
>
> **The Hunting of the Snark**

The refrain from Lewis Carroll's eminently sensible nonsense poem might well have been penned with the field of administrative law in mind. (Noteworthily, the participants in the Hunting included a Barrister.) What Sir Robin Cooke in a memorable address[1] characterised as "The Struggle for Simplicity in Administrative Law" continues to be the subject of hopeful search – with, it sometimes appears, as much diversity and little success as attended those engaged in the hunt for the metaphorical Snark.

In this paper, my goals will be much more modest than actual capture of a Snark. I propose to limit myself to a review of some significant recent authorities in the administrative law area, particularly of the New Zealand and English Courts, with a view to identifying key developments and possible future trends.

I consider myself excused from any attempt at complete treatment of the entire field of judicial review of administrative action not merely by the enormous dimensions of the topic but also by the emergence at last of a comprehensive and up-to-date New Zealand text in this field. I am referring to Dr Graham Taylor's most useful work, *Judicial Review: A New Zealand Perspective* (Butterworths), published late last year.

Those wanting a clear statement of basic principles or a comprehensive review of leading authorities are therefore referred to Dr Taylor's book.

The recent developments to which I have referred fall more or less neatly to be dealt with under the following subject headings:

> Reviewability/Justiciability;
> The Substantive Grounds of Review;
> The Ultimate Outcome;
> Judicial Review and the New Zealand Bill of Rights Act 1990;
> Judicial Review Under The Employment Contracts Act 1991;
> Future Trends.

This paper is sub-divided accordingly.

It is not proposed to deal with procedural matters such as applications for an interim relief, or evidence and discovery. There is however one trap of a procedural nature which has received prominence on more than one occasion lately, which warrants brief mention. This relates to the need to join as respondents to an application for judicial review not merely the decision maker but also all third parties whose interests may be directly affected by the outcome of the review application. The point is well illustrated by the recent Court of Appeal decision in *Minister of Education v De Luxe Motor Services (1972) Limited,*[2] where the Court of Appeal held that an application for review brought by an unsuccessful tenderer for a contract for a school bus run had "miscarried", because the successful tenderers had not been made parties to the proceeding and thus had been given no opportunity to be heard. Their interests, it was held, had been "directly affected" by the application and they should therefore have been joined as parties.

II Reviewability/Justiciability

This section is concerned with two separate but inter-related issues. The first issue is whether an administrative decision or action can be the subject of an application for judicial review under the Judicature Amendment Act 1972. The second is whether the decision or action is such that the Court will enter upon the process of subjecting it to review, either under the 1972 Act or at common law, and if so, upon what precise grounds of review.

Review under the Judicature Amendment Act 1972

The first issue is of course to a large extent a matter of analysing the administrative decision or action in terms of the well-known definitions of "statutory power" and "statutory power of decision" in s 2 of the

Judicature Amendment Act 1972. For detailed analysis of these definitions and their components, see Taylor, pp 31-46.

While the availability of the remedy of judicial review under the 1972 Act continues to arise as a question of substance from time to time, it is I believe a reasonably safe generalisation to say that this is not usually an issue which of itself determines the ultimate outcome of a case. That is not to say that attempts to roll forward the frontiers of judicial review, or major legislative change, cannot give rise to fresh issues of reviewability in this context. This has recently occurred, for example, in relation to the legislation dealing with State-owned enterprises.[3]

One perennial problem arises in relation to the entering into or termination of a contract, or the exercise of powers conferred by contract, in situations where there is a degree of statutory regulation of the subject matter of contract or of a contracting party itself. This is an area where fine distinctions have sometimes to be made, but the basic principles stated in the two *Webster* cases,[4] and the generally beneficial approach of the Courts to the 1972 Act, continue to operate. Issues of reviewability in a contractual context have most recently arisen under the Employment Contracts Act 1991, and these will be discussed in a separate section of this paper. Overall, as already stated, if the subject matter of administrative decision or action is in general terms one capable of review at common law, reviewability under the Judicature Amendment Act 1972 will tend to follow pretty much as a matter of course.

Reviewability/Justiciability

The second issue is therefore the more fundamental. It addresses the question whether a particular subject matter of administrative decision or action is properly the subject of judicial review. (By "judicial review", I mean the application of administrative law principles by Courts of law to invalidate administrative or executive action or decisionmaking, irrespective of the form of procedure adopted.) In the last decade, the list of "no-go" areas for judicial review has had to be substantially amended. For example, as is well known, since the House of Lords decision in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, it can no longer categorically be said that an exercise of prerogative power by the Crown cannot be the subject of judicial review.[5] Nor will the fact that the organisation in question is one governed primarily by private rather than public law necessarily preclude judicial review. In recent years, as is well-known, organisations as diverse as incorporated sporting bodies (see eg *Finnigan v NZRFU* [1985] 2 NZLR 159, 181) and non-statutory bodies exercising de facto regulatory authority in a commercial sphere (see eg *R v Panel on Takeovers and Mergers, ex p Datafin plc* [1987] QB 815 (CA)) have found themselves subject to the judicial review jurisdiction of the superior Courts.

The potentially liberalising — some would say, floodgate-opening — effect of this approach has been, and in my view is increasingly being, tempered and balanced by a more critical analysis of the nature and subject matter of the power or action in question. Indeed, we appear to be nearing the point where it can definitively be stated that the availability of judicial review depends not on characterisation of the precise legal nature of the source of power of the administrative or executive decision or action taken, but rather on the overall nature and subject matter of the power or action in question and the other relevant surrounding circumstances, including, it is submitted, the relevant matters of complaint.

The approach to issues of reviewability leads in its turn to a concentration, at least in difficult cases, upon a concept of "justiciability".[6] In the *Civil Service* case, Lord Scarman explicitly makes this point (at 407):

> . . . the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the Courts can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power.

The particular prerogative power[7] at issue in the *Civil Service* case was founded on an assessment of what was in the interests of national security, and its exercise was for that reason held to be unreviewable. What the recent cases about to be analysed show, it is submitted, is that the "justiciability" approach adopted by Lord Scarman is now also being adopted in relation to exercises of power having their origins in statute.

***R v Environment Secretary, ex parte Hammersmith LBC* [1990] 3 WLR 898 (HL).**

In this case 19 local authorities applied for judicial review of an exercise by the Secretary of State for the Environment of his powers under the Local Government Finance Act 1988 (UK) to designate particular local authority budgets as excessive. The Secretary's power of decision formed part of a statutory process of determining the appropriate amounts payable to local authorities generally, out of central Government funding. The local authorities advanced a three-pronged challenge to the Secretary's decision, arguing not only illegality (contravention of the empowering legislation), but also procedural impropriety (failure to consult) and irrationality.

In the House of Lords, all three prongs failed. In the view of Lord Bridge, who delivered the leading judgment, the challenge based on illegality failed on the interpretation of the statute. After having rejected that challenge but *before* turning to the challenges based on irrationality and procedural impropriety, Lord Bridge stated that it was first "appropriate to consider whether any limitations upon the scope of judicial review are imposed by the subject matter of the legislation" (at 960). Applying an earlier House of Lords decision (*R v Secretary of State for the Environment, ex p Nottinghamshire CC* [1986] AC 240), His Lordship laid stress both on the political nature of the judgment involved in the Secretary of State's decision, and on the fact that under the legislation, his decision required the approval of the House of Commons before it could

take effect. Accordingly, His Lordship held that, once it had been determined that the ministerial action did not contravene the requirements, express or implied, of the statute, a challenge to the Minister's actions on grounds of irrationality would not be entertained unless it were shown that he had acted in bad faith, or for an improper motive, or that his decision was "so absurd that he must have taken leave of his senses": [1990] 3 WLR at 961. By parity of reasoning, it was held that the subject matter of the nature of the power exercised did not require principles of natural justice to be implied into the legislation in addition to such procedural requirements as were stipulated therein. Accordingly, the challenge based on procedural impropriety failed also.

It is submitted that what is of particular significance in the *Hammersmith* case is the emphatic reliance by the House of Lords upon the nature and subject matter of the legislation and of the decision under review as the basis for either excluding or at least substantially restricting the extent of any challenge based on procedural impropriety (fairness) or irrationality (*Wednesbury* unreasonableness).[8] By contrast, the challenge based on illegality was the subject of a more neutral consideration, and (it appears) fell to be determined on the basis of ordinary canons of interpretation of statutes.

***Hawkins v Minister of Justice* [1991] 2 NZLR 530** involved a challenge by the former Equiticorp Chairman to an Order in Council placing the companies in the Equiticorp Group under statutory management, initially pursuant to the Companies Special Investigations Act 1958 and subsequently pursuant to the Corporations (Investigation and Management) Act 1989. The challenge related to the inclusion in the list of companies covered by the Statutory Receivership of Ararimu Holdings Limited and its subsidiaries. (Ararimu Holdings Limited and its subsidiaries were not themselves members of the Equiticorp Group.) The "real issue" in the appeal related to the first of two Orders in Council, which was made pursuant to the 1958 Act. Section 3(4) of the 1958 Act provided for the making of an Order, where (in summary) it was desirable to do so for the protection of shareholders or creditors of any company or companies or where otherwise in the public interest that the provisions of the Act should apply to any company or companies, and the interests of shareholders or creditors or the public interest could not be adequately protected under the Companies Act 1955 or in any other lawful way. The powers conferred by s 3(4) were those of the Governor-General acting on the advice of the Minister of Commerce given on the recommendation of the Securities Commission.

The first Order in Council was made on a Sunday following a public announcement the previous Friday that the Group would be suspending business. In fact, the solicitors and accountants of the Group had themselves argued on the Group's behalf that such intervention was imperative, in the national interest.

The applicant sought to challenge the exercise by the Governor-General in Council of the power under s 3(4) and sought in particular to argue that the grounds for acting pursuant to that provision, summarised above, were not shown to have existed as at the time of exercise of the power. It was argued that this issue was "fully open to review by the Courts". Reviewability in those terms was said to be available because the stated criteria were conditions precedent to the making of an order in Council, and therefore reviewable as "matters of jurisdictional fact".

Cooke P held (at 533-534) that the issue was "purely one of statutory interpretation". His Honour held that, although "grammatically" the argument was open on the wording of the sub-section, in fact s 3(4) "implicitly conferred on the Governor-General . . . power to determine whether the conditions were fulfilled". His Honour was of the view that, bearing in mind the principle that, where reasonably practicable, statutes should be interpreted so that they work,[9] . . .

> It is highly unlikely that Parliament would have contemplated lengthy litigation, including even a series of appeals, before it could be authoritatively determined whether the criteria for an Order in Council had been satisfied.

Cooke P went on to add that the Governor-General, Minister and Commission had to "direct themselves to the right tests and comply with the ordinary obligations of an authority in whom a statutory discretion is vested". His Honour therefore concluded that the provision did not empower these authorities to determine conclusively a question of law such as the true interpretation of the sub-section. His Honour then went on to consider, and reject, an argument based on "*Wednesbury* unreasonableness"![10]

His Honour Mr Justice Richardson (at 536-538) similarly considered that the issue was in essence one of interpretation. He stated:

> Although cast in the terminology of jurisdiction, collateral or precedent fact, the first issue, at least in New Zealand terms, is better viewed as a straightforward question of statutory interpretation. This is for the obvious reason that the principles on which the exercise of a statutory discretion may be reviewed by the Courts must turn on a consideration of the particular statutory provision under which the power is exercised. That requires an assessment of the nature and subject-matter of the decision under challenge set in its broad legislative context which necessarily involves consideration of the object of the statutory grant of decision-making power, and the role under our system of Government of the body entrusted with the exercise of that power. . . .
>
> The larger the policy content and the greater the room for the exercise of judgment by the statutory decision maker, the less scope there is for a conclusion that the legislature intended that the Courts by way of judicial review should determine whether the statutory criteria were established as a precondition to

> the exercise of the statutory power. To put it another way, the legislature may implicitly entrust the jurisdiction to determine whether the criteria are present to the statutory decision-maker. In some such cases the statutory analysis will lead to the conclusion that the identification and weighing of relevant policies and considerations is for the decision maker alone, and in that sense is not justiciable at all. In others the conclusion will be that it is for the Courts to determine by way of judicial review whether there was material before the Minister on which the Minister could properly have concluded that the statutory criteria were present. In the end it is a question of statutory interpretation whether, and if so on what principled basis, judicial review of the exercise of the particular statutory power is available.

Stressing that the 1958 Act would often need to be applied in circumstances of considerable urgency, and that the "first instance" judgment was that of the Securities Commission as the "expert body entrusted with [the] power of recommendation", Richardson J concluded:

> Against that background it would be unreasonable to attribute to a legislature, which has provided for the Commission's expert commercial scrutiny of what must in the end be matters of commercial judgment, an intention that a Court of general jurisdiction should be able to rule long after the event and pitting its assessment against the Commission's that the Commission lacked jurisdiction to even consider the matter. On the contrary, the language of "desirability" and "adequacy" as the statutory yardsticks is expressive of the exercise of value judgments. The omission of any express reference in the subsection to the opinion of the Commission cannot in that context be given any great weight. It is implicit in the language used and in harmony with the object and scheme of the provision, and importantly with the workable operation of this provision, that the Commission's judgment in relation to these two associated matters it made the statutory criterion at the first step. If then the Commission in its consideration of the case asks itself the correct legal questions and addresses the relevant facts, its decision to recommend that the Minister apply the Act must stand, unless it is one of that rare category of cases where it can be said that its conclusion was so extraordinary that the only proper inference is that the power itself must have been misused.

Richardson J held that he could not see any justification for a conclusion that the Commission misconstrued the statute or failed to address itself to the correct questions.

His Honour Mr Justice Hardie Boys stressed that both the 1958 and 1989 Acts were intended to provide the means of dealing with situations "of urgency, if not emergency" (at 540). He stated:

> I think it most unlikely that Parliament intended that perhaps many months later the very existence of the criteria for invoking the statute should be subjected to judicial review. In my opinion the issues of desirability and adequacy, which must be addressed under the section, and which are really the only issues to be addressed, are entrusted to the Minister and to the Securities Commission as his adviser. . . . In my judgment, the Court may interfere only if it is shown that the making of the Order in Council was unreasonable, in the well-known sense that no reasonable Minister in the position of this Minister could have concluded that the statutory criteria was satisfied.

All three members of the Court therefore were unanimous in rejecting the challenge to the Orders in Council, although as will have been seen some differences in approach emerge.

Cooke P's judgment can be interpreted as on the one hand rejecting any challenge based on "jurisdictional fact" – that is, rejecting the argument that there was a full review, on the evidential merits, of the factual existence of the criteria specified in the sub-section – while on the other hand retaining largely untrammelled all other traditional grounds of judicial review. His statement that *all three* decision-makers had to "direct themselves to the right tests and comply with the ordinary obligations of an authority in whom a statutory discretion is vested"[11] and his consideration of the issues in terms of the administrative law test of unreasonableness would seem to indicate that His Honour's judgment should be read in this way.

Mr Justice Richardson, in the first of the two lengthy passages cited from his judgment, would appear at first sight to be expressly adopting a criterion of justiciability, and holding that the exercise of the power in question, or at least "the identification and weighing of relevant policies and considerations" in terms of the power, was not reviewable at all. However, His Honour goes on, in the second passage quoted, to accept that the Commission must ask itself the correct legal questions and address the relevant facts, and even then its decision will be open to review "where it can be said that its conclusion was so extraordinary that the only proper inference is that the power itself must have been misused".[12]

Mr Justice Hardie Boys perhaps goes furthest, in his statement that the Court may interfere "only if" it is shown that the making of the Order in Council is unreasonable in the sense that no reasonable Minister could have concluded that the statutory criteria was satisfied.

In strict logic, it may be thought that the statements of their Honours in the *Hawkins* case, stressing the special features of the discretionary power conferred and the likelihood that Parliament would not have intended the exercise of such a power to be overturned by belated legal challenge, lead necessarily to the complete exclusion of the possibility of judicial review – at least in the absence of proved error of law. However, it can be seen that their Honours' judgments do not go that far. While rejecting a full-on challenge on the basis of "jurisdictional fact", their Honours (with the possible exception of Hardie Boys J), in differing phraseology, remain willing to

contemplate the availability of much if not all of the traditional battery of grounds of judicial review.

***Petrocorp Exploration Limited v Minister of Energy* [1991] 1 NZLR 641**

In the well-known *Petrocorp* case, the process of characterising non-reviewable statutory powers appears to have gone one stage further. There the applicants for review — the appellants before the Privy Council — were parties with the Minister of Energy to a joint venture agreement which governed their prospecting and mining for petroleum in a defined area of Taranaki. The entire area in question was subject to a 10-year prospecting licence, which expired in July 1987. The purpose of the joint venture, which took effect from 15 January 1986, was to carry out further prospecting operations under the prospecting licence until its expiry, and to carry out mining operations under any existing or future mining licences granted in the area of the licence. During the life of the prospecting licence, certain relatively small deposits of oil were found, and mining licences were granted to enable the joint venturers to exploit these. One such mining licence was in respect of the Waihapa field. In February 1988, after the expiry of the prospecting licence and before any replacement prospecting licences had been granted, oil was discovered while the joint venturers were carrying out tests in the Waihapa well. This was a major, entirely new discovery of oil, unrelated to the original find at that site. The oil field thus discovered extended far beyond the boundaries of the Waihapa mining licence, although it fell within the boundaries of the now expired prospecting licence.

The other parties to the joint venture applied to the Minister for an extension of the original Waihapa mining licence to cover the new oil field. The Minister declined the application for an extension of the Waihapa licence, and instead granted himself on behalf of the Crown a mining licence, known as the Ngaere licence, over most of the newly discovered oil field. He then invited the other joint venturers to enter into negotiations for the purchase of all Crown interests in the existing mining licences, and the Crown's full interest in the new Ngaere licence.

The applicants for review, having failed at first instance, were successful in the Court of Appeal (Richardson J dissenting). The majority held that the joint venture agreement placed the Minister under a contractual obligation which precluded him from granting the Ngaere licence to himself on behalf of the Crown. This approach was somewhat resoundingly reversed by the Judicial Committee. Their Lordships first stressed the dual role of the Minister under the Petroleum Act 1937. The Minister, their Lordships held, had a statutory function as licensing and regulating authority, conferred upon him in his capacity as Minister. At the same time, he acted in a quite different capacity, as agent on behalf of the Crown, when functioning under the Act as a grantee, purchaser or seller of a mining or prospecting licence, or when carrying on mining operations, either alone, or jointly with others. These "two distinct functions of the Minister" were respectively referred to as "his statutory and his commercial functions". In granting the Ngaere licence to himself, the Minister was, it was held, quite clearly exercising his *statutory* function, while in receiving it (from himself) as grantee, he was performing his *commercial* function.

The Privy Council analysed the joint venture agreement and concluded that the Minister had not breached its terms in granting the Ngaere licence to himself on behalf of the Crown. Their Lordships held further that, had the joint venture agreement in fact purported to impose a "contractual fetter on the Minister's exercise of his statutory powers", it would have been ineffective, "because [the fetter] would have been quite incompatible with the proper exercise of the Minister's statutory powers in the national interest" (at 652).

In the absence of any contractual impediment to the Minister's decision, the only remaining grounds for review were based on fairness. First, it was argued that, when the Minister contemplated the possibility of granting the Ngaere licence to himself on behalf of the Crown, the other joint venturers had a legitimate expectation that they would be specifically consulted and given the opportunity of making representations against his taking that course. This argument had found favour with the majority of the Court of Appeal. The Privy Council saw "no basis for such an expectation". Complaints against the Minister of his taking into account an irrelevant consideration and of general unfairness were also shortly rejected.

Their Lordships concluded that, once it was understood that the contractual obligations of the Crown under the joint venture agreement were irrelevant to the Minister's exercise of his statutory powers, it was clear that the application for review was misconceived. Their Lordships approved a passage from the dissenting judgment of Richardson J which includes the following (at 655):

> . . . I would hold that the identification and determination of the national interest in this case was for the Minister alone and was not reviewable by the Courts. That in my view is the true intent and meaning of the statute in that regard. . . . Section 36 does not specify the criteria to be weighed by the Minister in the exercise of various powers conferred on him by that provision. But the whole thrust of the legislation is to subject the resource and its development and exploitation to the control of the Minister.

While it is plain that neither the Privy Council nor Mr Justice Richardson is saying that the statutory power in question was entirely unreviewable, it appears that they, and he, are saying that the central assessment relating to the grant of the licence was. As Richardson J notes, the statutory provision in question did not expressly specify the "national interest" as a criterion. Thus it is no more than an implicit one. Whether explicit or implicit, but *a fortiori* in the latter case, the view that the identification and determination of the national interest is a wholly unreviewable power would seem, with the greatest of respect, to go too far. It is one thing to use the nature of such a power as a reason for severely limiting review to the extreme case. But is is another to

exclude it altogether – an approach which invokes the spectre of *Liversidge v Anderson* [1942] AC 206, and of the "unreviewable" subjectively-conferred power. It is respectfully submitted that the law and the role of the Courts were correctly stated by His Honour Mr Justice Thomas in the Doctors' Contracts case, *King and Others v Minister of Health* [1990] BCL 1863:

> Ministers' decisions on important matters of policy are not for that reason exempt from the Court's scrutiny, including the application of the broad unreasonableness doctrine . . . The Court's reluctance to intrude upon questions of policy is well-established, but it is equally clear that this reluctance can quickly be dissipated if the exercise of a policy discretion gives rise to an issue of legality, reasonableness, rationality or fairness.
>
> Of course, other factors limit the Court's readiness or ability to intervene. Thus, in this case, and apart altogether from any question of policy, the subject matter involves numerous facets . . . Practicalities, not to mention political realities, must be considered. The Court cannot, even if it were minded to do so, be as well-informed as the Minister and her advisers and must recognise, not only the scope of the Minister's responsibility and accountability, but also the limitations of the judicial function.
>
> To my mind, however, the real danger is not that the Court will be minded to intervene where intervention is not warranted, but that it will, in the face of strong submissions to the effect that it is all a matter of policy such as that advanced by [Counsel for the Minister], fail to detect or deal with an abuse of the law. However great the policy element, or however much the policy aspects are stressed, the Courts must be on guard to ensure that the Minister's decision is nonetheless made in accordance with the law. The Crown's repeated claims to have acted in the name of "policy", or the "national interest" or the "public interest" cannot supplant this requirement.
>
> Sir William Wade makes the point succinctly in his treatise *Administrative Law* (6th ed), at p 399:
>
> > Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.
>
> So it is in this case. (at pp 34-36 of the judgment).

In *SmithKline Beecham (NZ) Limited v Minister of Health* [1992] BCL 366, one of the grounds of review involved a direct challenge to a change in Health Department policy on setting subsidy levels for therapeutic drugs. It was held that the formulation of the policy was a necessary precursor to exercise of the express statutory power to fix or amend drug prices and the level of payments made to pharmacists who supplied particular drugs to the public. The policy itself was therefore subject to judicial review pursuant to the Judicature Amendment Act 1972. His Honour Mr Justice Greig (at pp 19-23 of the judgment) described the subsidy policy as being

> based upon and . . . a reflection of what might be described as "high policy", that is to say government policy which is the decision made by government in, among other things, balancing its social policies and the extent and the scope of these to provide a national health service against the varied demands for other national services within the amount of money available to it.

His Honour noted that this "high policy area" was one which the Courts were not inclined to enter, but concluded:

> . . . in this case the decision of the Minister in formulating by his advisers and adopting himself the Uniform Subsidy Policy is and will remain subject to review on grounds of illegality by inquiry into and decision on the extent of the power contained within the Act itself. *But in so far as the policy involves government decision and policy it is not subject to review.* There remains, however, in my judgment, an area in which the Court, even beyond the rubric of illegality, will be entitled to go if it is made to appear that the Minister in applying the government or [sic] high policy has reached a decision which is manifestly absurd or unreasonable in the *Wednesbury* sense. (emphasis added)

In the case, the challenge to the policy based on illegality and irrationality failed.

It is suggested that these recent cases show a continuing trend towards placing emphasis, at least in difficult cases, on a comprehensive analysis of the overall nature and subject matter of the administrative power or action under review. This in itself is not new. (See eg *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, 197-8.) While it will seldom be the case that this approach results in the power or action being entirely unreviewable, it may well as we have seen influence the question of what precise grounds of review are available. On the other hand, the apparent judicial willingness to contemplate situations of extremely limited or even no reviewability, on the basis of such an approach, may conceivably signal that the judicial review pendulum is on a return voyage. □

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1 Reproduced in Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986, OUP).

2 [1990] 1 NZLR 27, 34. See also *Dunedin Taxis (1965) Ltd v Dunedin Airport Limited*, High Court, Dunedin Registry, CP 120/90, 15 November 1990, Tipping J.

3 Discussed in depth in "Administrative Law – The Changed Role of Government", G Taylor and J Timmins, New Zealand Law Society, August 1989, pp 17-29. For some recent decisions, see *Bradley v Governor-General* [1991] BCL 659, (complaint under Defence Act 1971); *Leadbeater v Osborne* [1991] BCL 1518, (Coroner's verdict); *ER Squibb and Sons (NZ) Limited v Commissioner of Inland Revenue* [1991] 3

continued on p 206

The New Zealand Bill of Rights Act 1990 and the Transport Act 1962

By Janet November, Judges' Research Counsel, District Court, Wellington

In this article Miss Janet November considers the decisions of the Court of Appeal given on 30 April 1992 in the cases of Noort *(CA 369/91) and* Curran *(CA 378/91). The point at issue was the right of access to a lawyer as provided by s 23(1)(b) of the New Zealand Bill of Rights Act 1990 in relation to s 58A, B and C of the Transport Act 1962. Miss Janet November concludes that these decisions are an affirmation of the fundamental rights and freedoms given in the Bill of Rights Act subject to limitations of a practical nature in order to achieve a sensible solution.*

In *Noort* and *Curran* the Courts faced the conflict between the civil rights individualistic philosophy of the New Zealand Bill of Rights Act 1990 and the utilitarian aims of the Transport Act 1962, of deterrence and protection of the public.

1 The facts, taken from the judgment of the President in the Court of Appeal

Mr Curran was observed driving in Central Auckland at about 100km/h, making a skid turn of 360°, driving through a red light and continuing in such manner until his car scraped the road and gave out sparks. Soon afterwards he was found in a hotel bar outside of which he refused a breath screening test, then was taken to a MOT office where he refused to undergo either an evidential breath test or a blood test on the basis that his lawyer was not present. He had, however, had access to a telephone and had tried to make several calls, and a police officer had obtained his father's number.

He was convicted of dangerous driving and of refusing to permit a blood sample to be taken.

Mr Noort was apprehended driving (unlicensed) at Paraparaumu at 85km/h in a 50km limit. A roadside breath test showed a positive result and an evidential breath test at the police station showed 1000 micrograms of alcohol per litre of breath, (the limit for unlicensed drivers is 150 micrograms). There was no direct evidence that he had the opportunity to consult a lawyer, but the Crown accepted that he was not informed of his right to do so.

He was found guilty of exceeding the speed limit, driving whilst disqualified and driving with excess breath alcohol.

2 The legislation

Section 58A of the Transport Act authorises an enforcement officer who has good cause to suspect that a motorist has consumed alcohol, to require that motorist to undergo forthwith a breath screening test. If the test is positive or the motorist fails or refuses it, the officer may require the motorist to accompany him to a place to undergo an evidential breath test, (s 58B). On arrival at this place the officer may require the motorist to undergo the test forthwith. If the motorist fails or refuses this test, or the test is positive and within 10 minutes of being advised of his right to a blood test the motorist elects to have one, the officer may require the motorist to permit a doctor to take a blood specimen, (s 58C). But if a "conclusive" evidential breath testing device shows more than 600 micrograms of alcohol per litre of breath, there is no right to a blood test. It is an offence to refuse to allow a blood specimen to be taken.

Section 23(1)(b) of the Bill of Rights Act provides:

> (1) Everyone who is arrested or detained under any enactment—
>
> . . .
>
> (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right.

continued from p 205

NZLR 635 (income tax assessment); *Ellis v Hawkins*, High Court, Auckland Registry, M 1773/91, 8 October 1991, Smellie J. (evidential ruling at a preliminary hearing).

4 See *Webster v Auckland Harbour Board* [1983] NZLR 646; *Webster v Auckland Harbour Board* [1987] 2 NZLR 129. Cf *NZ Stock Exchange v Listed Companies Association* [1984] 1 NZLR 699.

5 The position in New Zealand remains an open one. See *Bradley v Attorney-General* [1988] 2 NZLR 454; *Burt v Governor-General* (1988) 7 NZAR 261; *Hallett v Attorney-General* [1989] 2 NZLR 87, 96. See also Taylor, pp 7-8.

6 The judicial focus on "justiciability" is not always explicit, however. For detailed discussion of the concept, see Taylor, p 18; Professor D G T Williams, "Justiciability and the Control of Discretionary Power", in Taggart, supra, at p 103.

7 On one view of the nature of the power at issue.

8 See later detailed discussion of the grounds of review.

9 See later discussion of the ground of "illegality".

10 Cooke P considered, however, that the "geographical epithet" added nothing.

11 Query whether, in an appropriate case, this might include procedural fairness (not in issue in the *Hawkins* case).

12 It is somewhat curious that Richardson J deals only with the position of the Commission, when the actual repository of the power was the Governor-General in Council. His Honour appears to treat the real decision as that of the Commission, despite the fact that the Commission's function was recommendatory (to the Minister of Commerce) only.

Section 6 provides that where an Act can be given a meaning consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred. But s 4 says that where a provision of another Act is inconsistent with the Bill of Rights, Courts shall not hold it invalid or ineffective. Pursuant to s 5, rights and freedoms in the Bill of Rights may be subject to reasonable limits prescribed by law, as can be demonstrably justified in a free and democratic society. But s 5 is subject to s 4.

3 The issues

The main issues, which were identified in the District Court in *Noort* but not raised until the High Court appeal in *Curran*, were first, whether the Bill of Rights Act applied to the alcohol testing provisions of the Transport Act, that is whether those provisions could be given a meaning consistent with the right to a lawyer in s 23(1)(b) of the Bill of Rights Act, without undermining the effectiveness (and the purpose) of the alcohol testing procedure. However, in the Court of Appeal this issue became to what extent s 23(1)(b) could be applied to the Transport Act. Secondly, if the Bill of Rights Act applied, what was the effect of failure to comply with s 23(1)(b).

Prima facie, whether s 23(1)(b) applied was a matter of statutory interpretation and all the Judges adopted the purposive approach, pursuant to s 5(j) of the Acts Interpretation Act 1924, as will be seen. This approach was informed inevitably by the underlying and conflicting philosophies of the two Acts.

4 The High Court decisions

A *Does s 23(1)(b) apply?*

In the High Court in *Noort v MOT* reported at [1992] 1 NZLR 743, Gallen J upheld the District Court Judge's decision and decided that s 23(1)(b) did not apply to the alcohol testing provisions of the Transport Act.

Gallen J first discussed Canadian breath and blood alcohol cases where it had been argued there had been a breach of the right to retain or instruct counsel pursuant to the Charter of Rights and Freedoms, 1982. His Honour noted the distinction between *Therens* (1985) 18 DLR (4th) 655; 45 CR 3d 97 and *Thomsen v AG of Canada* (1988) 63 CR 3d 1. In *Therens* the Supreme Court found that s 10(b) of the Charter had been violated and that the breathalyser certificate should be excluded when the relevant section (235(1) of the Criminal Code RSC 1970) authorised an officer "by demand made . . . forthwith or as soon as practicable [to] require [the motorist] to provide samples then or as soon thereafter as is practicable" at the place of testing. In *Thomsen* where the breach of the Charter took place at the roadside, s 234.1 (1) authorised an officer to require a motorist to provide a breath sample "forthwith". The Supreme Court distinguished *Therens* and found that the violation of the Charter was justified at the roadside breath screening stage for purposes of deterrence.

Gallen J then went on to consider the New Zealand High Court cases on the issue of whether the Bill of Rights Act applied to the breath and blood alcohol testing sections of the Transport Act; Doogue J's decision in *Curran v Police* (High Court, Auckland Registry, 27 June 1991, AP 97/91) being the only one then focusing on the point.

Doogue J had referred to *Thomsen* (supra) and accepted that the purpose of ss 58A, B & C of the Transport Act was to enable the alcohol tests to be taken as closely as possible to the time of driving in order to give the most accurate indication of alcohol consumption. It was thus impossible, his Honour said, to give those sections of the Transport Act an interpretation consistent with s 23(1)(b) of the New Zealand Bill of Rights Act.

Doogue J cited the words of Judge Hobbs at first instance in *MOT v Noort* (CRN 0091008450-1, Wellington District Court, 7 May 1991):

> Powers are given to traffic officers in the [Transport] Act which necessarily curtail some . . . rights and liberties. Sections 58A and 58B with their provisions for step by step procedures towards breath or blood alcohol testing allow the detention of a suspect before arrest, and the taking of blood would technically amount to assault if taken without consent. These provisions evidence a clear intention by Parliament to limit individual rights in the interests of society as a whole.

In *Curran* however, there was no evidence of a breach of s 23(1)(b) so Doogue J's consideration of its applicability to the Transport Act provisions was strictly obiter.

In *Noort* Gallen J was satisfied that:

> Looked at overall the scheme and purpose of the legislation is such that the section [of the Transport Act] could be frustrated if the evidential aspect were to be dependent on the availability of legal advice.

Because interference with individual rights is involved, Parliament has built safeguards into the scheme of the Act.

> To now add the general right contained in the Bill of Rights Act to a specific situation carefully worked out without reference to it, would be, I think to disturb the structure and basis of the blood and breath alcohol legislation.

Then in *Littlejohn v MOT* [1992] BCL 354 Temm J concluded that s 23(1)(b) does apply to ss 58B & C of the Transport Act, although it may not apply to s 58A. This opinion was obiter as the conviction was quashed on other grounds.

However, in a lengthy consideration of the application of s 23(1)(b) Temm J reasoned that whereas the roadside breath test is to be provided "forthwith" the requirement to accompany is not so qualified. A delay is anticipated within which a motorist could have the opportunity to phone a lawyer.

B *The remedy question*

Gallen J addressed the question of remedy although he found s 23(1)(b) did not apply to the Transport Act provisions at issue. He did not think absence of a remedies clause in the Bill of Rights Act was a weakness in the light of the judicial discretion to exclude evidence unfairly obtained.

Whilst accepting that there is such a judicial discretion in New Zealand, following, inter alia, *Coombs* [1985] 1 NZLR 318, and *Police v Hall* [1976] 2 NZLR 678,

his Honour nonetheless thought that where rights contained in the Bill of Rights are concerned, there must be a strong weighting against admission of evidence.

But Gallen J thought that if the Bill of Rights had applied in the case before him, the evidence should be admitted, unless other facts made it unfair to do so.

5 The Court of Appeal decision

All five Court of Appeal Judges found that s 23(1)(b) of the Bill of Rights Act does apply to the alcohol testing provisions of the Transport Act but only to a limited extent. The right for the purposes of these provisions amounts to a reasonable opportunity to consult a lawyer by telephone and to be informed of this right. It was accepted by the majority that neither *Noort* or *Curran* had been given this opportunity. Gault J on the other hand found the evidence did not establish an infringement of rights in either case and the onus was on the persons claiming an infringement to establish one.

All the Judges held the Bill of Rights Act should be given a generous interpretation as a constitutional enactment though it is not constitutionally entrenched, following *Minister of Home Affairs v Fisher* [1990] AC 319, 328, as well as a purposive interpretation.

A *Purposive interpretation of the legislation*

Both the President and Richardson J (with whom McKay J agreed) reproduced the long title of the Bill of Rights, viz:

> An Act —
> (a) To affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
> (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

Cooke P and Richardson J both referred to international recognition of some fundamental and inalienable human rights. Although the right to advice may not be quite in this class, it is widely recognised, and New Zealand Courts must give it practical effect, according to the particular circumstances of the case (p 17, of Cooke P's judgment).

Hardie Boys J said the right to advice was a "necessary concomitant of those other rights which maintain the freedom and the dignity of the individual against the coercive powers of the state" (p 2).

Richardson J, too, noted "the individual's disadvantage against the informed and coercive powers available to the state". The purpose of access to counsel, he said, was to reduce that imbalance and allow the detainee knowledge of his rights and duties under the law (pp 8-11). A right to a lawyer is "part of our basic constitutional inheritance".

As to the Transport Act all the Judges looked at the scheme of the blood alcohol testing provisions and found there should be no unreasonable delays. The President and Richardson J referred in particular to the evidence of Professor Batt, who deposed that after alcohol intake, breath and blood alcohol levels rise for about 30-45 minutes, then slowly fall at the rate of about 13.5 milligrams per hour. Dr Stowell's evidence for the Crown was not significantly different although he noted the variation between people.

Thus, a reasonable delay in the testing procedures to allow a telephone call to a lawyer would apparently have a *de minimis* effect on the alcohol tests (p 12 of Cooke P's judgment).

Richardson J said that the purpose of the legislation is the protection and safety of other road users from drivers whose faculties were impaired by alcohol (p 12). He noted the cost of road accidents both financially and in terms of human suffering, and that alcohol is a major factor in 41% of fatal crashes.

It is submitted that a main purpose of Part V of the Transport Act is to obtain self-incriminatory evidence. As Quilliam J said in *White v MOT* (High Court, Wellington Registry, 17 April 1984, M 634/83) the blood alcohol legislation imposes a form of compulsion to supply self-incriminatory evidence. The purpose of these provisions is bound to conflict therefore with the purpose of s 23(1)(b), the right to consult a lawyer, which is primarily to ensure protection of the privilege against self-incrimination. As Michalyshyn puts it in a Canadian context:[1]

> . . . the purpose of the Charter right to counsel is to give a person a free and rational choice of whether to incriminate himself.

Part V of the Transport Act has limited this free and rational choice in favour of societal protection. The apparent choice is to some extent illusory. If the detainee chooses not to accompany or not to submit to tests he or she will commit an offence; whereas submission to the testing procedure may result in no evidence of the commission of an offence. A lawyer would no doubt advise this, which would not protect the detainee against self-incrimination, although it may be more acceptable to be advised by a lawyer than by enforcement officers.

B *Application of the Bill of Rights Act*

In considering whether s 23(1)(b) could be interpreted consistently with the Transport Act testing procedure, the Judges all looked at ss 4, 5, and 6 of the Bill of Rights Act.

They all agreed that if there was true inconsistency s 4 meant that the Transport Act would override the Bill of Rights Act (p 19 of Cooke P's judgment). But Richardson J said:

> In determining inconsistency under s 4 it is proper to have regard to the statutory objectives of protecting and promoting human rights in New Zealand and New Zealand's commitment to international human rights standards (p 8).

Hardie Boys J said that it is consistent with the spirit and purpose of the Bill of Rights Act that a limited and abridged meaning should be adopted rather than that s 4 should apply to exclude the right altogether (p 4).

Cooke P emphasised the importance of s 6, that a meaning consistent with the Bill of Rights Act should be preferred if there was ambiguity (p 8). In the present case, however, he thought the two Acts could stand together. Preferring the approach in *Littlejohn* to that in *Noort* and *Curran* he thought there could be a limited opportunity of

making telephone contact with a lawyer (see pp 24-25). The problem then is, what justifies a reading down of the s 23(1)(b) right?

For Hardie Boys, Richardson and McKay JJ s 5 provided the answer. Agreeing that the objective and operating requirements of Part V of the Transport Act limited the scope of the right to consult a lawyer, their Honours found that s 5 allowed justifiable limits on the rights and freedoms in the Bill of Rights provided they were "prescribed by law". Following Le Dain J in *Thomsen* (supra at 10):

> The limit will be prescribed by law . . . if it is expressly provided for by statute or, regulation, or results by necessary application from the terms of a statute or regulation, or from its operating requirements. The limit may also result from application of a common law rule.

However, Cooke P and Gault J did not think that s 5 was to be used by the Courts to impose limits on Bill of Rights Act rights. Noting that s 5 is "subject to s 4" (see p 19 of Cooke P's judgment) they found that s 5 was a section the Attorney-General may have recourse to when introducing a Bill which appears inconsistent with the Bill of Rights.

But the question remains as to what authorises limits on a Bill of Rights Act right. All the Judges were clear that the right must be curtailed in this case. As Hardie Boys J put it:

> To allow full recognition of the right to a lawyer would undoubtedly hinder, perhaps even frustrate, the purpose [of Part V of the Transport Act].

Likewise Gault J was:

> . . . of the clear view that any reasonable interpretation of the Transport Act provisions is inconsistent with the full unrestricted rights to consult a lawyer.

He did, however, concur that:

> [t]he limited right to consult a lawyer by telephone but not otherwise to delay the testing procedures is sensible.

This does indeed seem sensible even if not strictly authorised, but it is hard not to agree with Gault J also that:

> to read down fundamental rights and freedoms has obvious dangers and is contrary to the approach already emerging in decisions of this Court rejecting narrow constructions.

Gault J also foresaw:

> . . . potential practical difficulties for enforcement officers who inform a suspect that he or she has a right to consult and instruct a lawyer without delay . . . but then insist that the fundamental right is to be exercised only to the extent of a telephone call . . .

C *The Canadian decisions*

Although the Judges referred with respect to Canadian Charter decisions and in particular to *Thomsen* (supra) and *Therens* (supra), and they decided that the right to a lawyer does not apply at the roadside screening stage but does (to a limited extent) apply at the evidential breath testing stage — a similar approach to that of the Canadian Judges — they did not expressly follow the Canadian decisions. The Canadian transport legislation is different and the Charter a constitutionally entrenched statute overriding ordinary enactments unless they contain justifiable limits.

One difference in the Canadian transport legislation is that while the roadside breath test may be required to be taken "forthwith", the evidential breath test can be required "forthwith or as soon thereafter as practicable". Two hours are then allowed for completion of testing procedures. This was one basis for the distinction between *Thomsen* and *Therens*, discussed above. The assumption seems to have been that "forthwith" means "immediately".

However, the New Zealand legislation authorises an officer to require a motorist to undergo a breath screening "forthwith" and an evidential breath test also "forthwith" on arrival at the place of testing. To complicate matters, "forthwith" has been held to mean "as soon as reasonably practicable" in the alcohol testing sections of the Transport Act per Cooke J, as he then was, in *Scott v MOT* [1983] NZLR 234. So the Canadian distinction would not apply in New Zealand. It could be argued that Part V of the Transport Act allows a right to consult a lawyer before the motorist accompanies the officer, but it is unlikely to be practicable then, or during the journey to the place of testing, but it will not always be possible to make a telephone call at this stage. Richardson J (at p 20) suggested the right could be exercised in the officer's car or at the testing station. Usually it will be at the place of testing. This means, however, that an officer is given authority to require an evidential breath test not "forthwith", (even meaning "as soon as is reasonably practicable"), but "after the motorist has had a reasonable opportunity to consult his lawyer by telephone".

D *Remedy*

In *R v Accused* (CA 227/91) (1991) 7 CRNZ 407, the Court of Appeal said:

> Prima facie, . . . a violation of rights should result in a ruling out of the evidence obtained thereby.

However, some real evidence obtained by the police was held to be admissible as it would have been discovered without guidance from the accused even though the confessions were excluded as obtained in breach of s 23(1)(b).[2]

The majority in *Noort* and *Curran* treated the evidence as in the same category as a confession or admission. Having found that there was in both cases a breach of a limited right to consult a lawyer, their Honours held that a violation of the Bill of Rights Act prima facie requires exclusion of the evidence obtained by this violation (Cooke P's judgment at 19).

Cooke P held that a ruling out of evidence was not inevitable. But the Court could not "safely assume that failure to comply did not contribute to the subsequent refusal [in *Curran's* case] or the test [in *Noort's* case]". Thus the evidence must be excluded (pp 25-26). In *Noort's* case, however, it seems there was no evidence that the breach was the means by which the evidence was obtained.

The judicial discretion to exclude

evidence unfairly obtained pursuant to, inter alia, *Coombs* and *Police v Hall* (supra)[3] is modified where a violation of a Bill of Rights Act is concerned (judgment of Cooke P at p 19). In *R v Accused* (CA 227/91, supra), the President said that:

> The New Zealand Bill of Rights Act cannot be relegated to the category of a relevant factor in exercising [the] jurisdiction [to ensure fairness].

In the case of the limited right under consideration the test seems to be one of causation: would the evidence have been obtained but for the breach? This means that exclusion of evidence will almost always be inevitable as it will be very difficult for the prosecution to show that a defendant would have acted in the same way if there had been no violation of the Bill of Rights.

Conclusion

The lack of a remedies section has posed no problems for the Courts, but remedies are now slightly uncertain. It appears that violation of both a limited right and an absolute right means the evidence thereby obtained will prima facie be excluded. If causation is the test, does this not mean that in effect there will always be exclusion as there will always be uncertainty as to what difference availability of the right would have made?

The Court of Appeal decision in *Noort* and *Curran* is a clear affirmation of the New Zealand Bill of Rights Act, and of the Court's intention to give effect to the fundamental rights and freedoms even if this may on occasion mean limiting them somewhat. The decision is a compromise solution to the problem of the applicability of the absolute rights and freedoms in the Bill of Rights Act to the blood/breath alcohol testing procedures which are designed to obtain accurate evidence of alcohol consumption with minimum delay, and as such can be seen as an invasion of individual rights in the interests of the community. The decision allows the two statutes to sit together, if a little uneasily, and the solution is no doubt "sensible" as Gault J says, especially as apparently telephone calls to lawyers or parents have been permitted in practice by some enforcement officers, provided these do not delay procedures unreasonably. It will probably take some time to work out what a "reasonable opportunity to telephone a lawyer" means, but there seems no reason to be unduly pessimistic about the workability of the solution.

As to the authority for curtailing rights so as to give effect to a statute, three of the five Judges relied on s 5 of the Bill of Rights Act. This will presumably allow curtailment of other rights where justifiable limits prescribed by law can be found in a statute (or at common law – per Le Dain J). So that in future the test will be not simply whether a provision in an Act can be read consistently with the Bill of Rights Act right, but *to what extent* can it be read consistently with that right. As Richardson J said:

> In the absence of express statutory exclusion of a Bill of Rights provision it must be a question of determination under s 4 whether there is any room for reading along with the other enactment a Bill of Rights provision whether absolute, modified or limited pursuant to s 5 and s 6.

It is to be hoped this will not open the floodgates to watered-down rights. □

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1 P Michalyshyn "The Charter Right to Counsel: Beyond Miranda", *Alberta Law Rev* 1987, 190, 192.

2 The Canadian cases have acknowledged the differences between real evidence and confessions too. In *R v Collins* [1987] 1 SCR 265 the Supreme Court of Canada stated that:

> . . . real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly.

In *Police v Hall* [1976] 2 NZLR 678 the New Zealand Court of Appeal had focused on the distinction between medically obtained evidence and confessional verbal statements when Woodhouse J said:

> If [medical evidence] is relevant to a matter in issue then it will be admissible and its acceptance or rejection will not depend upon the principles which control confessional statements (at 682);

but also noting:

> Nevertheless in a criminal case the Judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. (*Kuruma v R* [1955] AC 197,203).

Hall was a case where a blood sample was lost so the question was whether the doctor's clinical examination of the young motorist was admissible.

3 There are pitfalls in the unfairness test as Simon France has pointed out. Mr France advocates the adoption of public policy criteria rather than unfairness, to test admissibility of evidence improperly obtained, following the views of the High Court of Australia in *Bunning v Cross* [1978] 19 ALR 64. Factors to consider under public policy included whether the unlawfulness was deliberate or accidental, how easy it would have been for the police to comply, was it important to act quickly, and the seriousness of the offence weighed against police conduct. See S France "Exclusion of Improperly Obtained Evidence" (1985) 11 NZULR 334 and "Illegal Searches and the Exclusion of Evidence" 1989 NZLJ 81. Perhaps where the Bill of Rights Act does apply the test of exclusion should be whether admission of the evidence would bring the administration of justice into disrepute as under the Canadian Charter, S 24(2). But see *R v Accused* (CA 227/91)(1991) 7 CRNZ 407.

Air New Zealand's bid for Mt Cook:
The threshold for compulsory acquisition of shares — s 208 Companies Act

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The decision in Plaza Fabrics v NAC Ltd *[1992] 1 NZLR 584 is perhaps the last chapter in Air New Zealand's bid for the remaining shares in Mt Cook Group Ltd. This article discusses the bid, the Extraordinary General Meeting of the company called by dissenting shareholders, the level of acceptances required to trigger compulsory acquisition under s 208 Companies Act 1955, the decision in* Plaza Fabrics, *and the effect of the Companies Bill and proposed Takeovers regime.*

Introduction

Air New Zealand has long held a stake in Mt Cook Group Ltd, and since the High Court decision in *Air New Zealand Ltd v Commerce Commission* [1985] 2 NZLR 338 overturning the Commission's refusal to authorise Air New Zealand's acquisition, has held about 80%. In late 1990 Air New Zealand mounted a bid for the remainder of the shares it did not already own. The bid was made in the name of a newly formed subsidiary, National Airlines Company Ltd. In response, a dissident minority received considerable media coverage and forced an Extraordinary General Meeting of Mt Cook in Christchurch on Tuesday 11 December 1990. At the Extraordinary General Meeting the bidder, NAC Ltd, stated it had acceptances from 87% of shareholders in Mt Cook. This was still short of the 90% required to trigger compulsory acquisition. This also raised the question of the method of calculating the 90% threshold for compulsory acquisition of shares. And this in turn, raised the question of the reasons for the use of NAC Ltd to make the bid.

There was considerable speculation in the media about why Air New Zealand mounted the bid using a subsidiary, NAC Ltd, as the vehicle for making the bid. Industry rumour of a then forthcoming split in Air New Zealand's international and domestic airline operations led to suggestions that the domestic operations, including the 737 jet fleet, would be taken over by a reorganised Mt Cook, with some speculation as to what the name of the operation might be.

The explanation of the reasons for the use of NAC Ltd to make the bid could be much simpler than that and found; firstly in the wording of s 208 Companies Act 1955 setting the 90% threshold for compulsory acquisition of shares; secondly, in s 106 (1)(h)(ii) Income Tax Act 1976, providing for the deductibility of interest on money borrowed to acquire shares in a company within a group of companies. It is suggested that legal and tax reasons might explain the use of NAC Ltd rather than any intention then to use NAC Ltd as the basis for a reformed domestic airline division.

The decision in *Plaza Fabrics (Tauranga) Ltd v National Airlines Company Ltd & Another* [1992] 1 NZLR 584, came in a contest between the bidder and a dissenting shareholder seeking a higher price. It clarifies the procedure surrounding s 208 but it does not end the difficulty with s 208 in calculating the 90% required for compulsory acquisition.

The 90% threshold for compulsory acquisition

Section 208 is the provision which allows a successful bidder who acquires 90% of the shares to compulsorily acquire the minority. The key to this section is how the 90% figure is calculated.

Section 208 provides for the following:

1 A compulsory acquisition power where a 90% majority is obtained,
2 Provision for notice to dissenting shareholders,
3 The mechanism for compulsory transfer of shares to the bidder unless the dissenting shareholders make a successful application to the High Court
4 A mirror power for remaining shareholders to require purchase of their shares.

The key to the 90% threshold is the definition in s 208 of the "shares

whose transfer is involved". This excludes those shares already held at the date of the offer by the bidder, by a nominee for the bidder, or by a subsidiary of the bidder. In the case of the Air New Zealand bid for Mt Cook, the Mt Cook shares held by the Air New Zealand group were apparently held in the name of Air New Zealand Ltd which means that it is the parent of the bidder which holds the shares. This means that by s 208 the 90% can be calculated including the shares already held in Mt Cook by Air New Zealand Ltd. The effect of all this in calculating the 90% is set out below:

Mt Cook issued capital in $1 shares	13,376,248
less Air New Zealand Ltd held at outset of bid	10,842,420
= in hands of other shareholders	2,533.828

[Note: apparently a further 8,373 shares were held on trust for Air NZ by a group of Mt Cook directors and 7,168 shares were held personally by Mt Cook directors who would sell.]

With a subsidiary bidding, 90% of 13,376,248 = 12,038,623 so s 208 will clean up 1,337,625 dissenting shares. Thus the bid only required acceptances from roughly 50% of the other shareholder to trigger compulsory acquisition.

With Air New Zealand Ltd bidding, 90% of 2,533,828 = 2,280,445 so s 208 would clean up only 253,383 dissenting shares. So a bid by the parent company would require acceptances of 90% of the other shareholders to trigger compulsory acquisition.

The effect of this difference in calculating is clear. It is further boosted by the proviso to s 208 (1) that where the bidder or a nominee, or subsidiary of the bidder, holds more than 10% of the shares in the target company then to trigger the compulsory acquisition provision, not only is a 90% acceptance by value of shares required from the remainder, but also a 75% acceptance in number of the holders of those shares remaining. Given the widespread and small nature of the remaining holdings in Mt Cook, that would just make the task faced by Air New Zealand in making the bid more difficult.

There is case law authority that the corporate veil could be lifted to treat the company making the bid, and those behind it, as one and the same legal person with perhaps the resulting recalculation of the 90% figure. The significant case is *Re Bugle Press Ltd* [1961] Ch 270. In *Bugle Press* there were three shareholders, two of whom held 45% of the shares and the third held the remaining 10%. After an unsuccessful attempt to buy out the minority the two majority holders incorporated a company and in the name of that company made a bid. They obviously obtained the required 90% of the shares and then attempted to acquire the minority shareholder's shares under the United Kingdom equivalent of s 208. On the application to the Court to disallow the bid the minority shareholder was successful. The United Kingdom Court of Appeal lifted the corporate veil around the bidding company to treat that company and the individuals behind it as the same. By its words use of the provision is limited to where the bidder is a company. The Court would thus not allow those behind the bid to use a corporate entity to do something which they would not otherwise have been able to do.

The application of this to the Mt Cook situation is not easy. The bidders in *Bugle Press* were interposing a corporate buyer to do something which they would not have been able to do as individuals. In the Mt Cook situation Air New Zealand were merely using the clear words of s 208 to obtain a favourable calculation of the 90% figure. None the less, had National Airlines Co Ltd obtained acceptances from only just over half of the other shareholders in Mt Cook and sought to force the compulsory acquisition power, a lifting the veil argument, roughly along the lines of that in *Bugle Press*, would be one of the few avenues open to a dissenting minority.

Diluting the minority by a further share issue

Had NAC Ltd fallen short of the 90% it would be possible to attempt to dilute the minority by a further share issue. The authorised capital of the Mt Cook Group was increased at the AGM prior to the bid to 20 million $1 shares of which some 13.3 million are issued. Such an issue would be subject to the Articles of the company as to pro rata issue of shares, let alone the Stock Exchange Listing Requirements. Although the Listing Requirements at para 5-3-2-(b) allow a pro rata issue without general meeting approval, this is not allowed where a takeover is occurring (para 9-5-4) when a general meeting must sanction the issue. But even a general meeting sanctioned pro rata issue could serve the purpose as it puts the minority on the spot of having to put up extra cash or see their proportion of the company decrease. With NAC Ltd already at 87% at the time of the Extraordinary General Meeting it would not take many holders declining such an issue to give 90% of the altered capital to NAC Ltd. Commendably, nothing Air New Zealand did gave any real indication that this type of action was contemplated.

Court action by minority to prevent compulsory acquisition

Section 208(1) contains a power for the dissenting minority to apply to the High Court for an order that the compulsory acquisition not proceed. A recent summary of the principles which might be taken into account by the High Court on such an application comes from the case of *Cockle v Carlingford Nominees Ltd* (1989) 4 NZCLC 65,120, where a nominee company Carlingford had been incorporated by two Unity Group Ltd directors Messrs Muller and Wyborn for the purpose of taking over Unity, of which Mr Cockle was a shareholder. Essentially the Court will only intervene when the takeover scheme is unfair, and the onus of proof of that unfairness is on the dissenting shareholder. However, where the 90% is calculated including acceptances which might be described as not wholly independent of the bidding company, then the onus might shift to the bidder. Despite the similarity to *Bugle* it does not appear that Mr Cockle, who represented himself, argued the case on lifting the veil, rather the argument was on the unfairness point.

In the Mt Cook case a dissenting

argument might focus on the price offered. The *Carlingford Nominees* case suggests that where the price paid for the shares is substantially above the market price, it would be difficult for the Court to decide that the offer was unfair. This is supported by the consideration of the Court in the case of *Re Sheldon; Re Whitcoulls Groups Ltd* (1987) 3 NZCLC 100,058 where the Court thought that in the case of a public listed target company it would be rare for the Court to be satisfied that a price substantially higher than the market price was not fair value for those shares. In the Mt Cook instance the Air New Zealand group offered $3 for shares trading at substantially under that figure, although they were within the previous six months trading as high as $3.30. The bid was then raised to $3.25. This places a question mark over what use the High Court could have made of suggestions from analysts that the $3 bid for Mt Cook was low. Note also that the Mt Cook shares were carried in Air New Zealand's books at $4.99 as disclosed in the Air New Zealand 1990 Annual Report (this is only a slightly higher value than the original purchase price). The conclusions of the Jordan Sandman Were Ltd report commissioned by the independent directors, and recommending acceptance at $3.25, are very important here.

In recent New Zealand commercial history attempts by dissenting minorities to challenge compulsory acquisitions in the High Court have had a very mixed reception and can perhaps be summarised by saying that dissenting shareholders have spent a great deal of time and money to achieve virtually no result. In the case of the Mt Cook bid the clear margin of the initial bid price above the current market value of the shares may well have been calculated by the bidding company just to make it that much more difficult for any dissenting minority to successfully object. The increased bid, together with the acceptance of that increased bid by the independent directors of Mt Cook, only made the position of any dissenting minority more difficult. All this, together with the favourable calculation of the 90% threshold obtained with a subsidiary bidding, made it that more likely that the Air New Zealand group would be able to mop up the shares of any dissenting minority in Mount Cook. Having acquired all the shares Mount Cook could then be delisted and transformed into a private company and so on.

Use of NAC Ltd to ensure deductibility of interest on money borrowed to acquire shares

Section 106(1)(h)(ii) Income Tax Act 1976 provides that where a company borrows money to purchase shares in a company that will become part of a company group, within the terms of the Income Tax Act, interest incurred on money borrowed to buy the shares is deductible. A share purchase transaction could be structured to fit within this provision even where only a minority interest is held in the operating company.

This was done by placing a subsidiary between the parent company and the operating company being purchased. Then the parent may subscribe for further shares in the subsidiary to fund the subsidiary's purchase of shares in the operating company. It appeared to be a Brierley technique to so structure transactions, particularly where the shareholding being purchased in the operating company was likely to leave Brierley with only a minority interest. A search of the Companies Register at the Wellington Companies Office revealed a number of, what might be called, "tax effect" subsidiaries of BIL, including companies with a share capital of only $100. As good an example as any of the use of such a subsidiary between the parent and the operating company by Brierley came with the purchase, some years ago now, of the Brierley interest in Petrocorp. One of the first stages of the Petrocorp privatisation was the sale by the government of a substantial block of Petrocorp shares to the Brierley group. These shares were in fact taken in the name of a subsidiary of Brierley, BIL Equities (No 2) Ltd, which was a $100 share capital company. The apparent reason for interposing this company between Brierley and the stake in Petrocorp was to come within the interest deductibility provision in s 106(1)(h)(ii). This meant that should Brierley have resold their stake in Petrocorp before receiving any taxable income from that stake, they would still be able to deduct against other group income the interest on the capital borrowed to purchase the stake in Petrocorp. Of course, the Brierley stake in Petrocorp was sold a relatively short time later when Fletcher Challenge made an offer for the entire shareholding of Petrocorp.

And, of course, in the Air New Zealand privatisation two BIL subsidiaries, Anafi Investments Ltd and BIL Nominees Ltd, held the initial Brierley stake in the airline. It was the shares held by BIL Nominees which were sold in the public offer. The present Brierley stake in the airline is held through Anafi Investments Ltd with presumably the same tax effect as in the Petrocorp instance.

The need for such a subsidiary in the Mt Cook bid for taxation reasons is not clear. Given the size of the Mt Cook company in relation to the Air New Zealand group, the need to borrow any money to complete the purchase is not readily apparent. Perhaps the structure of the transaction can be explained as a then standard Brierley operating practice. From past transactions this seemed to be to preserve as many options as possible and to maximise value by effective financial and tax structuring. Preserving options could be a type of insurance in the event that Air New Zealand Group became, for some reason, unable to satisfy the interest deductibility provision in s 106(1)(h)(ii) if it held its Mount Cook shareholding in the name of the parent company. Perhaps this could come about if the Air New Zealand group later sold a majority of Mt Cook to an outside party. There were industry rumours at the time of the bid of Japanese interest in Mt Cook Group. Perhaps such a potential sale could have been of the residue of the Mount Cook company (eg the skifields etc) after the airline and in-bound tourism operations have been absorbed into some other part of the Air New Zealand group. Acquiring the entire shareholding in Mount Cook through a subsidiary would allow Air New Zealand to later be a part owner of the Mt Cook company without losing interest deductibility, and without the bother of having a remaining minority public shareholding.

The resolutions at the Extraordinary General Meeting

The bid under the Companies Amendment Act 1963 was made at $3.00 and subsequently increased to $3.25. Dissent appeared to focus largely on the Extraordinary General Meeting, called using the power in s 136 Companies Act 1955 for 100 shareholders to call a general meeting of a company. The meeting was called to consider four resolutions:

1 To ratify the conditions and constraints, if any, placed by the independent directors on the preparation of an assessment of the takeover,

2 To ratify and consider the information contained in that assessment,

3 To require the Directors of Mt Cook to obtain an opinion from the company's solicitors about the calculation of the 90% threshold for compulsory acquisition,

4 To require the Directors to obtain confirmation that the buyer National Airlines Company Ltd can pay.

Media comment of the then forthcoming Extraordinary General Meeting claimed that "[c]o-ordinators of the effort to put the takeover before an extraordinary general meeting include Tauranga farmer Harold Zingle . . . ." And claimed that "[Mr Zingle's] family interests own 1.25% of Mt Cook, or about 100,000 shares, and he was looking for a better offer price." (*National Business Review* 28 November 1990, p 3.)

The fate of the bid

The Extraordinary General Meeting proved to be less of a spectacle than it might have been[1]. The resolutions were not put. Resolutions 1 and 2 related only to the independent directors' assessment of the takeover and the related report obtained from Jordan Sandman Were. Both resolutions could have made little difference to the progress of the bid unless some real shortcoming or lack of independence was shown and none was.

On resolution 3 the meeting was told that it was not Mt Cook's task to obtain such an opinion. While narrowly correct, it is suggested that the point is so important to the minority and to commercial law and practice in New Zealand generally that the meeting could quite properly consider the matter. It is a question of balancing the bidder's time and the company's expense against forcing a minority shareholder to seek such an opinion itself with the costs involved.

As to resolution 4 an assurance was given on behalf of Air New Zealand that NAC Ltd would be able to pay. This cuts two ways, for while it is important to sellers to know the purchaser can pay such assurance by Air New Zealand that it stood behind the bid perhaps makes it more arguable that the 90% threshold should be calculated excluding the shares Air New Zealand already owns.

Not unexpectedly the bid succeeded. Commendably NAC Ltd appears to have waited until it had 90% of the shares by any calculation before commencing s 208 compulsory acquisition. It announced on 19 December[2] that it had received acceptances for 92% of shares and was making the bid unconditional. By 17 January 1991 NAC Ltd had received acceptances for 97% of shares and on that date[3] sent to remaining shareholders notice under s 208(2) triggering the mirror power of remaining shareholders to require the bidder to buy on the terms of the bid, or as agreed or as the Court may order. It was not until 1 February 1991[4] that it had closed the bid with acceptances for 98.6% of shares from 85.4% of holders. This was 92.6% of shares not held by Air New Zealand at the outset and more than 85.4% of the over 1600 holders of those shares. To round up the remainder compulsory acquisition was the next step.

At this point enter Plaza Fabrics (Tauranga) Ltd a holder of 20 shares since 1984 and the purchaser of another 200 in November 1990. Plaza on 14 February 1991 "required" NAC Ltd to purchase its shares at $3.42. NAC Ltd declined and threatened s 208(1) acquisition. Plaza insisted on $3.42 and threatened proceedings. NAC Ltd gave notice of s 208(1) acquisition. Plaza sued. The affidavit filed with Plaza's application was sworn by Howard Zingel, apparently a director of Plaza.

The decision of Henry J in *Plaza Fabrics* is on NAC's application to strike out. There were two grounds. To dispose of the second first, NAC argued the action was an abuse of procedure. Essentially this stems from Plaza's small holding so the amount at stake was out of all proportion to the costs involved. The Court adjourned this part of the striking out application. Although Plaza in its claim now alleged a valuation of $4.65 it is hard to see how any decision in this case could affect the price to be paid for shares held by other holders. Section 208 does not so operate and the Stock Exchange Listing requirements at para 9-4-4 dealing with increased price in takeovers appears not to apply because of the lapse of time. If there be any connection between Mr Zingle of the Extraordinary General Meeting and Mr Zingel of Plaza, what became of the 100,000 shares held by Zingle family interests? Had these been at stake the amount involved is considerable.[5]

On the other ground, NAC Ltd claimed Plaza's action was defective as commenced only under s 208(2). Any right under s 208(1) had now expired. Section 208(2) had no application now because before Plaza exercised such right NAC Ltd had given its s 208(1) notice which now governed the relationship between the parties. Alternatively even if Plaza had given a valid notice under s 208(2) it was superseded by NAC Ltd's s 208(1) notice.

Plaza's application was expressed as in reliance in s 208. The statement of claim eventually filed (after NAC Ltd's s 208(1) notice) appears to refer to relief under s 208(1) at least. Henry J takes the view that the application can come within s 208(2) as well as s 208(1). Rather than dwell on this matter of High Court procedure this article turns to the relationship between the rights of bidder and dissenting shareholder under s 208(1) and (2).

Section 208 provides mirror rights of purchase and sale to bidder and remaining shareholder. In s 208(1) the bidder can require sale and the shareholder can apply to the Court to prevent this or to fix the terms. In s 208(2) the shareholder can require purchase and either party can ask the Court to fix terms

where they cannot agree. The procedure is not straightforward as the bidder must give s 208(2) notice regardless of intention to use s 208(1) and the time limits are different. The section is primarily aimed at the situation where one of the parties is unwilling to sell/buy. However, Henry J considers that mere disputes as to price must be included. He cites with approval *Re Deans, re Stevens Group Properties Ltd* [1986] 2 NZLR 271 where Hardie Boys J at p 278 observes (when discussing why interest should not be awarded to one shareholder) that the bounds of the section must go beyond just allowing/disallowing acquisition and include fixing terms.

Henry J decides that the respective rights available under s 208(1) and (2) co-exist, remarking at p 10 of the unreported judgment that a s 208(1) notice from the bidder does not preclude a shareholder giving a s 208(2) notice. Section 208(1) and (2) notices can both be issued. But given the wording of s 208 with the mandatory nature of the right/obligation namely s 208(1) the bidder shall ". . . be entitled and bound to acquire those shares . . ." and s 208(2) the bidder shall ". . . be entitled and bound to acquire those shares . . ." whichever notice is validly given first would appear to govern the parties' relationship. So any application to the Court should be under such first given notice.

The judgment in *Plaza* does discuss some of the law on the 90% calculation with Henry J noting a little doubtfully the parallel with *Bugle Press* and *Carlingford Nominees* though the matter did not require determination. That point is still open.

The writer is informed that subsequent to the judgment of Henry J in *Plaza* the plaintiff discontinued the proceedings and NAC Ltd completed the compulsory acquisition of Plaza's shares.

The effect of the Companies Bill and the proposed takeovers regime

The Companies Bill (as before the Select Committee) does not deal fully with takeovers presumably because of the proposed separate takeovers regime. Section 208 does not reappear in the Companies Bill. So a bidder may not be able to mop up a minority, at least not as readily as at present. The proposed right of a company to acquire its own shares in cls 50-56 will surely be much used by listed companies to clean off their share registers small holdings (ie less than marketable parcels) at a price well above the market price for marketable parcels because of the savings involved in not having to service these shareholders. Will this have a use (well) after a successful takeover to mop up a small minority even if at a price above that paid in the takeover? From the minority's point of view the buy-out right in cls 88-93 must be of some benefit and perhaps improves the tactical position of the minority in this sort of takeover.

The Takeovers Bill just released at the time of writing would establish a Takeovers Panel to draft a code for takeovers of listed targets. The Bill sets out objectives of such a code in cls 11-13. The code shall as far as practicable ensure the fair treatment of all shareholders: cl 11(c). The Panel may consider whether the code should provide for, among other things, compulsory acquisition at the option of the bidder or shareholder: cl 12(f). The Takeovers Bill has been referred to Select Committee. Let us hope that the new provisions are more certain than the old.

Conclusion

The decision in *Plaza* may have been the last act in the Air New Zealand bid for the remainder of Mt Cook but it does not end the difficulty with s 208 in calculating the 90% required for compulsory acquisition where a party associated with the bidder holds a substantial holding but the proviso to s 208(1) is not triggered. The lifting the veil in *Bugle*, apparently not argued in *Carlingford Nominees* and a potential issue in Mt Cook was overcome by the success of the bid and the conduct of the bidder in waiting until 90% had been obtained by any calculation before commencing compulsory acquisition.

This uncertainty does nothing for dissenting shareholders faced with expensive Court action to determine their rights. Nor for bidders faced with this difficulty when they might choose to so structure the bid for tax or other commercial reasons.

This is unsatisfactory at a time when other aspects of s 208 such as the threshold for the Court intervening to prevent acquisition have been well set out in the cases and where the procedure has now been clarified by *Plaza*.

The advent of the Companies Bill and the new takeovers regime will give new rules in place of old. The Companies Bill proposed right of purchase of own shares will surely be useful to clean up small holdings at a premium that will entice holders to sell. For a dissenting minority the proposed buy-out right may be useful. There will probably be some type of compulsory acquisition power in the takeovers regime to be formulated by the Takeovers Panel. □

1 The writer is indebted to Mr Chris Rennie, formerly of *National Business Review*, for this account of the meeting.
2 Reported in *National Business Review* 19 December 1990 p 2.
3 From the judgment in *Plaza Fabrics (Tauranga) Ltd v National Airlines Company Ltd & Another* [1992] 1 NZLR 584.
4 Reported in *National Business Review* 1 February 1991 p 28.
5 Since this article was completed the writer has been informed by Mr Howard Zingel that after promoting the Extraordinary General Meeting (with others) the approximately 150,000 shares that his family interests held in Mt Cook were sold to NAC Ltd on 17 January 1991 at $3.25 as the amount was too significant to them to be left at risk. Their company Plaza had a token holding and if the action did achieve a higher price they hoped this would spill over to all shareholders.

Australian Institute of Judicial Administration

1992 AIJA Eleventh Annual Conference
22-23 August 1992
Brisbane

It has been advised that the venue for the Conference has been changed to:

The Banco Court,
Law Courts Building
George St,
Brisbane.

Discovery of Crown witness convictions

By Russell Lawn, a Hamilton practitioner

The author discusses in this article the reasons for seeking information as to the possible previous convictions of Crown witnesses and then the subsequent question as to whether the information obtained should be used at trial. He points out the risks inherent in any such action.

This article addresses a question often faced by all defence counsel in criminal trials where witness "credibility" arises namely: "Should I apply for particulars of a Crown witness's previous convictions?" It considers the procedures applicable under Jury Trial and Summary Jurisdictions. It concludes with a review of commital hearings under the Law Commission's Report No 14 entitled "Criminal Procedure Part One: Disclosure and Committal" as it pertains to discovery of criminal witnesses' convictions, and questions of "credibility" generally.

The answer to the question should I apply for Crown witness' particulars of previous convictions (hereinafter referred to as "convictions") will usually be "yes" if there is any doubt in counsel's mind that such convictions might be relevant to their client's case. No harm is done by obtaining this information. The question then arises: "Should they be used at trial?" This will often be a delicate question, of some moment, where the accused also has previous convictions.

When the defence impugns the character of a Crown witness, then it is open to the Crown (s 5(4)(b) of the Evidence Act 1908) to apply to the Court for leave to cross-examine the accused on his or her previous convictions and character. If leave to cross-examine is granted and the accused then elects to give evidence, thereby allowing the Crown to cross-examine an accused as to his or her character and this is likely to prove highly prejudicial to the accused in having the accused's previous convictions put to him or her! It is unwise to attack the Crown witness in the hope that their past is one of bad character when if by gaining access to the witness's records of convictions before trial this would eliminate (or at least quantify) the risks involved in making such a fundamental tactical decision.

Jury Trial jurisdiction

The Jury Trial jurisdiction has in most instances ample provision for the defence to obtain relevant information on previous convictions at the preliminary hearing, thus allowing defence counsel time between the preliminary hearing and trial to make inquiries into Crown witness' previous convictions and determine whether they are to be used in cross-examination at trial, or if, indeed, they are to be used at all.

Section 12 of the Evidence Act 1908 provides:–

> (1) A witness may be questioned as to whether he has been convicted of any indictable offence, and, upon being so questioned, if he either denies or does not admit the fact, or refused to answer, the cross-examining party may prove such conviction.
> (2),(3) Repealed by Section 20 the Statutes Amendment Act 1939.

This provision limits the defence's inquiry to indictable offences only but, in most instances this limitation is appropriate because the weight attached to purely summary convictions if put at trial is likely to be of little benefit to the defence and might, if they were available under s 12 induce a jury to believe that the defence was clutching at straws. Of more importance is the case where a Crown witness misleads the Court by giving evidence that they have no previous convictions when in fact they do have. This is especially so where the accused and his counsel know nothing of the character and background of the witness and will be none the wiser if a false answer is given.

This misleading situation can be overcome by the Crown or the Police informing the defence of the correct position after an incorrect answer has been given by a prosecution witness. Crown witnesses should not be permitted to mislead the Court, nor indeed perjure themselves when they have deliberately given false information about their previous convictions. If we assume a witness does disclose a previous offence, this then allows defence counsel the advantage of being able to draw out the nature, seriousness and attitude of a witness to the offence so disclosed. This will assist the defence in the preparation of defence counsel's cross-examination at trial and also in assessing whether a witness's character should be put in issue.

The substantive right of the defendant to cross-examine under s 12 of the Evidence Act 1908, is not always procedurally provided where for instance the Police prosecution undertake to provide information on convictions after a preliminary hearing as a convenience to the Court, but later decide not to. Meantime, counsel has waived putting questions, under s 12, at the preliminary hearing in reliance on the undertaking given by the Police there then being no opportunity to cross-examine a witness prior to the trial itself. Similarly Parliament has failed to provide any legislative provision for the defence to exercise its rights under s 12 at a preliminary hearing by denying an accused in sexual cases the right to cross-examine the complainant. Section 185C of the Summary Proceedings Act 1957 substituting in the stead of oral testimony the tendering of a

written statement by the complainant to the Court of preliminary hearing. Invariably however such statements make no reference to the deponent's previous criminal record[2].

This procedural oversight also applies to persons whom the Crown has decided to call to give evidence at trial after the preliminary hearing has taken place thereby preventing the defence from putting questions under s 12 prior to trial. The Crown does not make a practice of providing such particulars in the witness's statements of witnesses provided to defence counsel prior to trial.[3]

Has the Court power then, upon an accused person applying to it, to order that the Crown provide particulars of convictions?

If there is power can information be released from the Wanganui Computer Centre? And can this power if it exists be exercised in the jury jurisdiction as opposed to, or in addition to the summary jurisdiction?

The Court of Appeal has given a useful indication in passing in its judgment in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 by ruling that prosecution briefs are to be disclosed to the defence, prior to trial, if requested.

Official information

The statutory presumption in favour of disclosing official information under s 5 of the Official Information Act 1982 and its relationship to s 6 of that Act is equally applicable, in the present context, to the facts confronting the Court of Appeal in the Commissioner's case. The Court of Appeal indicated that there is unlikely to be good reason for withholding official information, under s 5 of the Act, where such withholding would prejudice the accused's right to a fair trial[4].

Cooke P went further, in obiter dictum, by stating that the prosecution had a duty to disclose known convictions affecting credibility of a witness, as a duty of fairness falling upon the Crown in the conduct of a trial[5].

In practice, however, the duty has not been universally honoured as will be discussed later. English authority shows the principle of disclosure of convictions to be well established in that jurisdiction.

The genesis of this line of authority was however a misapprehension by the English Court of Criminal Appeal in *Collister & Warhurst v R* (1955) 39 Cr App R 100 where the appellant appealed against the failure of the prosecution to disclose to the defence the complainant's previous appearance in a bankruptcy proceeding in which admissions were made, at that hearing, that the complainant told lies in order to get loan money, and, on another occasion the complainant had forged a document. The Crown also failed to disclose a conviction for the stealing of a book worth 30 shillings for which the complainant had been bound over for good behaviour for twelve months. These occurred before he appeared as a witness for the Crown against the appellants at their trial. Hilbery J stated:

> The Police are not to be expected to examine the records or to see whether possibly there exists anywhere in the country any matter which might affect the character of the witness. It is their duty to disclose to the defence in the way indicated a little while ago at page 20, actual convictions of crimes standing on the record of the prosecutor . . .

The reference to "page 20" of that report was to a Practice Note issued by Lord Goddard CJ which simply required the police to advise the defence solicitor, or counsel, of the accused's previous convictions so as to enable ". . . the prisoner's advisors to know whether they can safely put the prisoner's character in issue". The Practice Note made no mention of any requirement to disclose the criminal record of any witness the Crown intended to call at trial.

Since the Crown had in fact disclosed the conviction referred to, the appeal failed. The disclosure of the conviction was deemed, in the circumstances of the case, to be sufficient, whilst the disclosure of admissions at an insolvency hearing was held to be unnecessary.

Need for disclosure

The English Court of Appeal has subsequently followed the *Collister & Warhurst* decision in holding that the proper course is for the prosecution to provide details of their witnesses' convictions to the defence. (*R v Chambers & Wilson* [1960] Crim LR 437, *Parks v R* (1961) 46 Cr App R 29 and *Matthews v R* (1974) 60 Cr App R 292.)

R v Paraskeva (1982) 76 Cr App Rep 162 persuasively illustrated the need for such disclosure. The appellant was convicted of assault occasioning actual bodily harm.

The facts were that the complainant B, a council health inspector, visited the premises owned by the appellant A and had required A to carry out work required by the local council. B had visited A on a number of occasions. B claimed on the day in question that after he had made an inspection of A's property A had lost his temper and attacked him, seizing him and butting him in the face, then seizing B's briefcase and making off down the street. When interviewed by the police A denied the incident had taken place. Seven years previously B had been convicted of an offence for dishonesty. This was not known to the defence. By an error it was not revealed to them by the prosecution. A was also charged with robbery. A and his father gave evidence that there was no argument and no seizing of the briefcase. B gave evidence on behalf of the Crown. A was convicted of assault occasioning actual bodily harm but was discharged on the robbery count. A had previously been of good character and on appeal his counsel submitted that had the defence known of B's previous conviction the conviction would have been put before the jury. The Court of Criminal Appeal concluded (in its judgment delivered succinctly by O'Connor LJ, at p 164) that:

> . . .[h]ere was a head on collision between the complainant on the one hand and the appellant and his father on the other. Somebody was not telling the truth and it cannot be said that it was not a relevant matter for the jury to be told that one man had been dishonest in the past.

By way of contrast the New South Wales Court of Criminal Appeal in *R v Thompson* [1971] 2 NSWLR 213

preferred to follow the narrow rule of disclosure initiated in Lord Goddard's Practice Note (1955) 39 Cr App R 20 by not extending the duty of disclosure of convictions to prosecution witnesses generally. The Court refused to follow *Collister & Warhurst v R* (supra) stating at p 215 of its judgment that

> . . . we know of no warrant for asserting generally that there is any duty on the Crown to enquire as to the convictions of any person proposed to be called as a witness for the prosecution, and we would not be prepared to lay it down in practice this is so.

The above English and Australian authorities were referred to by defence counsel in support of an application for particulars of convictions in *R v Edwards Paul* (unreported, High Court, Hamilton, 23 March 1989, Doogue J) where a police prosecutor during a preliminary hearing, undertook to defence counsel to provide particulars of convictions of several prosecution witnesses and on that undertaking defence counsel refrained from putting questions authorised under s 12 of the Evidence Act 1908 to those witnesses. Following the preliminary hearing however the police declined to make the information available because the Police Prosecutor believed such disclosures would contravene the provisions of the Wanganui Computer Centre Act 1976. Accordingly the accused applied for an order that the information be supplied.

The application was heard by Doogue J, in the course of argument, it was acknowledged that the point had not yet been decided in New Zealand. The Crown, following argument, consented to providing the information sought and a decision of general application on the point was not made. The reason put forward by the police in the *Edwards Paul* case preventing disclosure of the Crown witnesses' convictions from the Wanganui Computer Centre was that such disclosures were not authorised by the Wanganui Computer Centre Act 1976. This objection can be met by a Court finding that disclosure of prosecution witnesses' convictions is . . . within the meaning "official duty" referred to in s 29(2)(c) of the Wanganui Computer Centre Act 1976.

This deals with a Court's jurisdiction to require disclosure without reference to the preliminary hearing or summary hearing procedures as occurred in *R v Chignell & Walker* (infra).

The concept of an official's [prosecuting] duty of fairness to the defence in this context is analogous to the rule stated in *R v Mason* [1975] 2 NZLR 289 that the Crown has a duty to make the name and address of a witness available to the defence where the witness can give evidence upon a material subject and the prosecution does not intend calling that person whether the prosecution considers that person to be credit worthy or not. This rule has remained unaltered by the enactment of the Official Information Act 1982 as was confirmed by the Court of Appeal in *R v Connell* [1985] 2 NZLR 233.

Summary jurisdiction

In the summary jurisdiction there is under s 12 of the Evidence Act 1908 no right to put questions to prosecution witnesses prior to the actual trial. Where the prosecution, in the summary jurisdiction, refuses to supply details of convictions, then, for the tactical reasons referred to above an application will be necessary, prior to trial, to obtain details of prosecution witness convictions.

Thorp J held in *Wilson v Police* (1990) 6 CRNZ 642 on an application for judicial review that the District Court did have jurisdiction to order disclosure of prosecution witness's convictions where there was an issue of credibility and the prosecution witness's convictions were relevant to the credibility at issue in a trial (at pp 646 and 647).[6] This was based on a concession by counsel for the Police that

> . . [t]he court when hearing defended summary charges and charges triable indictably has power to enforce the obligations that the common law imposes by the prosecution. That is part of the District Court regulating its own procedure to ensure that the hearing of criminal charges is conducted fairly and in the interest of justice.

Thorp J confirmed the propriety of this concession noting it was part of the necessary ancillary powers of the District Court in regulating its own procedure. This decision however was predicated on an undertaking to provide a "print out" from the Wanganui Computer if the Court ruled there was jurisdiction to require disclosure of convictions. This appears to have avoided the question of whether the Wanganui Computer Centre Act 1976 authorised the provision of that information from the Wanganui Computer Centre as opposed to some other source such as the Police prosecution files. It did not consider whether the person's convictions released to defence counsel is in breach of the right to privacy which may be protected by the terms of the Wanganui Computer Centre Act 1976 or whether such persons who are subject to possible disclosure of their convictions should have a right to be heard in opposition to such an application by an accused as is provided for under Rule 451(d) of the High Court Rules which provides for directions as to service on applications for judicial review.

Information and credibility

The Court of Appeal in *R v Chignell & Walker* (1990-91) 6 CRNZ 103 while not explicitly dealing with the obligation to make available prosecution witness' convictions, in the jury trial jurisdiction, appears to have included this obligation within the scope of its decision requiring that any information which is relevant as to credibility of a prosecution witness appearing on the prosecution file, is to be disclosed to the defence. Central to the evidence against the accused Walker (W) was an alleged admission made by W to the secret witness B whilst B and W were being held in the Auckland District Court's holding cells. B was on a charge of theft and W, a charge of murder.

It was noted by the Court of Appeal that W's counsel had access to the police file and had been advised by Crown Counsel before trial and also shortly after the commencement of W's trial that W's counsel had obtained lengthy

lists of previous convictions, information as to B's previous history as a police informer, and information laying a foundation that a police summary submitted at one of B's Court appearances had been falsified. This information formed the basis of an attack on secret witness B's credibility but it was noted that ". . . the ammunition available at the time was but a fraction of what it could have been and should have been . . ." (*R v Chignell & Walker* (supra) at 117.

W's counsel in his initial request for information made to the Crown under s 24 of the Official Information Act 1982, sought an order requiring the police to supply all witness statements, briefs of evidence, job sheets, forensic, medical and other scientific reports, photographs and "any other documentation to which the applicant is entitled either by statute or common law".

The Court of Appeal found (at p 118 of its judgment) that, in addition to the information supplied by the Crown to the defence, there was also other information available which had not been provided to W's counsel either before or during W's trial including, inter alia:

(a) Ten payments to witness B by the police for previous information supplied to the police in a four year period prior to W's trial; and

(b) Seven charges brought by the police against B but subsequently dropped and two further charges against B which were dismissed; and

(c) Traffic convictions which were not disclosed, and the failure to disclose the method of the disposal of the convictions indicating warrants for arrest had been issued; and

(d) Following a perceived threat to B three months' accommodation and food were offered to B by the police shortly before the depositions hearing; and

(e) Other food items and air fares between Rotorua and Auckland, payment of groceries and further cash advances were offered to B by the police.

The Court of Appeal found that had this additional information been made available the answers given in cross-examination

> . . . would not have withstood the further examination to which it could have been exposed had defence counsel had the information since obtained . . . which the jury could have regarded as having a significant bearing on B's credibility, and which given the request made and the undertakings offered in response should properly have been disclosed . . . . (p 122)

While the Court of Appeal endorsed the view that disclosure should be made where information is relevant to a Crown witness' credibility, it is not authoritative in requiring the Crown to make disclosure. The Crown gave an undertaking to provide various information (the subject of the Court's decision) which undertaking had not been fulfilled. If the Crown had not given its undertaking, would then the Court still have ruled as it did, requiring that information to be disclosed as being relevant?

In the light of the *Wilson v Police* decision, the answer to the question would probably have been "yes".

The Law Commission's Report No 14 "Criminal Procedure: Part One Disclosure and Committal" recommends the Summary Proceedings Act 1957 be amended to require the Crown to give:

> . . . advice of previous convictions of a potential witness where relevant to credibility and known by or available to the prosecution . . . (p 27.)

This proposed amendment, if enacted, would clarify the law and be beneficial in its equal application to all cases falling within the jury and summary jurisdictions, and eliminating the anomalies referred to earlier.

Right to cross-examine

The Law Commission, however, goes on to recommend that the long-established right of the defence to cross-examine any witness it wishes, (variously described as an "absolute right": *R v Griffiths & Williams* (1886) 54 LT 280 and a "substantial requirement of justice"[7]) be removed, subject to the defendant retaining the right to apply to the Court for leave to cross-examine a witness.[8] In the context of "disclosure of convictions", this removes counsel's unfettered right to cross-examine a witness as to previous convictions to elicit their attitude to any offence, the facts of the offence, and how the offence was disposed of as well as to cross-examine as to character. This was the type of information the prosecution failed to disclose in the *Chignell & Walker* case.

Given the defence is not required to disclose its defence to the Court prior to the trial itself (especially at the preliminary hearing stage) it will not necessarily be obvious to the Court what information is relevant to the defence and what information, if any, will prove useful to the defendant's line of defence. The categories of evidence which could be described as relevant cannot be determined in advance and this has been illustrated where the Crown inadvertently omits to advise the prosecution witness of convictions (as occurred in *R v Paraskeva* (supra)) or the witness has used an alias, and so thus misleads the prosecution, but admits his alias in cross-examination thereby providing the opportunity to check known convictions against the witness's true name.

It would be counter-productive to deny the defence's right to independently verify the information supplied to it by the prosecution if such denial is intended to eliminate potential disclosure of the Crown's non-performance with respect to a partial or total failure to supply relevant information.

The Court of Appeal noted that it was only through the assiduous conduct of the defence counsel in *R v Chignell & Walker* (supra) that the vital information to the defence was discovered by the defence after trial thereby revealing a miscarriage of justice because the information was not available at trial. In such circumstances, it is essential that the defence be enabled to develop its case fully and not to be deliberately restricted to relying on the Crown for information.

The Law Commission proposes amendments to the Summary Proceedings Act 1957 by inserting,

inter alia, a new s 185F(1) which provides:

> (1) A defendant in a criminal prosecution is entitled to disclosure, in accordance with this Part, of information that is relevant to the charge against the defendant and is held in recorded form by the prosecutor, whether recorded in writing or otherwise.

This proposed provision does not of itself, make clear in the context of previous convictions that previous convictions are to be disclosed from the Wanganui Computer. The authority for such disclosure of prior convictions by the prosecution is "relevance". Whilst being commendable in its object of obtaining flexibility and not closing off categories of evidence which might otherwise have been excluded by oversight, it does not provide explicit authority for disclosure of prior convictions from the Wanganui Computer.

Relevance test

The test of relevance may well prove confusing, in an administrative sense, in that it does not explicitly state that the disclosure of prior convictions from the Wanganui Computer is an official duty within the meaning of "official duty" used in s 29(2)(c) of the Wanganui Computer Centre Act 1976. The authority to disclose should be explicit and not an oblique reference to an apparently unconnected statute. Further, the question of disclosure of offences admitted to, or proved and subsequently dealt with by way of diversion or a discharge under s 19 of the Criminal Justice Act 1985 but not recorded as convictions on the Wanganui Computer should be addressed to decide whether they should be disclosed to the defence in the narrow circumstances of disclosure attaching to persons called as witnesses for the prosecution in criminal trials, as these offences are "relevant" to the character of persons so dealt with by the Courts.

Relevance is defined in subs (2) of the proposed s 185 (F) of the Summary Proceedings Act 1957 as:

> Information is relevant for the purposes of this Part if it tends to support or rebut or has a material bearing on the case against the defendant.

If the Crown takes the view that a conviction is not relevant and therefore declines to advise the defence of prior offending by one of its witnesses (either because the conviction is too old, or not serious, or of a different kind of offending to that charged against the defendant in the instant case, or the offending was dealt with by a s 19 discharge, or diversion and therefore considered supposedly not material) such a decision begs the question. The defendant should be able to apply to the Court to require the Crown to disclose relevant information on the grounds of relevance but the defendant does not know there is relevant information available to be disclosed because the Crown has formed the view erroneously that the information is irrelevant.

A solution was put forward by Thorp J in *Wilson v Police* (supra). In the course of his judgment he acknowledged that it should not be for the prosecution to be the final arbiter of relevance[9] in terms of disclosing convictions and Thorp J suggested at p 651;

> If the defence has reason to believe either that a witness may have convictions relevant to the basic issues which have not been disclosed, or that because of some issue on which the defence intends to rely which may have not been obvious to the prosecutor he may not have correctly assessed the relevance of previous convictions, there seems to be no reason why it should not make application to the Court, setting out grounds for concern and asking the prosecutor be ordered to state on oath whether or not he has knowledge of convictions other than those already disclosed, and if so, to file particulars of those convictions for inspection by the Court, to enable it to determine whether or not any should be disclosed to the defence.

Where there has been a partial disclosure of convictions by the prosecution which suggests no "holding back" of convictions by the prosecution to defence counsel, defence counsel may mistakenly have no reason to believe that there had not been the required disclosure made by the prosecution when in fact proper disclosure had not occurred thereby justifying an appropriate application but defence counsel being unaware of "reasonable grounds" to support such an application. this would appear to have been the situation confronting defence counsel in *R v Chignell & Walker* (supra) and demonstrates the impractical nature of the recommendation made by the Criminal Law Reform Committee's 1986 Report on Discovery in Criminal Cases to place the onus on the defence (at p 49) ". . . to demonstrate the relevance of the request [for disclosure] to the question of credibility".

The general principle (which was affirmed by Edmund Davies LJ in *R v Chambers & Wilson* [1960] Crim LR 437) is that:

> An accused is entitled to be fully informed of the convictions and criminal conduct of the prosecution witness's standing on the prosecutions record so the accused may properly test the evidence given at trial, and make a properly informed decision before electing to give evidence and thereby putting his or her own character in issue.

Any existing substantive or procedural departures from this principle should be reviewed to decide whether they are justified. The right to privacy, where name suppression is granted in cases of diversion and s 19 discharges, should come second to a fair trial to an accused. This view was reflected by the Court in *R v Paraskeva* (supra) where a spent conviction under the Rehabilitation of Offenders Act 1974 (UK) could not be put to a witness without the authority of the trial Judge (1975) (61 Cr App R 260) Practice Direction). Where there was a head on collision of credibility the Court expressed the view that a Judge would have given consent to the question being put. The relevant consideration being past dishonest conduct and not simply the recording of a conviction.

The decisions of *R v Chignell & Walker* (supra) and *R v Edwards*

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Techniques for writing plain legal English

By Dr Margaret McLaren, Associate Professor in Management, University of Waikato

Drafting documents, writing opinions and composing letters are the stock activities of legal practice. The use of language is therefore the everyday business of all lawyers. In this article, as in the one published last month at [1992] NZLJ 167, Dr Margaret McLaren emphasises the value of simplicity of style for lawyers as well as for others in communicating with an intended audience.

> *Those who write well must speak like commoners and think like sages. Everyone will then understand what they say.*
>
> Attributed to Aristotle 384-322BC

The writer of plain legal English needs to pay attention to audience, purpose, organisation, language, tone, layout and testing. These matter separately and together, since they interact all the time. This article will outline techniques for handling each of them, techniques which you can apply before beginning to write, while writing and while revising.

I say before writing because unless you find out who the audience will be and sort out the reasons for writing before beginning, you may need to discard much of the writing as either irrelevant or unnecessary.

I say while writing because you may have read so much heavy legal writing that you need to keep reminding yourself that writing is meant to be understood. In the words of one new practitioner, "The difficult task, after one learns to think like a lawyer, is relearning how to write like a human being."[1]

And I say while revising because plain writing is the result of constant rewriting. The writer struggles with the concepts and the language so that the reader does not have to. The finished writing shows no sign of the effort but looks as though it could have no other form, as natural on its paper as dew on a leaf. Speech has many advantages over writing, but writing has one great advantage. The word you might give anything to take back in speech can always be changed in writing. No one sees what you write till you are ready.

Let's consider the parts of writing to work on.

Audience

The more information you can gather about your audience, the better. Their age, gender, education and social background can all affect how your audience read.[2]

The writer has to remember that those who are intimidated by professional people and government departments may be reluctant to ask for help if information they need is missing. Those with different family structures may be uncomfortable with the assumption that a "normal" family comprises two parents and their children. A woman may not consider that writing which constantly refers to "he" or "him" applies to her. Yet writing like this persists: "This proxy form must be signed by the appointer or his attorney . . . In the absence of your instructions your proxy will vote or abstain from voting as he thinks fit . . ." and so on."[3]

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Paul (supra) indicate the Crown will provide information of prior criminal convictions if an application to the Court is made![10]

The criminal discovery process requires reform to provide consistency, certainty, and ease of access by the defence to relevant information. This reform should not remove the existing checks and balances already available to the defence to ensure as far as is practicable that all relevant information is disclosed by the prosecution.

This checking is achieved principally by means of a cross-examination at a preliminary hearing and, where necessary, an application made directly to the Court. The risk of the Crown inadvertently omitting to supply convictions could be overcome by the defence being able to apply to the Court for an order authorising the Wanganui Computer Centre to disclose relevant criminal convictions directly to the defence for the purposes of that trial only. The Wanganui Computer Centre provides a reliable collection point for such data.

The disclosure of "all" convictions overcomes the problems of a relevance test relating to non disclosure by the prosecution.

When it comes to the rewarding of witnesses by the payments of sums of money paid to informers by the police, charges laid and subsequently withdrawn by the police, and the payment of travelling and food privileges by the police and similar provisions, the setting up of an independent register recording such transactions would be useful as a source for independent inspection by authorised persons. The setting up of such a register may raise vexed questions such as what information has to be registered? how quickly? and who would be entitled to inspect this register? Without such a register, independent verification of disclosure by the prosecution to the defence by the Courts would be problematic and unreliable. However the reliable availability of such information to an accused is essential to ensuring a fair trial. □

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1 See *Garrow and McGechan's Principles of the Law of Evidence* (7th Edn), Butterworths 1984 pp 162-163 and *Cross on Evidence* by D L Mathieson (4th Edn), Butterworths 1989 at pp 390-395.

2 Query whether an application to cross-examine the complainant in the absence of

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You might be surprised how little you know about your readers. Try yourself out on these questions:

> Who will read the document?
> What will the reader have to do with it?
> How is the reader to do whatever is needed?
> When?
> If there's a deadline, what happens if it's missed?
> How motivated is the reader likely to be?
> What kind of background knowledge is the reader likely to have?
> How familiar is the reader likely to be with your procedures?

Such questions have been asked by some government departments. The Department of Inland Revenue in its new tax forms and the Department of Immigration in its revised forms for those entering New Zealand are both showing true consideration of audience.

Purpose

In plain writing the readers meet the purpose as soon as they begin reading and stay constantly aware of it. Sir William Dale explained what this means for legal drafting:

> We need . . . a determination to seek the principle, to express it, and to follow up with such detail, illuminating and not obscuring the principle, as the circumstances require.[4]

This attention to principle, or the main point or points, is important in all plain writing. In correspondence and memoranda it should be caught in the subject line. The lawyer who wrote:

> Re: Deceased estate of G R Hereford [not the real name]

was surprised to find the letter returned to him. The widow assumed the matter was one the lawyer would attend to and just didn't read on. He might have got what he needed if he'd written as his subject line:

> Request for your husband's ANZ cheque butts, Jan-Dec 1991

Reports, statutes, regulations and bylaws should similarly have the purpose spelt out in the beginning. The title, terms of reference and the first paragraph of the main body of the writing are ideal places for this to come. An example of a strong statement of purpose comes in the title, of Law Report No 17, *A New Interpretation Act to Avoid "Prolixity and Tautology"*. The terms of reference are equally clear.[5]

Organisation

Once you know who your audience and what your purpose are, it is easy to organise your message in a way that will suit your readers.

Tenants, for instance, will want to be told in writing who they are making a contract with, which property it is about, what it will cost, what they will get for their money and what their obligations are.

Draw up a plan with a set of obvious headings. For some kinds of writing these headings will serve as your table of contents. Most of the time they will simply give you your introductory paragraph and the headings you will use as signposts to your readers.

Under each heading you will have an opening, a middle and a close. Each part will follow naturally from the lead in and will be in parallel, grammatical and visual form. For example:

The opening

Use the opening to:
(a) introduce the topic.
(b) state the general rule.

The middle

Use the middle to:

(a) give the detail
(b) explain any qualifiers or exceptions.

The close

Use the close to:
(a) sum up
(b) direct readers to more information.

Tone

Tone, or the underlying feeling, can make or mar your writing. If readers don't like your tone, they simply won't read what you write.

Because many people, especially many New Zealanders, are suspicious of any experts, it is essential to keep even the slightest suspicion of superiority out of your writing. In the words of Strunk and White, "No-one can write decently who is distrustful of the reader's intelligence, or whose attitude is patronising."[6]

For the public the best tone is straightforward, friendly and considerate of the reader's likely reaction. For the Courts, a tone of "measured rationality", to quote Pamela Samuelson,[7] is sensible.

Language

Most lawyers are language lovers. Why else would they enter a profession whose main tool is language? Yet much legal writing is dreary, repetitious, and weighed down with archaisms and legal jargon. To make your writing crisp, clear and pleasant to read, play with words and sentence structure until they are just right. These suggestions may help:

Words

1 The short, strong, familiar word is usually better than a longer synonym. Prefer "use" to "utilise", "do" to "accomplish", "start" to "begin", "rank" to "prioritise".

2 Drop old-fashioned words like "heretofore" and "aforesaid" which are not used in other kinds of writing. Some of them like "demised premises" might even make the public laugh at you. Others like "shall" are perfectly good lay English but rarely used now by anyone other than a lawyer. If you persist in using them you could be considered pompous.

3 Use English rather than Latin or other foreign words and phrases. "Among other things:" means just the same as "inter alia", "face to face" just the same as "vis-a-vis". If you are in doubt as to the lay equivalent of some non-English word or phrase, consult *A Dictionary of Modern Legal Usage*.[8]

If you don't, you run the risk of alienating those readers who do not understand you, and losing credibility if you make a slip because you have simply memorised the word or phrase without understanding the language. When Latin terms were accepted in legal writing, all lawyers had at least some Latin. Now most do not and some unintentionally funny blunders occur.

4 When you find you have used two or even three words where one would do, prune sharply. Especially watch two groups of words:

(a) Those which overlap or repeat each other:

completely final
initiate a beginning
true facts
optional choice
forward planning
new innovation

(b) those which use two or more words with the same meaning but different roots. Usually one comes from Anglo-Saxon and the other from Norman French. When William the Conqueror first came to England, two or three words may have been necessary. Now they are not. Examples include these:

null and void,
initiate a beginning
fit and proper,
give, bequeath and devise
completely final
goods and chattels
will and testament,
past memories

5 Watch out for words which have a technical meaning for lawyers and ordinary meaning for everyone else. *Clause* and *guilty* are examples.

> If a man were to give another an orange, he would simply say "I give you this orange." But when the transaction is entrusted to a lawyer to put in writing, he adopts this form: "I hereby give and convey to you, all and singular, my estate and interests, right, title, claim and advantages of and in said orange, together with all its rind, skin, juice, pulp and pips, and all rights and advantages therein, with full power to bite, cut, suck and otherwise eat the same, or give the same away with or without the rind, skin, juice, pulp or pips, anything hereinbefore or hereinafter or in any other deed or deeds, instrument or instruments of whatever nature or kind soever to the contrary in any wise notwithstanding."
>
> **Anon**

6 Don't be tempted into what has been called "elegant variation". If you are writing about a farm, don't call it the farm in one line, the property in the next and the land a little further down. This recommendation is specially important with nouns.

7 Keep an eye open for what Ian Gordon has called "confusables".[9] These are pairs of words like "effect" and "affect", "discreet" and "discrete", "disinterested" and "uninterested".
If in doubt, consult one of the books which list and distinguish between such pairs![10]

8 Use a spelling checker. If you have an American spelling checker, add British spellings to it. Most spelling checkers allow a thousand or more words to be added to the dictionary. You will only have to add twenty or thirty words such as these: centre, labour, colour, honour, woollen, travelled, travelling, enrol, enrolment. The particular list will depend on the work you do.

Sentence structure

Much of the advice on sentence structure has been about the length of sentences. Certainly a sure way to stop people reading is to produce sentences like this one:

> No directors of the Holding Company have, since the end of the previous financial year, received or become entitled to receive any benefit (other than a benefit included in the aggregate amount of emoluments received or due or receivable by Directors shown in the accounts of fixed salaries as full-time employees and normal professional fees received by a firm of solicitors of which a Director or a related corporation with any Director or with a company in which any Director is a member, or with a company in which any Director has a substantial financial interest other than as follows and other than as previously disclosed in last year's Directors' Report![11]

Such a sentence could easily be broken up so that each part became a separate item in a list. Teasing out the parts would show where redundancy occurs. For instance "since the end of the previous financial year" makes "other than as previously disclosed in last year's Directors' Report" unnecessary.

So long as sentences are broken up in such a way that a reader can grasp and retain the meaning easily, long sentences are not necessarily bad. Indeed, writers who want to keep their readers' attention will vary their sentence length, working for the rhythms of natural speech. Be wary of strings of nouns, of phrases pushed between subject and verb, and of anything which might trip a reader up so that the wording, rather than the message, receives attention. Many writers think it helps to read their work aloud, and then change anything which sounded odd and so could distract the reader from the message.

Layout

If writing is to be read willingly, it needs to look inviting. Although you, as lawyers, will seldom produce the finished copy of your work, you are still responsible for its final appearance.

Remember that most readers read selectively. First they glance at headings. They then skim through any brief extracts which have been highlighted or set into a frame. Then, if they've liked what they've read so far, they *may* begin reading the whole.

Organisations such as the Document Design Centre at Washington and the Communications Research Centre of Australia at Canberra have tested readers to see what formats are the most effective. They provide professional advice for important documents. New Zealand has no equivalent but does have many experts in layout who can be consulted for major documents. For day to day work, just make sure you provide the following:

1 Pages laid out for easy reading. If you have desktop publishing you may be able to produce easily legible columns. If you don't have it, keep to one column only.

2 Typeface that will be easy for the intended audience to read. The Document Design Center recommends type of between 9-12 point size, in a plain bold typeface such as Times![12] Documents for older readers,

such as retirement or superannuation contracts, should be in 12 or even 14 point size.

3 Plenty of white space, used in a way that will help readers find information.

4 Medium line lengths. Lines that are too long are hard to keep concentrating on; those that are too short lose the reader's attention.

5 Ragged right margins. Books and journals usually have straight, or what typesetters call "justified" margins, but only highly sophisticated machinery can produce work that has straight right-hand margins and is still easy to read quickly. Amateur publishers tend to like straight right-hand margins because the page looks so tidy. But remember, plain writing is writing with the *reader's*, not the writer's needs in mind.

6 Use lists if you have points which are important or complex or both. Too many lists, however, are self-defeating.

Testing

Testing needs to be an ongoing process, both for documents for individuals and those for the public. Bill Riley, a Canadian lawyer who taught for some time at the University of Ottawa Law School, says that when he is asked to write documents such as marriage contracts he drafts and prints out a letter on his computer while his client is still in his office. He is then forced to change anything which the client does not understand completely![13]

Layout is easy to test. You can give two or more versions of part of a document to readers to see which they prefer and which they grasp most quickly.

It is not so easy to check whether you have conveyed the right message. Before beginning writing you should check to find what the intended readers want to know, and what they know already. As the writing develops, you should check continually, both to find out if readers can get what they want from the document and if they understand what is written. The testing can be oral or written. You can ask readers to explain individual words or whole concepts or to solve problems from the document.

For instance you could ask tenants whether they or the owner would be responsible, according to the document, for repairing or replacing a burnt-out water cylinder. If the tenants could not find the answer from the tenancy agreement, you would work on the document until they could answer easily.

Testing before and during the writing of a document must be followed by further testing after you think you have finished writing. Only when all tested readers can grasp the whole message can you consider the document to be "plain".

The public themselves test documents all the time. If they fill forms in incorrectly or answer letters inadequately they show they do not understand the message. For instance, travellers will either fill in landing papers quickly and happily or they will grumble and ask each other and whoever else is available questions, or they will give up so causing delays when an officer checks their papers.

Testing takes time, certainly. But it can save far more time than it takes. It can show you, as writer, where trouble spots are, so you can repair them before anger or misunderstanding occurs.

The final stage

Make sure, by repeated revision that what you write makes sense, sounds good and looks right. One thing is sure. You will never get your writing right first time. As has been said often, there is no such thing as good writing, only good rewriting.

If you apply the techniques outlined here your English should be plain. You will be serving the public, your main audience, well. □

1 Floyd Abrams, quoted in Thom Goldstein and Jethro K Lieberman, *The Lawyer's Guide to Writing Well*, University of California Press, Berkeley, 1989, p 4.
2 George Klare, "Writing to inform", *Information Design Journal*, Vol 1, No 2, 1979, pp 98-105.
3 "Proxy Form Instructions", p 2, *Annual Report 1991*, back insert. The company is best left unnamed.
4 William Dale, *Legislative Drafting: A New Approach*, London, 1979, pp 331-332, quoted by Geoffrey Palmer, *Unbridled Power*, Wellington, 1979, pp 85-86.
5 Law Commission, *Report No 17, A New Interpretation Act to Avoid "Prolixity and Tautology"*, December 1990, Wellington.
6 William Strunk Jnr & E B White, *The Elements of Style*, MacMillan Publishing Co, 1979, p 70.
7 Pamela Samuelson, "Good Legal Writing", *University of Pittsburgh Law Review*, Vol 46 149, 1984, p 156.
8 Bryan A Garner, *A Dictionary of Modern Legal Usage*, Oxford University Press, NY 1988.
9 Ian Gordon, *A word in your ear*, Heinemann, Auckland, 1980, p 104.
10 For example, Margaret C McLaren, *Check it out*, Longman Paul, Auckland, 1991.
11 Additional statutory information from the 1991 Annual Report of a major New Zealand and Australian company, again best left unnamed. It is not the same company referred to in fn 3.
12 D B Felker (ed) *Document Design: a Review of Relevant Research*, Document Design Center, Washington, 1980.
13 *Clarity*, The Plain Language Newsletter of the Canadian Legal Information Centre, No 3, Winter 1990, p 3.

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the complainant's criminal record being disclosed in the complainant's statement could be made under s 185C (b)(ii) that it is necessary in the interests of justice that the evidence be given orally to enable questions to be put under s 12 of the Evidence Act 1908.

3 In order to avoid prejudice by way of surprise to an accused which would lay the foundation for an application to adjourn or abandon a trial under s 368 (1) of the Crimes Act 1961.

4 As opposed to the Crown's right to a fair trial the latter option being rejected where the Crown sought to rely on s 6(c) of the Act to restrict disclosure to the defence.

5 In the context of a trial referring the English Court of Appeal decision of *R v Paraskeva* (1982) 76 Cr App R 162 as an illustration of that principle.

6 This corresponds with the Criminal Law Reform Committee's recommendations in its Report on Discovery in Criminal Cases (1986) at p 18, paras 88 & 91 that the test for disclosure should be relevance relating to credibility.

7 *Poimatagi v The King* [1948] GLR 419; as to the great utility of the defence's unrestricted right to cross-examine any witness the defence chooses at a preliminary hearing see: pp 36-46, *The Techniques of Persuasion* by D Napley (3rd ed) Sweet & Maxwell.

8 Subject to the exceptions to cross-examine a witness as of right where a witness gives evidence of identification, an alleged confession, is an alleged accomplice of the defendant or has previously given a statement which appears to conflict with the evidence to be given by the witness.

9 This conflicts with the view expressed by the Criminal Law Reform Committee's (1986) Report on Discovery in Criminal Cases at p 18, paras 81 & 91 that ". . . it is for the prosecutor to determine relevance and materiality prior to disclosure".

10 See "Pre-trial Disclosure in criminal cases" by P Williams QC published in the New Zealand Law Conference 1987, Conference Papers pp 188-191 for a general discussion of disclosure in criminal cases and for a precedent application inter alia for discovery of convictions.