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A Salmond biography

During the past few years there has been an increase in publications about aspects of our legal history. There have been the two books on the history of the firms Bell Gully Buddle Weir by Julia Millen, and Russell McVeagh McKenzie Bartleet by Russell Stone reviewed together at [1992] NZLJ 149. Then there was Professor Spiller's book on the Chapman family reviewed at [1992] NZLJ 301; and Anthony Alpers recasting of the autobiography of his father O T J Alpers *Cheerful Yesterdays* under the title *Confident Tomorrows* – [1994] NZLJ 41. Finally of course there has been the publication of the first two volumes of the excellent *Dictionary of New Zealand Biography* with a reasonable number of entries about legal personalities – reviewed at [1990] NZLJ 221 and [1993] NZLJ 309 respectively.

In the review of the two legal firms' histories referred to above I wrote at [1992] NZLJ 150:

> Until recently writing about the legal profession and the practice of the law in New Zealand has not been very extensive, nor of a very high quality. The centennial book of the New Zealand Law Society *Portrait of a Profession* is very valuable, but inevitably with so many authors, variable in quality. There has been a modest history of the firm of Chapman Tripp that was published in 1975. W Downie Stewart wrote biographies of Sir Joshua Strange Williams and the influential Sir Francis Bell, who of course figures prominently in Julia Millen's book. Waldo Hilary Dunn and (now) Sir Ivor Richardson wrote a biography of Sir Robert Stout. Guy Lennard has written about our first Chief Justice Sir William Martin, and J G Denniston wrote a biography of his father Mr Justice Denniston. The best lawyer's book of course is still the autobiography *Cheerful Yesterdays* by O T J Alpers. It is not a rich harvest for a period of over 150 years.

The publication this month of Alex Frame's biography of Sir John Salmond under the title *Salmond: Southern Jurist* (Victoria University Press, ISBN 0 86473 286 4) is another substantial contribution that enriches our legal literature in terms of the profession itself. However the book gets away to a disturbing start. Alex Frame starts the Introduction with the phrase "At the quaintly titled Dominion Legal Conference in New Zealand in 1960 . . .". As one who attended that Conference I saw nothing then, and see nothing now, that is "quaint" about the title. In those days for instance Dominion Day, 26 September, was a legal holiday when all legal offices were closed. From 1907 the designation of New Zealand as a Dominion was the formal recognition of its change from being a colony of Great Britain. It was therefore recognised as a most significant designation in our constitutional history. Oddly enough Mr Frame himself notes the significance of the event on p 80 where he refers to the Vice-regal reception held to mark the occasion, and which he sees as the real-life happening that inspired the Katherine Mansfield story, *The Garden Party*.

But as an indication of a lack of historical sympathy the use of "quaintly named" is a disturbing, modern, politically correct opening for the book. This is after all the biography of a man who lived from 1862 to 1924. For most of that time, from 1875 when he was 13 until his death 49 years later, he lived in New Zealand with short periods in England and Australia. Happily the work improves after the first sentence. It is ironic that at p 30 Mr Frame warns against the danger of "retrospective modernism", that is of assessing the past "with a retrospective backdrop of modern conventions".

The initial concern is greatly alleviated a few pages later when Mr Frame explains what led him to write the book. He says:

> Salmond also played an important part in the drive in the period before the first world war to bring order and effectiveness to the law relating to Maori land and status. Although, as draftsman and advocate, Salmond will not be held responsible for the policies underlying the measures – these were "assimilationist" and aimed at facilitating the passage of Maori land into general ownership – his work in this area will contain some surprises and much relevance for the modern New Zealand debate. . . .
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> I have been motivated by surprise that so little is known of the life and work of New Zealand's most influential and renowned jurist, by curiosity about the origins and development of his thought, and above all by the discovery of Salmond's central role in the making of the New Zealand legal system as it bears upon issues which I found myself working on as a

teacher of law and as a legal adviser. Sir John Salmond's fingerprints seemed to be everywhere.

As an aside one is constrained to note that, whatever Salmond's degree of responsibility may have been, there is more to be said in favour of an assimilationist policy than is indicated by Alex Frame's comment. One has only to look, sadly, at the present Maori figures in the statistics for imprisonment and for unemployment to be given pause about current racial policies. The anti-Maori back-lash that is being built up by administrative and Court decisions is unfortunate; but it is also certainly understandable. It needs to be noted that while the back-lash is undoubtedly growing it is doing so without the existence of the modern debate Mr Frame speaks of. It would be a mistake to over-emphasise the degree of the current back-lash, but probably an even bigger mistake to ignore it and the reasons for it – as politicians and Judges seem to be doing at present.

The native title issue can of course be interpreted as being "assimilationist" for the purposes of acquiring Maori land, but the policy was a much more substantial one than just being intended to facilitate the passage of Maori land into general ownership. Indeed Frame quotes Salmond on the question of race in a passage that he says illustrates Salmond's "humanism". But it also indicates the philosophical basis of an "assimilationist" policy as distinct, let us say, from a divisive "partnership" policy. We need sometimes to remember that it was after all a nominal partnership policy – "separate but equal" – that the Supreme Court of the United States struck down in *Brown v Board of Education of Topeka* in 1954.

Alex Frame takes his quotation from an article by Salmond in the *Harvard Crimson* of 22 January 1922, and then supplements it with an extract from *Jurisprudence*. It is interesting to set these two quotations together to see them as relating to the idea of assimilation as an historical inevitability – at a time when "progress" and "historical inevitability" were the current intellectual fashion. In the *Harvard Crimson* Salmond wrote as follows:

> It is one of the lamentable features of human nature that every separate community tends to develop a conscience and spirit of its own which is distinct from, and antagonistic to, those of other communities, and which excludes that common conscience and common spirit which ought to bind the whole human race together as one society. The result is the growth of national animosities, misunderstandings, suspicions, fears – feelings which, however long they may slumber or lie latent, are capable at any time of flaming into the tragedy of international conflict. This racial feeling which divides mankind into separate sub-species emotionally antagonistic to each other is essentially evil. The future of civilisation demands that so far as may be, it should be eliminated from the world. Men must learn that from north to south, from east to west, they are all of one blood and of one family, and until they learn that hard lesson there will be no security for the cause of peace and righteousness . . .

In *Jurisprudence* Salmond wrote about the distinction between what he called "nation" and "state", but what we today would name differently as "culture" and "nation" respectively. The difference in the use of the word "nation" is rather confusing. Salmond wrote:

> A nation is a society of men united by common blood and descent, and by the various subsidiary bonds incidental thereto, such as common speech, religion and manners. A state, on the other hand, is a society of men united under one government. These two forms of society are not necessarily coincident. . . .
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> In every nation there is an impulse, more or less powerful, to develop into a state – to add to the subsisting community of descent a corresponding community of government and political existence. Conversely, every state tends to become a nation; that is to say, the unity of political organisation eliminates in course of time the national diversities within its borders, infusing throughout all its population a new and common nationality, to the exclusion of all remembered relationship with those beyond the limits of the state.

That last sentence, acknowledging the elimination in the course of time of national diversities – cultural diversities as we would now call them – by the development of a new and common nationality, certainly seems to put Salmond on the side of accepting and expecting, if not indeed encouraging the development of a new and common cultural nationality. It should also be remembered that a cultural assimilationist policy was very much the favoured policy of the radical, progressive Labour government of the 1930s. All of which probably only goes to illustrate the truism that today's reactionary view becomes the radical view of tomorrow – and vice versa.

John Salmond was born in North Shields, near to Newcastle on Tyne in 1862. His father was a Presbyterian Minister who decided to emigrate to Dunedin in 1875 as a Professor of Theology. Young Salmond did well scholastically winning a scholarship to University College London. He returned to New Zealand and after briefly teaching law in Dunedin, set up in practice in Temuka. Why Salmond went to a small town just north of Timaru has always intrigued me. Mr Frame does not raise the question, much less suggest an answer. While there, Salmond wrote on jurisprudence questions, and he even had an essay published in London in the *Law Quarterly Review* then edited by Pollock, on a point of contract law. He was married in Temuka to Anne Guthrie who had been a fellow student in London whom he courted by correspondence. She had been born in the same area of the Tyne as Salmond himself had been.

In 1897 Salmond went to Adelaide as Professor of Law and it was there he wrote – and published – his first major book *Jurisprudence*. Then in 1905 he was appointed Professor of Law at Victoria and took up the position in 1906. He remained there only a year. In 1907 Salmond published his magisterial book on *Torts*. It was in that same year he became Counsel to the Law Drafting Office and in 1910 he was appointed Solicitor-General. He held that office until his appointment to the Supreme Court Bench in 1920. He attended the International Conference on Disarmament in Washington in 1921. He resumed his judicial duties, but he died in 1924 at the age of 62. Salmond and his wife had three children, a son and daughter who survived him, and an elder son who

was killed in the Great War.

Alex Frame indicates a main thesis of the book at p 11 of the Introduction. He writes:

> Salmond was active at both theoretical and practical levels in shaping the role of the State in New Zealand in the first quarter of this century and, consequentially, beyond. The State and the administration of justice were the two indispensable and inseparable elements of Sir John's legal philosophy. A rare opportunity is provided to observe the relationship between idea and action as philosopher-Salmond and official-Salmond grapple with the ambivalent doctrine of "*raison d'état*", or "state necessity" in peace and in war.

As already indicated a great deal of the book is taken up with the author's personal views on jurisprudential questions and Maori issues. These views are of interest in themselves, but the extent of the treatment of them detracts from the balance of the book as a biography. The author is too intrusive. Some, indeed many of Mr Frame's views would be open to argument, and sometimes he seems to be quite wrong. For instance at p 162 dealing with the 1913 Waterfront strike he quotes Salmond as replying to a hypothetical question from Massey who was the Prime Minister "All such acts, although otherwise illegal, are justified in law by the necessity of the case". Frame then comments: "Here is theory come to practice: the State is justified in taking illegal action in its own defence". But that is not what Salmond said. He refers to such acts as Massey presupposed as "otherwise illegal". The important word is "otherwise". Taking such actions Salmond contends is legal in terms of the common law. It is not illegal. This is Salmond's point.

There are occasional lapses by Alex Frame from what might be called historical sensitivity in a number of places in the book. One example from the 1913 Waterfront Strike has already been given. Two other examples will suffice. They both relate to the period of the Great War and are intended as illustrations of that theme Mr Frame develops as a major one which he contends underlay Salmond's thinking – the supremacy of State power over legality.

Mr Frame's references to the Great War, expressed in such phrases as "the frenzy and madness of war" (p 170), and "the grinding of young flesh in Europe" (p 174) hardly make it surprising that he describes the war powers legislation as "despotic" or as "a revolution in constitutional theory and practice" (p 166) or that he accuses Salmond as having "pursued sedition ferociously" (p 174). For the senior law officer of the Crown to seek a substantial penalty for sedition during a major war hardly indicates ferocity. Failure to do so might more reasonably be criticised as a failure of a public duty. None of these judgments indicates an understanding of the social and political realities of a war situation, although Frame does make passing reference to the possibility it was "a special case" (p 168). Frame constructs an argument from Bracton to condemn Salmond's behaviour as Solicitor-General during the war, and in a wider context to criticise what he describes as a theme of Salmond's philosophy of law, that legality ends where the State's peril begins (p 167). One has only to point to the legal defences of provocation or self-defence to a murder charge to indicate that the question is a more complex legal and moral one than Frame indicates. My own personal sympathy lies with Bracton rather than with the analytical and positivist school of jurisprudence, but that is another matter.

In addition to his two great books on jurisprudence and on torts Salmond is particularly remembered for two things. The first is his drafting of the Native Land Act 1909 which has already been mentioned. In an essay on the historical background to Maori legislation, published at [1979] NZLJ 246, Mr E J Haughey refers to the 1909 Act as consolidating some 69 statutes or parts of statutes. He says that Salmond brought to the task his characteristic legal acumen and great capacity for judicial analysis. The second noteworthy matter is the judgment Salmond delivered in 1924 in *Taylor v Combined Buyers Ltd* [1924] NZLR 627. Mr Frame devotes attention to these two achievements among many others. The author considers at great length questions relating to Maori Land – or Native Title to use the then common phrase. Certainly this issue is of considerable interest today, but one is left with the feeling that the extent of the attention given to it reflects our current concerns to a degree that affects the balance of the book as far as the activities of Salmond's own day-to-day working life are concerned. The period from 1910 to 1924 in New Zealand history involved many other political, legal and constitutional questions that make the relative proportions of the book unsatisfactory.

While Mr Frame places a great emphasis on cases and opinions regarding native title it would be misleading to suggest he ignores these other questions. He has had access to a good deal of material in the Crown Law Office and he has made full use of this. He is thus able to illustrate from the files Salmond's attitudes and methods regarding a wide variety of issues that came before him as Solicitor-General. Salmond does not seem to have had any particularly strong personal political views; although P J O'Regan, a one-time student with whom he was friendly, thought that Salmond did not agree with his strongly socialist convictions.

It is somewhat hard to categorise this book which is a biography only in a limited sense of that term. At one time I thought of it as being described not so much *Salmond – His Life and Times*, as being more *Salmond – His Thoughts During his Life and Times*. But even this is not really adequate. There are large parts of the book that could best be described as *Frame's Thoughts Arising from Considerations of Aspects of Salmond's Life and Times*. The names, ideas and writings of worthies such as Kant and Hegel, Austin and Adam Smith, Bentham and Levi-Strauss, Savigny and Holmes, Pollock and Laski, as well as Katherine Mansfield and Nelle M Scanlan are scattered through the pages. Mr Frame has a well-stocked mind, but as already indicated his personal jurisprudential and, in the broad sense of the term, political views are very much manifest.

To some extent Mr Frame acknowledges at the end of his Introduction that the book is not just a biography as that would normally be understood. He explains the purpose of the book and then refers to the wish non-lawyers at least might have to skip some portions. He writes:

> I have tried to make the account accessible to scholars in disciplines other than law, and to the general

reader, while at the same time endeavouring to satisfy the reasonable demands of specialist lawyers. Unhappy compromises are no doubt sometimes the result, and non-lawyers at least may wish to make use of an imaginary fast-forward button at some points.

It would not simply be unfair but quite misleading to conclude this review on what might be thought to be a dismissive or carping note. *Salmond: Southern Jurist* is a book of great value and very considerable interest. Salmond's life was not one of adventurous physical activity, but essentially one of adventure of the mind. At p 39 Alex Frame notes the interesting historical and geographical juxtaposition of two extraordinary intellects, of John Salmond and Ernest Rutherford both living and working in Canterbury at the same time in the 1890s. In an essay on Salmond I wrote for The New Zealand Heritage series in 1972 I had remarked on this and referred to the two of them in the opening paragraph:

> New Zealand can claim a number of men of great talent who have become international figures within their particular field. Two stand apart with the mark of genius on them. The first, and most obvious, is Baron Rutherford of Nelson. The second is not nearly so well known. He was Sir John Salmond, barrister, Professor of Law, Solicitor-General, King's Counsel, and finally a judge of the Supreme Court of New Zealand. It is not in any of these titles or offices that the key to Salmond's reputation is to be found. They all stem from his greatness rather than constitute it.
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> Salmond was a great jurist. He made his reputation through his legal writings; an international reputation and influence that remains alive throughout the world of the common law.

This review, like the book, has wandered down several pathways and byways, but not, it is hoped, into any blind alleys. It is one of the virtues of the book that it invites and inveigles the reader into doing this. It is continually intellectually stimulating even in those passages that some readers might not find fully convincing.

Alex Frame has written a book that treats Sir John Salmond seriously as a great legal mind, and for this we are indebted to him.

P J Downey

Correspondence

DSAC urges caution with Dr Goodyear-Smith's comments on rape and sexual abuse

Dear Sir,

Doctors for Sexual Abuse Care (DSAC) recommends that lawyers cross-examine carefully the article "Review of "Was Eve merely framed; or was she forsaken?" by Dr Goodyear Smith [1995] NZLJ 230.

DSAC is a national organisation formed in 1988 to improve medical care for those affected by sexual abuse. Membership includes 250 doctors with skill and experience in paediatrics, venereology, gynaecology, psychiatry, pathology, general practice and forensic medicine.

It is beyond this letter to provide readers with a complete analysis of the many aspects of Dr Goodyear Smith's article which do not conform to usual standards for the presentation of a considered medical opinion. A serious problem is its interweaving of ideas that have universal professional support with ideas that do not. This is a literary technique used in advertising, propaganda, and cult indoctrination. It encourages adoption by the uninformed of theories that professionals with special expertise in the area would recognise as unproven or controversial. It is not a technique that belongs in medical or legal discussion on matters of serious concern.

The article contains some accurate statements – eg. "Deliberate falsehoods do occur", and "not all (women) will subsequently view themselves as "scarred for life". However many of the views expressed do not represent informed medical opinion on rape and/or are inadequately referenced.

The sections on "Misinterpretation of consent", and "Effects of rape" are particularly subject to semantic and logical confusion. The suggestion that sexual intercourse can be considered consensual and/or relatively harmless unless the woman physically fights off the sexual advance is not supported by research on the scope and impact of rape.[1]

Only one comment in these sections is referenced – and that is to the author's own book. A review of this book by Ian Freckelton QC, Editor of *The Journal of Law and Medicine* concludes "Goodyear-Smith's book deserves scholarly condemnation and curial dismissal . . . It is disturbing that a person of her experience should peddle sensationalist views that hold a superficial attractiveness to the uninformed but which have been exposed as misconceived by empirical study after empirical study."[2]

In her book Dr Goodyear-Smith chronicles influences that have affected her current views. These include her position as General Practitioner for Centrepoint Community from 1988 to 1995. Two women and seven men, including her husband and parents-in-law (Bert Potter, leader of the community, and his wife Margaret Potter) were convicted of indecent assault in 1992.[3] These events coincided with Dr Goodyear-Smith's development of a focus on false allegations and false memories of sexual abuse.

The *New Zealand Law Journal* article does not clarify that "re-

pression" and "recovered memories" are seldom relevant when recent sexual violation or rape is the complaint. The article's description of "repression theory" is confusing and inaccurate. The conclusion that there is "no scientific evidence which verifies this theory" is attributable to this inaccurate description combined with an analysis of a limited range of scientific evidence.

The most recent press release of the American Psychological Association on the topic of Memories of Childhood Abuse says "Most people who were sexually abused as children remember all or part of what happened to them. Concerning the issue of a recovered memory versus a pseudo-memory, like many questions in science, the final answer is yet to be known. But most leaders in the field agree that although it is a rare occurrence, a memory of early childhood abuse that has been forgotten can be remembered later. However, these leaders also agree that it is possible to construct convincing pseudo-memories for events that never occurred."[4]

An Interdisciplinary Conference on Rape is to be held in Wellington March 27th to 30th 1996. Friday 29th March is devoted to consideration of the legal issues including those discussed by Justice Thomas and Dr Goodyear-Smith. The latest research on rape and its management in New Zealand will be presented. We encourage any lawyers with an interest in this debate to attend this conference. Further information is available from DSAC, Building 43, Auckland Hospital, PO Box 92-024, Auckland.

Juliet Broadmore MBChB, MNZAP
President DSAC

References:

1 Koss MP. (1993) "Rape Scope, Impact, Interventions, and Public Policy Responses." *American Psychologist*. 48: 1062-1069.
2 Freckelton I. (1994) Book Review of "First Do No Harm". *Journal Of Law And Medicine* 1: 261-262.
3 Goodyear Smith F. (1993) *First Do No Harm – The Sexual Abuse Industry*. Benton Guy, Auckland.
4 American Psychological Association. (August 10, 1995). Office of Public Communications, 7SO, First St NE, Washington DC.

Reply from Felicity Goodyear-Smith

Dear Sir

Dr Broadmore appears to have misinterpreted my writing. I do not suggest all unwanted sexual intercourse where no physical struggle is involved is "consensual and/or relatively harmless", but clearly a rape involving "torture, extreme physical pain and permanent physical disability" will be viewed by the Courts as a more serious crime than one where no physical injury was sustained.

Dr Broadmore claims that my "focus on false allegations" coincided with the Centrepoint trials of 1992. However, as I clearly outline in *First Do No Harm: the sexual abuse industry,*[1] I have been expressing concerns about the development of protocols and practices contributing to false allegations since the mid-1980s, long before meeting my husband and my subsequent association with the Centrepoint Community.

DSAC has been the primary agency involved in bringing overseas lecturers to New Zealand to teach sexual abuse issues to our health professionals. They have sponsored some of the main proponents of "recovered memories", including John Briere, Jon Conte and Judith Herman. In Briere and Conte's study of 450 adults attending therapy, 59% are reported to have recovered previously forgotten or repressed memories of childhood sexual abuse.[2] A similar study by Herman and Schatzow reported 28% patients had previous "memory deficits".[3] DSAC have failed to promote any speaker who challenges belief in this phenomenon.

Dr Broadmore implies that there is scientific evidence to support the theory of memory repression and accurate recovery through therapy. I challenge her to supply details of this research.

As Glaxo Foundation Fellow 1995, I have just completed a New Zealand tour speaking to doctors and other health professionals about the memory repression debate. Whilst belief in this theory might be held by a high proportion of DSAC doctors, it is my impression that the majority of my profession are sceptical of its validity.

In the past few years, hundreds, perhaps thousands of New Zealand women have recovered memories of having been sexually abused as children, mostly recalled whilst undergoing psychotherapy. A number of these have laid charges of rape in the Courts. As many professional bodies, Courts and academic institutions are now acknowledging,[4] regardless of whether a woman claims her memory of sexual abuse is recovered, partially recovered or continuous, without independent corroboration there is no way to determine whether her memory is an accurate account of what happened, or a sincerely believed-in pseudomemory about the past.

Felicity Goodyear-Smith
MB ChB DipObst MRNZCGP

1 Goodyear-Smith, Felicity, *First do no harm: the sexual abuse industry*, Benton-Guy Publishers, 1993.
2 Briere, John; Conte, Jon. "Self-reported amnesia for abuse in adults molested as children", *Journal of Traumatic Stress*, V0006 N1, Jan 93, 21-31.
3 Herman, Judith; Schatzow, E (1987). "Recovery and verification of childhood sexual trauma"; *Psychoanalytic Psychology*, 4, 1-14.
4 Groff, William, Presiding Judge (May 1995) Decree *The State of New Hampshire v Joel Hungerford* and *The State of New Hampshire v John Moran*, Hillsborough County Supreme Court. Australian Psychological Society (Oct 1994). *Guidelines relating to recovered memories.*

Case and Comment

Competition law and refusals to license intellectual property

Radio Telefis Eireann and another v European Commission ("Magill") [1995] All ER (EC) 416

In April this year the European Court of Justice (the EC's highest Court) delivered its long-awaited judgment in the *Magill* litigation. The Court held that a refusal to license the copyright in television programme listings amounted to an abuse of a dominant position under article 86 of the Treaty of Rome. This is possibly the first time that a Court in any jurisdiction has decided that retaining the exclusivity inherent in an intellectual property right can, in certain circumstances, infringe competition law. The case is significant for New Zealand and Australian practitioners because s 36 of the Commerce Act 1986 and s 46 of the Trade Practices Act 1974 are based upon article 86.

Magill concerned three television companies operating in Ireland and Northern Ireland. Under domestic law each company had copyright in its TV listings. The listings were essential for the production of a TV guide. In addition to containing the listings, TV guides also contained programme reviews, actor interviews, and TV related advertising (etc). The companies each published weekly TV guides for their own stations, and daily listings were available for all stations through newspapers. A single weekly TV guide containing listings for the stations owned by all three companies was not available. Magill, having obtained weekly listings in advance, sought to publish such a comprehensive weekly guide. Magill was immediately the target of an action for copyright infringement under domestic law, and Magill in turn alleged breach of article 86 under European Community law. The European Commission decided in favour of Magill, as did the Court of First Instance of the European Communities when the Commission's decision was appealed.

The European Courts had previously adopted the position that the exclusive right to reproduce the work (and hence to refuse a licence) related to the *existence* of the intellectual property right, rather than its *exercise*, because it fell within the "specific subject matter" of copyright. Therefore, applying this existence/exercise dichotomy, refusals to license were not an exercise of the copyright challengeable by competition law. The difficulty with the bright-line existence/exercise rule was that it was limited to simply characterising the type of conduct as being either exempt from, or subject to, competition law without considering the market context in which that conduct occurred. The soundness of the rule was questioned, but not resolved, in *A B Volvo v Erik Veng (UK) Limited* [1987] ECR 6211 at p 6260 para 8:

> . . . [A]n obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and . . . a refusal to grant such a licence cannot *in itself* constitute an abuse of a dominant position [emphasis added].

The Court in *Volvo* added that the exercise of an exclusive right might breach article 86 if it involved "certain abusive conduct", such as refusals to supply spare parts to independent repairers (p 6236 para 9). However none of the examples given in *Volvo* actually necessitated the *licensing* of the right, as opposed to the *supply* of the products produced under the right, to avoid article 86 liability.

Using the door opened by *Volvo* the Court of Justice held that the exercise of rights within the specific subject matter of the copyright (although this would technically relate to the existence of the right) could breach article 86 in "special circumstances". This effectively rendered the existence/exercise dichotomy meaningless.

The Court implicitly acknowledged that a compulsory licensing order should not be given where this would jeopardise the "essential function" of copyright, which is to reward the creator by preventing third party competition in respect of the products *covered by the copyright*. The difficulty in *Magill* was that while the Magill TV guide would compete with the guides produced by the companies, TV guides embrace fields of commerce beyond the immediate scope of the copyright in the listings, such as programme reviews (etc). A refusal to license listings by a *dominant* firm would inhibit competition in the market for these "secondary" products.

The Court recognised that "the mere ownership of an intellectual property right cannot confer" dominance (p 472 para 46). Normally there will be substitutes for a copyright work, but the nature of the copyright in this case meant that the TV companies enjoyed a "de facto monopoly" over the listings information necessary for inclusion in a TV guide. They were therefore dominant in this market.

The Court decided in favour of Magill on two grounds (pp 473-474 paras 54-56): First, the refusal to license had "prevented the appearance of a new product . . . which the appellants did not offer and for which there was a potential consumer demand". This was an abuse under heading (b) of article 86 as it limited "production, markets or technical development to the prejudice of consumers". Secondly the Court held that the appellants' refusal to license had "reserved to themselves the secondary market of weekly television guides by excluding all competition on that market".

Application to New Zealand

What does the judgment mean for New Zealand? The Commerce Act 1986 regulates the interface with intellectual property law through s 45 which has the effect that contracts, arrangements, or understandings relating to intellectual property that are purely permissive, and impose no restrictions beyond those caused by the intellectual property right itself, will be exempt from the Commerce Act. Section 45 is aimed at letting intellectual property rights holders divide and license the totality of their rights, as long as no collateral advantages are gained. However the exemption in s 45 does *not* apply to s 36.

Section 36 has its own intellectual property exemption in s 36(2) which provides that a dominant firm does not infringe s 36 "by reason only that [the dominant firm] seeks to enforce any statutory intellectual property right". But there is some uncertainty whether s 36(2) is intended to include refusals to license. The only references to s 36(2) in case law have been in respect of sham litigation (*Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641, 652 and *Telecom v Clear* [1992] 3 NZLR 247, 254). However the question may be academic. Even if the words "seeks to enforce" include maintaining exclusivity by refusing to license (as well as the more usual meaning of bringing legal action) the words "by reason only" in the section suggest that the defence could not be used where the intellectual property right is being used as leverage to gain power in a market not properly within the scope of the right. Therefore refusals to license may be considered under s 36.

Of the Court's reasons in *Magill* only the second would be applicable under the Commerce Act. Section 36 does not regulate the "monopolistic" practices of dominant firms per se, but only those practices that interfere with the competitive structure, or the competitive processes, of markets. In so far as a refusal to license would have the purpose of restricting activity in a secondary market (ie the market for TV guides) it would be subject to s 36. From this perspective the case is analogous to *Queensland Wire v Broken Hill* (1989) ATPR 40-295 where the refusal to supply the "Y-bar" component prevented competition in the secondary market of "star picket" fences.

A compulsory licence is an ineffective remedy unless a price is also specified, as the failure to do so would allow "constructive" refusals to license by excessive pricing. At what level then should the Court set the price? In *Queensland Wire* the dominant firm was ordered to supply at a price equal to that which would be charged in a competitive market. However in contrast to an order to supply tangible property, an order to license intellectual property would have to reflect the monopoly profits which are integral to the intellectual property incentive scheme. So an order for "non-discriminatory" pricing, as given by the Court of First Instance, will not equal pricing close to marginal cost. If a fee is set that includes monopoly profits then the net economic result is that the consumer pays the same price and the dominant firm will make the same monopoly profits. This is true even if the third party competitor is more efficient and drives the dominant firm out of the secondary market altogether. Even so it is likely that using an intellectual property right as leverage to gain power in a market beyond the scope of the right will be viewed as an anti-competitive evil in itself. Foreclosing competitive opportunities in the secondary market will lessen competition in that market which, *in the long term*, will lead to productive and allocative inefficiencies.

The current test for "use" may prove an obstacle to bringing refusals to license within the ambit of s 36. An intellectual property rights holder of any degree of market power may refuse to license purely for reasons associated with efficiency of exploitation. The Privy Council's test for "use" in *Telecom v Clear* [1995] 1 NZLR 385, 403 seems to preclude conduct that could be engaged in by competitive firms from ever amounting to the "use" of a dominant position. This narrow view of "use" looks only to whether dominance made the conduct possible rather than whether dominance caused the anti-competitive effect. In *Geotherm*, 650, Gault J took the wider view suggesting that "use" may be satisfied where dominance gave the anti-competitive "force" to the actions. Obviously a non-dominant intellectual property rights holder could refuse to license, but they would be *unable* to use the right to leverage to obtain collateral advantages. A dominant firm would not have this problem. Interestingly in *Magill* the Advocate-General took the opposite approach to the Privy Council's test commenting that article 86 existed because "[m]any forms of commercial conduct will, in fact, only affect the proper functioning of the common market in so far as they are engaged in by [firms] in a dominant position" (p 433 para 52).

International trend

It may be possible to view *Magill* as a product of the particular circumstances of the case, but more probably it signals a general international trend that, while the scope of intellectual property rights continues to grow, the use of those intellectual property rights will increasingly be subject to antitrust scrutiny. The ramifications of *Magill* extend to computer software, information technology, the anti-competitive use of functional copyrights, and even to patent law. However intellectual property practitioners need not be too alarmed by *Magill*, as a reasonable refusal to license, without an anti-competitive motive, is unlikely to ever infringe s 36.

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Apology

The Editor has been chided by a male District Court Judge for a careless omission in the report at [1995] NZLJ 292 of the appointment of Her Honour Justice Elias. The report made reference to "the only other New Zealand woman Judge, Dame Silvia Rose Cartwright". As has been quite correctly pointed out there are fifteen other women Judges, being Judges of the District Courts. The failure to identify Dame Silvia Cartwright as being the only other woman Judge of the High Court is inexcusable. It is acknowledged that the rebuke was entirely justified. An apology is tendered accordingly to the women District Court Judges. □

Solomon Islands Appeal Court sitting

Remarks by the Hon Justice Michael Kirby, President of the Court of Appeal of Solomon Islands.

On 28 August 1995 the Hon Justice Michael Kirby was sworn in as President of the Court of Appeal of Solomon Islands. The other two members of the Court are Justice Savage, formerly a Judge of the High Court of New Zealand and before that Solicitor-General of New Zealand, and Justice Palmer who is a native of Solomon Islands who did his law degree at Otago University. Justice Kirby's remarks about the possibility that had existed at an earlier time of building a Privy Council to sit in the region of Australia, New Zealand and the Pacific Islands is of course particularly apposite at the present time.

Your Lordship the Chief Justice, your Lordships, Attorney-General, President of the Solomon Islands' Bar Association, Your Excellencies, ladies and gentlemen.

I am very conscious of the honour you have done me by inviting me to take up the office of President of the Court of Appeal of Solomon Islands. I have just been sworn into office at Government House by His Excellency the Governor-General (Sir Moses Pitakaka). I express thanks for the warm welcome which Their Excellencies extended to me at Government House and to you for the welcome now received in this Courtroom.

This is the ninth time that I have taken the Oath of Allegiance to Her Majesty the Queen and the Judicial Oath; but it is the first time that I have taken such an oath to the Queen in her capacity as Queen of Solomon Islands. These are repeated and timely reminders of the fact that those who lead also serve.

This ceremony is the fourth time in which I have been welcomed to a new judicial office. The first was long ago in December 1974 when I was appointed as a Deputy President of the Australian Conciliation and Arbitration Commission. In 1983 I was welcomed as a Judge of the Federal Court of Australia. In 1984 I was welcomed as President of the New South Wales Court of Appeal. And now, I have the honour to preside in this Court.

At my welcome in the Supreme Court of New South Wales, the words of praise and reassurance from the assembled Bench and Bar were hardly still in the air but I was whisked away to preside in the busy motion list of that Court. Indeed, I have a feeling that, if he could have done so, the Judge who organised the welcome ceremony in 1984 would have had me disposing of motions during that ceremony. Things are not so different in Solomon Islands. Within a few minutes of the close of this ceremony, I will be busily at work hearing my first appeal. Appeal Courts around the Commonwealth, it seems, are invariably busy places. But it is no bad thing to mix ceremony and work. And to remember that each has its place in the law: but that work has primacy.

I wish to pay tribute to Your Lordship the Chief Justice. Sir John Muria has made me feel most welcome in the company of the judiciary of Solomon Islands. From the time he first approached me in relation to this office to this day, he has shown friendship and brotherly cooperation. So have the other Judges of the Court whom I have met, his Lordship Mr Justice Savage and his Lordship Mr Justice Palmer. In time, I will come to know all of the Judges of the Court and this will be a great experience for me.

I must also pay tribute to the warmth of the welcome extended by the Attorney-General and Government of Solomon Islands and by the Bar. In a common law country, such as Solomon Islands, the Bar comprises persons who are absolutely essential to the proper working of the system. They assist and support the Judges in the exposition and development of the law. I look forward to working closely with them and I express thanks for their welcome.

I should also pay tribute to my distinguished predecessor, Mr Justice Peter Connelly. He served on this Court from 1982 until this year. From 1987 to the conclusion of his service, he was President. Since the offer of my appointment I have spoken with him. He has given me every encouragement and support as I assume this office. I know from speaking with him that he retains a special corner of his heart for Solomon Islands and its people. He spoke most warmly of the privilege of serving in this office.

The opportunity to sit in a Court comprising Judges of common law countries around the Pacific is a great occasion to realise our shared traditions. If only there had been more imagination at an earlier time, it might have been possible to build a Privy Council sitting in our region, comprising Judges of the Commonwealth countries of our region. This opportunity slipped through the fingers of distracted leaders who lacked the imagination at a time when it was possible. But here in the Solomon Islands Court of Appeal we have built a truly trans-Pacific Court. The Judges come from Solomon Islands, Australia, New Zealand, Papua New Guinea and beyond. Sitting with each other, and working with each other, will provide new insights into our own legal systems

which can only be of benefit to the law as a servant of the people in this part of the world.

The Chief Justice has mentioned that one of my tasks is to be Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. What a contrast exists between the stable institutional arrangements of the law in Solomon Islands and Australia and the instability in Cambodia, born of revolution, war, genocide and invasion that has been Cambodia's recent history. The Khmer Rouge, which instituted the period of genocide, hated law and killed Judges and lawyers. They sought a society without law. They began again with a "year zero". In such a society there remains the law of power. The law of the gun. How much better it is to resolve conflicts in Courtrooms than by bloodshed and violence.

In Cambodia I have been engaged in the training of the new Judges. Most of them were formerly teachers. They are striving to recreate in their country what we, to a large extent, can take for granted: the institutions of the administration of justice.

Reflecting upon this contrast in the tasks that have engaged me within the space of two succeeding weeks, brings home to me (as I hope it does to all who hear these words) the blessings which we enjoy, living in a society ruled by law. The Judges especially are aware of the many faults of our legal system: principally of delay, cost and practical inaccessibility of justice to many. But for all those many faults, there are great blessings which we should daily count. They include the independence of the judiciary from the other branches of government; the existence of an uncorrupted judiciary deciding cases on its merits; the energy of a vigorous legal profession standing up for its clients' rights with courage and determination; the acceptance of fundamental human rights and the enshrinement of those rights in the constitution and the laws; the principle of the rule of law itself which permeates all laws and institutions and sustains our societies; the existence of orderly reform of the law and the vision of the law as a means of defending and advancing social justice. We, the current Judges and legal practitioners, must strive to be worthy of the strengths of the system. Whilst it is in our charge, we should bend our efforts to sustain and strengthen these features which we have inherited.

The full impact of my appointment to this office did not really strike me until I was in church yesterday. I attended the morning service at the Cathedral Church of St Barnabas in Honiara. A thousand congregants joined in a service of great spiritual force. When the choir proclaimed the first hymn, I was arrested by the magnificent singing – the harmonies of the Pacific joined in the praise of the Lord. The choir of this cathedral has no rivals in any church that I have attended in the Commonwealth, unless it be at Westminster Abbey.

The Dean of the Cathedral commenced the service with prayers for the Judges and the Magistrates of Solomon Islands. His sermon was shorter than these remarks – a great blessing in a cleric. He emphasised, in the context of the Church, a message which is of significance for the Judges. He urged the importance of putting substance over form. He described the way in which the Church can often make the mistake of giving primacy to form rather than substance. It was a message particularly apt for a new Judge and I shall take it to heart.

At the end of the service, although he did not know us or why we were there, the Dean asked Justice Savage, his wife and me to stand to be greeted. And greeted we were with applause of friendship from the assembled congregation.

The important feature of the service which immediately attracted my attention was that not a single expatriate officiated in its conduct. The churches are stronger in Solomon Islands because they have taken root, deep and permanent, in the fertile soils of these Islands. No cyclone and no human intervention can ever remove this inherited work of spiritual missionaries. So it must be with the law. The work of legal missionaries must finish. The common law must be planted deep and strong in the soil of Solomon Islands. Its institutions must, before long, draw exclusively upon the people of Solomon Islands. Then its survival and advancement will be sure indeed.

And so we conclude this ceremony and turn to work. I will, in the words of the oath which today I have taken for the ninth time, perform my duties without fear or favour, affection or ill-will. This is a promise I have made to the people of Solomon Islands. The period during which I hold this office, whether it be long or short, will be devoted to the fulfilment of that promise. The words of praise and thanks that I have received this morning are greatly appreciated by me. The privilege of service is mine. I shall do my best. □

Solomon Islands

For those whose geographical, historical and demographic knowledge of the Solomon Islands is not as great as it should be, the following extract from the Random House Encyclopaedia should be helpful.

Solomon Islands, independent nation in W Pacific, E of Papua New Guinea, extends for 900mi (1,450km), composed of seven large volcanic islands and many small islets; northernmost islands of the Solomon Archipelago are part of Papua New Guinea. The Solomons were discovered (1568) by the Spaniard Álvaro de Mendaña. By 1900 the Solomons had become a British protectorate. In 1942, Japan invaded the Solomons, and they were recaptured the following year by US forces only after fierce fighting on Guadalcanal. In 1976 the islands were granted internal self-government, becoming fully independent within the Commonwealth of Nations in 1978. Since then the principal political issue has been decentralization of government to the country's four far-flung districts. The people are overwhelmingly Melanesian, with about 90% of the labor force engaged in subsistence agriculture. Formerly, copra was virtually the only export, but because of a successful government diversification program launched during the 1960s, timber and palm oil are now also leading sources of income. Area: 10,938 sq mi (28,446 sq km). Pop. 221,999. Capital: Honiara.

The right to a trial without undue delay:

What are the principles after *Martin v District Court at Tauranga*?

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

This article is concerned with the issue of a permanent stay of proceedings in a criminal prosecution as in the recent case of Martin. *Ms November reviews cases in a number of jurisdictions, and concentrates more particularly on the Canadian case of* Morin.

Section 25 of the New Zealand Bill of Rights Act provides:

> Everyone who is charged with an offence has . . .
> (a) The right to a fair and public hearing by an independent and impartial court.
> (b) The right to be tried without undue delay.

In *Martin v District Court at Tauranga and Attorney-General* [1995] 2 NZLR 419, (1995) 12 CRNZ 532, 534, the President of the Court of Appeal expressly adopted the majority approach in the Canadian decision of *Morin* [1992] 1 RCS 771, regarding the factors to take into account when considering the s 25(b) right. McKay J agreed with Cooke P but neither Casey J (who preferred the minority opinion in *Morin* regarding prejudice to the accused) nor Hardie Boys J expressed agreement on this point, and Richardson J found it unnecessary to embark on a consideration of principles in order to determine the case. As to remedy for a breach of the right, although all agreed that a stay was appropriate in the case, all but the President suggested other options should be available in some cases. In the absence of clear guidance from a majority of the Court of Appeal it is submitted that puisne Courts in New Zealand could follow *Morin* and the Canadian majority approach or could follow the Privy Council where it has considered principles applicable to constitutional rights to a trial without undue delay, in particular when the right has been embodied in a written constitutional document similarly worded to the New Zealand Bill of Rights Act.[1]

A. Written constitutional provisions for a right to trial without undue delay – the development of guidelines

The Sixth Amendment of the United States Constitution requires that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. In *Barker v Wingo* 407 US 514, 530-532 (1972) Powell J identified four factors which His Honour thought Courts should assess in determining whether an accused has been deprived of his right:

(1) the length of the delay, noting that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge".
(2) the reasons given by the prosecution to justify the delay, noting that "a deliberate attempt to hamper the defense should be weighed heavily against the government" while "overcrowded courts should be weighed less heavily . . . Finally a valid reason, such as a missing witness, should serve to justify appropriate delay".
(3) the responsibility of the accused for asserting his rights. This is not a legal obligation to assert rights. "Whether and how a defendant asserts his rights is closely related to the other factors we have mentioned . . . The more serious the deprivation the more likely a defendant is to complain."
(4) Prejudice to the accused, which should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect:
(i) the prevention of oppressive pre-trial incarceration;
(ii) the minimisation of the anxiety and concern of the accused; and
(iii) the limiting of impairment of the accused's defence.

The *Barker v Wingo* principles were approved by the Privy Council in *Bell v DPP* [1985] AC 937, a decision on s 20 of the Jamaica (Constitution) Order in Council 1962 which provides:

> Whenever any person is charged with a criminal offence . . . he shall . . . be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.[2]

In *Bell v DPP* their Lordships acknowledged "the desirability of applying the same or similar criteria to any constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings." (953)[3]

The Canadian Charter of Rights and Freedoms states:

> Section 11. Any person charged with an offence has the right . . .
> (b) to be tried within a reasonable time.

Application of this section led to a number of Canadian decisions in which the *Barker v Wingo* principles were applied by Provincial Courts of Appeal (see *Mills v R* 52 CR (3d) 1 at 69) but disapproved by Lamer J (as he then was) in his dissenting judgment in *Mills*. In *Mills* Lamer J's four factors were:

(1) the growing impairment of the interests of the accused by the passage of time;
(2) waiver of time periods;
(3) the time requirements inherent in the nature of the case; and
(4) institutional resources. (69-70)

Although Dixon CJ concurred with Lamer J their minority opinion did not gain acceptance in subsequent decisions, where the *Barker v Wingo* principles have been essentially refined and expanded, though influenced by Lamer J's considerations. In *R v Morin* [1992] 1 RCS 771, 787 Sopinka J listed the factors (distilled from earlier decisions) to be considered in analysing how long is too long, as follows:

1 the length of the delay; [*Barker v Wingo* no 1]
2 waiver of time periods; [Lamer J, no 2]
3 the reasons for the delay [*Barker v Wingo* no 2] including
   (a) inherent time requirements of the case, [Lamer J, no 3]
   (b) actions of the accused, [compare *Barker v Wingo* no 3] Sopinka J emphasised that there is no legal obligation to assert the right but that "action or non-action by the accused which is inconsistent with a desire for a timely trial is something the Court must consider." (802) Indeed such non-action was the accused's undoing in *Morin*.
   (c) actions of the Crown.
   (d) limits on institutional resources, [Lamer J, no 4] and
   (e) other reasons for the delay; and
4 prejudice to the accused.[4] [*Barker v Wingo* no 4] (p 787-8).

In *Martin v District Court at Tauranga* a minority of the Judges (Cooke P and McKay J) has adopted the *Morin* guidelines. Richardson and Hardie Boys JJ have not thought it appropriate to comment on this point, and Casey J agreed with Lamer CJ's dissent in *Morin* as to the prejudice factor. Clearly the prejudice factor is one important issue which the Court of Appeal will have to resolve.

The prejudice factor

In *Morin* Lamer CJ agreed with the principles set out by Sopinka J except as regards proof of prejudice, (777). Lamer CJ was clear that there is a general presumption of prejudice to the accused and the onus is therefore on the Crown to demonstrate that the delay caused no prejudice to the accused. In contrast the majority in *Morin* found that although prejudice can sometimes be inferred by a very long delay the accused may have to adduce evidence (of for example ongoing stress or damage to reputation) regarding actual prejudice.[5]

In one sense prejudice is axiomatic from the moment a person is accused of committing a criminal offence; the presumption of innocence cannot prevent society treating that person as someone who may be a criminal and even a trial within a reasonable time, even indeed an acquittal, will not necessarily undo the consequences of that prejudice.[6] Some prejudice must always be presumed; whether there has been over much prejudice depends to some extent on the length of time factor.[7] But as Powell J said in *Barker v Wingo* what may be a reasonable length of time for a complex fraud or conspiracy trial is not necessarily reasonable for a simple street crime. Thus what amount of prejudice is too much will vary from case to case. In these circumstances it is submitted that it is in the accused's interest to prove actual prejudice on the balance of probabilities, this being within his or her knowledge, and not to rely on presumed prejudice.

As to evidence of prejudice, in *Morin* Sopinka J thought that

> prejudice to the accused's security interest can be shown by evidence of the ongoing stress or damage to reputation as a result of over long exposure to the "vexations and vicissitudes of a pending criminal accusation" to use the words adopted by Lamer J in *Mills*[8]

and

> the accused may rely on evidence tending to show prejudice to his or her liberty interest as a result of pre-trial incarceration or restrictive bail conditions. (802)

Presumably loss of a witness who would have testified in corroboration with an accused's alibi or other defence could prove prejudice to fair trial interests.

B Balancing the accused's interests and society's interests

As well as considering the four factors, many Judges mention balancing the interests of the accused and the interests of society.[9] The right to trial within a reasonable time is not an absolute right as Lamer CJ noted in *Morin*.[10] Because of this it is necessary to look at the context of the right (relevant to whether there has been undue delay) and other possibly competing rights and interests of, for example, society and of the victim (relevant to consideration of remedy, it is submitted).

1 The right to trial without undue delay in context

In *Bell* the Privy Council said:

> in giving effect to the rights granted by . . . the Constitution of Jamaica, the courts of Jamaica must balance the fundamental rights of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica. (953)

This was endorsed in *Mungroo v R* [1991] 1 WLR 1351 (PC) where Lord Templeman stated:

> The expressed constitutional right contained in section 10 [of the Constitution of Mauritius] to a hearing of a criminal case within a reasonable time injects the need for urgency and efficiency into the prosecution of offenders and demands the provision of adequate resources for the adminis-

tration of justice but, in determining whether the constitutional rights have been infringed, the courts must have regard to the constraints imposed by harsh economic reality and local conditions.

Cory J in *Askov* similarly discussed variations of local geography, population and resources throughout Canada in terms of systemic delay (301-303). What constitutes delay and what amounts to delay will vary according to time and place[11] and all these matters must be taken into account in considering whether the right to trial without undue delay has been breached.

2 The accused's interests

The US Supreme Court has listed the interests that the right is designed to protect as:

(i) the prevention of oppressive pre-trial incarceration;
(ii) the minimisation of the anxiety and concern of the accused; and
(iii) the limiting of impairment of the accused's defence: *Barker v Wingo* (532).

As for the individual interests protected, Sopinka J in *Morin* listed these as:

> (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial.
>
> The right to security of the person is protected in s 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. [*Barker v Wingo* (ii)] The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. [*Barker v Wingo* (i)]. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh. [*Barker v Wingo* (iii)] (786)

It is important to note too, as the Privy Council did implicitly in *Bell*, that an individual has a right to a trial simpliciter (954) in order that guilt or innocence can be fairly established. This relates to protection of the security interest.

Thus there seems to be judicial agreement generally that the purpose of the individual right sought to be affirmed by speedy trial guarantees is protection of security, liberty and a fair trial. But some Judges, notably Lamer CJ, have made a clear distinction between the pre-trial interests of security and liberty (which they consider protected by the right to a speedy trial) and the right to a fair trial. His Honour noted that the concept of trial within a reasonable time has been closely associated with the remedies of habeas corpus and bail. (*Mills*, 64.)[12] Certainly the Habeas Corpus Acts of 1640 onwards allowed the release of persons committed for treason or felony if not indicted in the second term after their committal, and so protected the liberty interests of the accused, but that is a limited view of the purpose of right to a trial within a reasonable time. Some modern charters of rights have re-enacted Habeas Corpus Acts in their speedy trial guarantees, providing for trial without undue delay, or release.[13] But others such as the New Zealand Bill of Rights Act are not phrased disjunctively, indicating a wider purpose of protecting liberty, security and fair trial interests, even though these latter interests may be also separately protected by the right to a fair trial.

As Cooke P said in *M*, although the rights are made separate in the Bill of Rights Act (as in the Canadian Charter)

> that does not exclude the possibility of some overlapping . . . Undue delay before the commencement of trial may affect the fairness of trial, as by resulting in the unavailability of witnesses or by evidence less reliable because of the dimming of memories of witnesses, but that consideration is more relevant under (b). (532).

Later His Honour cited Lord Templeman in *Mungroo*:

> The right to a trial "within a reasonable time" secures first, that the accused is not prejudiced in his defence by delay [fairness] and, secondly, that the period during which an innocent person is under suspicion and any accused suffers uncertainty and anxiety is kept to a minimum. [security] (535).

3 Society's interests

Cory J in *Askov* 79 CR (3d) 273, 297-300, said that society's interests (the collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law) were addressed impliedly in s 11(b). Lamer J in *Mills* (64) on the other hand stressed that society's benefit from the prompt prosecution of criminal cases is a by-product of the s 11(b) right, not its object. In *Morin* Sopinka J stated that the "primary purpose of s 11(b) is the protection of the individual rights of the accused. A secondary interest of society as a whole has however been recognised by this Court". This is the interest "in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly" (which interest parallels that of the individual) and also the interests of society in law enforcement (786-787).

4 Victims' interests

The rights of victims of alleged crimes, too, need to be acknowledged and considered in the balancing process. Brennan J in the High Court of Australia in *Jago v District Court of NSW* (1989) 168 CLR 23, emphasised the immediate community interest in the administration of criminal justice to guarantee peace and order in society. Further His Honour thought that the interests of the community and of victims of crime seem to be overlooked:

> The victims of crime who are not ordinarily parties to prosecutions on indictment and whose interests have generally gone unacknowledged until recent times, must be able to see that justice is done if they are not to be driven to self-help to rectify their grievances. (49-50).

C Remedy

In *Martin* Cooke P said that a standard remedy under the Bill of Rights should logically be a stay; if there is found to have been undue delay a trial would be a breach of the right to be charged without undue delay. But as Professor Amsterdam has argued[14] remedy for breach should be related to the interests

breached. The right has been seen as a single indivisible right which either is or is not breached by delay, but it should be seen as protecting three separate interests (security, liberty and fairness). In this writer's view it is also necessary to relate remedy to the rights of society and of victims of alleged crimes. Amsterdam says:

> Surely the primary form of judicial relief against denial of a speedy trial should be to expedite the trail not to abort it . . . If the sole wrong done by the delay is "undue and oppressive incarceration prior to trial" the remedy ought to be release from pre-trial confinement; if prolongation of the anxiety and other vicissitudes "accompanying public accusation" is sufficiently extensive, the remedy ought to be dismissal without prejudice; and it is only when delay gives rise to "possibilities [of impairment of] the ability of an accused to defend himself" or when a powerful sanction is needed to compel prosecutorial obedience to norms of speedy trial which judges cannot otherwise enforce, that dismissal of a prosecution with prejudice is warranted. . . . Obviously if a criminal prosecution is sufficiently well founded to be instituted, it should usually proceed to disposition on the merits . . . it seems intolerable that "the criminal should go free because the system blundered". (535-6).

In *Martin* members of the Court of Appeal other than the President questioned whether a stay was the minimum remedy. Richardson J suggested that where the delay has not affected the fairness of the ensuing trial the trial should be expedited rather than aborted and the breach of s 25(b) should be met by an award of monetary compensation (539). Hardie Boys J suggested bail if a person was in custody or an order for an early trial in other instances (545). McKay J also proposed an early trial date unless the delay was inordinate and inexcusable (546).

D Conclusion

It is suggested that New Zealand Courts could either follow the Privy Council's adoption of *Barker v Wingo* in *Bell*, or the Canadian Supreme Court's expansion and refinement of these factors in *Morin*. Both approaches should lead to similar results.

As to remedy, this writer agrees that there are alternatives to a stay and submits that a permanent stay is generally only appropriate when the fair trial interest of the accused is in jeopardy. For as Brennan J put it:

> Refusal by a court to try a criminal case does not undo the anxiety and disability which the pendency of a criminal charge produces, but it leaves the accused with an irremovable cloud of suspicion over his head. And it is likely to engender a festering sense of injustice on the part of the community and the victim . . . if permanent stay orders were to become commonplace it would not be long before the courts would forfeit public confidence. (*Jago*, 50.)[15] □

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1 There is also a body of persuasive common law jurisprudence on constitutional rights to trial without undue delay and remedies, some of which has been of assistance to New Zealand Courts in the past and, it is submitted, can still assist in the future. See "From Magna Carta to the Bill of Rights", forthcoming article by this writer.

2 See also *Mungroo v R* [1991] 1 WLR 1351 (PC) regarding the Constitution of Mauritius, s 10(1) of which provides: "Where any person is charged with a criminal offence, then, . . . the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

3 *Bell* was followed by the Australian state Courts in for example *Kintominas v AG for NSW* (1987) 24 A Crim R 456, 461, *Aboud v AG for NSW* (1987) 10 NSWLR 671, *R v Clarkson* [1987] VR 962 and other cases mentioned by Paul Byrne in "The Right to a Speedy Trial" 1988 ALJ 160. But see now *Jago v District Court of NSW* (1989) 168 CLR 23, where the Australian High Court concluded that there was no constitutional right to a speedy trial as such at common law. However Deane J slightly adapted and expanded the *Barker v Wingo* factors in considering delay as abuse as process. See forthcoming article, above n 1.

4 See *Askov v R* 79 CR (3d) 273, 306-308 per Cory J for a summary of aspects of the factors.

5 An alternative approach is not to utilise the burdens of proof concept but to balance the factors to consider against each other. Thus Lord Mustill giving the advice of the Privy Council in *Tan Soon Gin v Cameron* [1992] 2 AC 205, 225 said: ". . . the longer the delay the more likely it will be . . . that the delay has caused prejudice to the defendant", but that nothing was to be gained by the introduction of shifting burdens of proof.

6 As Deane J said in the Australian High Court decision *Jago*, above n 3, 55, an innocent person accused of wrongdoing may suffer undeserved mental, social and often financial damage.

7 Prejudice does not necessarily increase through lapse of further time especially prejudice of the fair trial interest; fading memories and disappearing witnesses can assist the defence probably more than the prosecution.

8 From AG Amsterdam "Speedy Criminal Trial: Rights and Remedies" [vol 27, 1975] Stanford Law Review, 525, 535.

9 Sopinka J in *Morin* eg at 787 "the interests of the accused must be balanced by the interests of society in law enforcement".

10 At 82: "Of course it is obvious that s 11(b) is not an absolute right; few rights if any can be considered absolute".

11 See McHugh JA in *Aboud v AG* (above n 3): "Considerations applicable in an age when cases depended upon oral evidence of a few witnesses are not comparable with cases where great masses of documents must be analysed and put together." (695)

12 See also McHugh JA in *Aboud v AG* (above n 3) at 694 following Lamer J in *Mills*. McHugh JA contends that the right to a speedy trial was secured by Habeas Corpus Acts.

13 The Hong Kong Bill of Rights Ordinance 1991 provides in article 5:
"(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."
This wording is taken from Article 9(3) of the International Covenant on Civil and Political Rights 1947. It essentially protects the liberty interests of an arrested person. Fair trial interests are protected separately in both these documents – see article 14(3)(c) of the International Covenant and article 10 of the Hong Kong Bill of Rights.

14 Above, n 8.

15 At Common Law the Privy Council and the High Court of Australia, exercising the Courts' inherent power to prevent abuse of process have held they may only intervene to stay proceedings if it would be oppressive and vexatious to allow them to continue. In *Tan v Cameron* (above n 5) 223-4, the Privy Council approved Lord Lane CJ's dicta and test in *AG's Reference* [1992] QB 630, 644: ". . . no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held", though noting that long delays may lead to presumed prejudice so the question should be considered "in the round". (*Tan*, 225.) Mason CJ in *Jago* approved Wilson J's test in *Barton v R* (1980) 147 CLR 75, 111: "to justify a permanent stay there must be a fundamental defect which goes to the root of the trial 'of such a nature that nothing that a trial court judge can do in the conduct of the trial can relieve its unfair consequences'" (*Jago*, 34).
In *AG of Hong Kong v Cheung Wai-Bun* [1994] 1 AC 1, 8, (a case on the Hong Kong Bill of Rights Ordinance, above n 13) the Privy Council recognised that it was possible to argue that there should be a different approach under the Bill to that at common law but no pronouncement was made on this point.

Good news from Emgeoo (MGU)

By Nigel Jamieson, Law School, University of Otago

This is the second of three articles by Mr Nigel Jamieson regarding his experience earlier this year when he attended a course at Moskovskii Gosudarstvenii Univyersityet Imeni MV Lomonosova, known as MGU, that is, Emgeoo. The first article about life in Moscow for foreign students was published at [1995] NZLJ 219. The concluding article will be published next month.

How long does it take to travel to Moscow? Like any question of abstract jurisprudence the answer for many still lies in Lewis Carroll's *Wonderland*. The classic case is that of New Zealand's greatest linguist Harold Williams who first had to unfrock himself from the Methodist clergy to get to Moscow. He spoke over forty languages but his Inglewood parishioners felt him to be insufficiently fluent in his native English. Having reached Russia as Moscow correspondent to the *Manchester Guardian*, he eventually resigned because, as a matter of conscience, nothing seemed to be happening in Moscow. Later, Williams would become instrumental in determining British foreign policy towards the Bolsheviks – a far cry from his hesitancy of speech in Inglewood. The Leninist Litvinov called him "Russia's greatest enemy" – a remarkable role for someone who was turned out of preaching because he couldn't speak plain enough for folk in Taranaki. My colleague Ian Williams, teaching law in our southern citadel of plain speaking down here in Dunedin, is a relative of Harold Williams. Dunedin is now as close as one can get to Litvinov's greatest enemy, better known to other Russians as *The Cheerful Giver*. Small world, isn't it, although its belly-button is obviously still Otago.

It was another New Zealander, former communist and future Fletcher's executive George Fraser, who wrote of the things he did for Stalin with *Both Eyes Open*. Of course we were all comrades with Uncle Joe through the Second World War. But then came the Cold War and the building of the Berlin Wall. The Scots poet Hugh MacDiarmid would be thrown out of the Scottish National Party for being a communist and thrown out of the British Communist Party for being a nationalist. "I'll hae nae hauf-way hoose, but aye be whaur extremes meet", wrote MacDiarmid. "A great poet", wrote the greater poet Evtushenko of MacDiarmid, "but politically crazy". Scotland's pride becomes Scotland's fall, but do Kiwis still recall the contretemps caused by Mrs Boswell, the wife of New Zealand's first consul, who was accused of "shutting one eye during her years in Moscow"? Every Johnson has his Boswell, but in this case the legation's first lady wrote a series of articles attacking the Soviet Union – only to be derisively contradicted by Ruth Lake, formerly the legation's third secretary, with her account of *My Years in Mrs Boswell's Moscow*. The good news now from Emgeoo is that such things don't matter. This change of heart makes sense of much that made nonsense before, and now makes nonsense out of much else that then made sense.

Despite the end of the Cold War, East-West relations still remain a risky area in which Irishisms abound. Look at Afghanistan's freehold embassy in Moscow. It was gratefully given by the Soviets because Afghanistan was the first to recognise the Soviet Union. By representing one of the last nations to withstand Soviet aggression, however, it also stands for the collapse of the Soviet Union brought about by the invasion of Afghanistan. Looking westwards is much the same. Witness the impressive plaque to be found in the lobby of the CIA. It quotes from John's Gospel that "the truth shall set you free". Like meeting up with Jeremy Bentham's mummy in London University, one is not quite sure what to make of the experience; except to note that the heavily marbled lobby of the CIA is strangely reminiscent of Dunedin's railway station as well as of many stations on the Moscow metro. The very ancient Greeks believed the earth to be hollow with exits and entrances at key positions so that the real rulers of society who were always spelunceans living underground could pop up here and there whenever world events needed them. New Zealanders are like that, but probably the only thing all these suitably marbled mausoleums have in common is the same Pharaic-Egyptian style of architecture.

Today's tourists on the golden ring of ancient cities in central Russia little realise how a whole generation of serious students of Soviet affairs have patiently waited a lifetime just to get there. In my own case, from the time of modestly opening Semeonoff's *New Russian Grammar* in the Wanganui Public Library until stepping off the plane in Moscow's Sheremyetevo airport, the question of how long it takes for any New Zealander travelling to Moscow becomes one of elementary arithmetic. The answer, almost exactly to the day, is forty years.

The once and future spy

There is an irony in having waited a lifetime to visit Moscow rather than be mistaken for a spy. As Twining has pointed out in *Blackstone's Tower*, to be a lawyer is now enough in the public eye to make one a spy. The result for lawyers is like living out one of Kafka's short stories – the one in which he who patiently waits his turn to get into heaven, unlike those who impatiently push past him, never gets there. Think of what it means to have become a lawyer while waiting around in the wilderness, rather than visit Moscow and be considered a spy,

when to be a lawyer has become enough by itself to be considered a spy without even visiting Moscow. Poetic justice!

Spying is said to be a state of mind. Because stable states of mind sometimes refuse to respond to changing worlds, spying may be the symptom of an extremely static mind. Sometimes the spying is subconscious, as for Sir Anthony Blunt who admitted the deeds but denied the spying. His view was that whereas the West had renounced the East after defeat of their common enemy in World War II, he had kept faith with his Soviet comrades just as he had been ordered to do during the War. Static minded lawyers like myself who still stay steadfast to Dicey's Rule of Law have thus been fairly warned. Doubtless it would have been different had the no-longer Sir Anthony stood up and spoken his mind before he was discovered – although that did not avail William Joyce, known for his idiosyncratic laugh as Lord Haw-Haw, in *DPP v Joyce* [1946] AC 347. Nothing could have been more public than Lord Haw-Haw's anti-British views which he broadcast all over Europe, but after the war he was tried for treason and hanged for the static state of mind in which he had forgotten to cancel his British passport.

Because spying is done in secret, the perfect spy is prone to overlook his own subconscious. This considerably complicates the chances for the spy's survival, as portrayed by Robert Littell's *Once and Future Spy*. Without any reference to his own subconscious, the spy is accordingly always the tourist but never the traveller. Intellectually curious but somewhat effete, he is suspiciously like the scholar on sabbatical – until now when accountability for academic work puts an end to the sabbatical, and the end of the sabbatical, in letting ideas lie fallow for every seventh year, puts an end to scholarship.

There are obvious risks for scholarship in spying out the truth – which is one reason why serious Sovietologists rarely mention spying – but Twining has made the subject of spying the leading issue of the legal profession's public relations. Perhaps, with the end of the Cold War, the next generation of international spies will work in counter espionage. This will give rise to a legal profession of whistle blowers. Twining's view from *Blackstone's Tower* on the score of spying could be wrong for the present but right for the future – the next generation of spies will be doing the previous generation's work of constitutional lawyers. Most big law firms are already retooling their profession. Unless I am reliably disinformed, big business has already introduced the sabbatical. Where else would all our ideas for renewing our legal system come from if not from businesses big enough to let small ideas lie fallow every seventh year.

Due process perfects the purpose

There is no more serious student of Sovietology than the wandering Jew. Often the study has been required simply for his own survival. In the same way, it is not surprising that, after having spent a lifetime travelling to Moscow, one should focus on the process of getting there rather than achieving one's aim. Our own legal system of the common law concentrates on adjectival rather than substantive law in much the same way. For the moment we may overlook our own Chechnyan rebellion of new-look legislation. Besides, there are good literary reasons, apart from keeping faith with one's own experience, to encode every text within its widest possible context and so pull the punchline in writing about Russia.

The collapse of communism was won by circumlocutionary prose. It was by writing round and round and round about the subject that Solzhenitsyn could enable the Soviets to identify *One Day in the Life of Ivan Denisovich* as being their day also. Our own tabloid press is very different. It starts off each day's revolution with a headline. The history of journalism explains the rise of the headline, the withering away of sequential argument, and the machine-gun like staccato of simple-sentenced construction as the result of paper shortage in wartime. By decree dated 10th October 1918 the Soviets reformed the Russian alphabet with the same purpose in mind of resource-managing a paper shortage. The New Orthography uses far less paper than the Old Imperial. The forcefulness of this world-wide journalistic revolution has yet to be documented for the proponents of purpose-driven legislation. It reverses the usual course of argument in the West by beginning with the conclusion and ending with not much more than one began.

Bigger countries, like bigger statute books, need bigger literary buildups of a longer lasting explosive force. Nevertheless the bolshevik revolution took little more than a single lifetime to collapse. A few flashy headlines on human rights or resource management, however captivating to the political imagination, are not going to avoid the intense sequential argument required by the process of refining truth. For common law, this can only come about through the Courts by the ensuing nitty-gritty litigation. As for the heyday of the common law, this controlled reaction of a longer lasting explosive force required more attention to the formal process and procedural means of legislation than to proclaiming its preferred purpose and insisting on its desired end. Funnily enough for our own society, when directed to an outcome that was expected to take care of itself, the expression "She'll be right!", was not only the most forceful of feminist compliments to women, but the most forceful expression of trust in one's fellow men.

The West is blessed by its ignorance of Soviet legislation. Otherwise the glasnost-like quality of the former Soviet Constitution proclaiming "a society whose law of life is the concern of all, and one in which all power belongs to the people" would have turned many Western heads in the same direction of self-referential, and ultimately self-reverential travel. Learning from the Soviets is so suspiciously like spying that we shrug off the scholarly pride that puts an end to blissful ignorance. Can we accept that our suspicion of high-falutin' legislation is confirmed by good news of a renewed interest in the common law from Emgeoo?

It has always been a characteristic of Soviet legislation to be clearly written. The highest human ideals are never half as controversial as the means to achieve them. The paradox remains that what the high-falutin' legislation means can be understood only by those in gulags, psychiatric wards and overcrowded prisons – not to mention mass graves. For this reason, although *glasnost* and *perestroika*, like *intelligentsia*,

have become everyday English words, the Soviet Constitution would be the world's prime example of laughable legislation. At best it would be a bad joke. Under its earlier forms, Stalin and Brezhnev could promote a particularly ruthless sense of humour, but even after Gorbachev came into power, that joke would continue to have macabre consequences. As Professor Peter Maggs writes of the legal system constituted by this legislation, it is not one which has been "taken seriously inside or outside the Union".

As Maggs himself admits, "writing on Soviet or Russian law has become a risky business". That is one good reason to leave it alone for a lifetime. The lawyer Frank Haigh, who chaired the ad hoc committee on a non-nuclear policy for New Zealand, had to commence proceedings before our own State Intelligence Service would apologise for calling him "a communist fellow-traveller". As seen from Twining's *Tower*, running with both hares and hounds now makes lawyers appear as double agents. It must be riskier for lawyers still running long after the hounds have been called off now to be mistaken for some sort of triple agent.

Cold War

There is a lesson to be learned from a lifetime of highly aspirational legislation leading to the collapse of a country as rich in both legal theory and natural resources as the Soviet Union. Forty years of Cold War is an awfully long time to wait in the wilderness learning this lesson, but the ivory-towered isolation of the intellectual reveals no immediately promised land. The power which words alone exert over an academic mind too often convinces the idealistic law reformer that highly principled and abstractly aspirational legislation can be made far more accessible to the statute user in a continental form than can any carefully worked out set of common law rules. Nothing should be plainer to the proponents of plain language for lawyers than the way in which the glasnost-like language of see-through legislation led to the disintegration of the former Soviet Union.

In removing law reform from the practical hurly-burly of parliamentary counsel offices and putting it under the leisurely aegis and immeasurably better staffed position of law commissions we unwittingly follow a notoriously Soviet model. There are those who have always seen the Soviet legal system at odds with our own; but those who pray *against* instead of for their enemies invariably go down with them. The same collapse could result for us as it did for the Soviets in their one last Indian summer of Soviet law reform. In entrusting his overly dynamic policy of perestroika to a restructured Institute of Marxist-Leninism, Gorbachev created the equivalent of a Western styled law reform commission.

As long ago as 1960, B D Inglis in New Zealand's first text on *Family Law* warned that:

> it is only too easy for a reformer with pronounced views to magnify one case of hardship into an intolerable hardship throughout society, and to imagine that some legal restrictions cause difficulty when in fact the majority of people accept them as natural.

"Only the future will show," Inglis wrote of family law reforms in the first half of this century "whether [these] have been more phenomenal than the interests of society have really warranted." Whatever the outcome, one thing is sure, that in the interests of facilitating divorce, promoting contraception, authorising abortion and mooting euthanasia, the Soviet and New Zealand legal systems have for most of this century been travelling in tandem. The Reds have not been under the bed but reforming the law from on top of our establishment's glorified four poster.

As Turgenev speaks satirically of law reform through one of his characters in *Smoke* "I see we've got some sense at last by borrowing everything from abroad instead of trying to do our own thing". The question now for the West as for the latter days of the Soviet Union is whether we have passed the same critical point of no return. Sometimes the proposed change, as for euthanasia, is highly sensational. More often, the hidden move from parliamentary counsel to law commissioner exaggerates the highly academic and intellectual thrust of today's very impractical law reform. The impracticality relates simply to the speed of change, aside from whether the change be good or bad. The resulting injustice, albeit only temporary, requires a rapidly rising level of litigation to readjust the outcome through new means of enforcement. The first consequence is to overload the Courts. We appoint Masters instead of Judges. The second consequence is to encourage summary jurisdiction. We set up Small Claims Courts and empower registrars to discharge the continually increasing overload through para-legal forms of jurisdiction. Finally when *Blackstone's Tower* lies toppled, the balance of power as for the Soviets lies entirely with the executive. Preparing ourselves for the privatisation of prisons we then rename what was once Justice as the Department of Corrections. Perhaps by that time the once-sovereign legislature needs its own restructuring. "All is smoke, smoke – smoke and steam" wrote Turgenev of men's urge to change everything "all apparently in perpetual motion, phantoms pursuing phantoms, but in reality all the same, and in the end everything disappearing without trace and achieving nothing". Of course Turgenev is only paraphrasing Ecclesiastes.

Restructuring of the common law

Even without any Soviet model for legislation the West is already deeply committed to its current policy of restructuring the common law. This is done by substituting principles and purposes for detailed rules and specific procedures. The resulting politicisation of law strangely accords with the old Soviet model. As parliamentary watchdogs, old guard common law draftsmen have traditionally opposed the new-look legislation. Once champions of democracy, the changing context of law and politics is apt to regard Sir John Salmond's watchdogs now as just childishly obstructive. In some ways conservative counsel have only themselves to blame – British counsel banned themselves from discussions with the Statute Law Society. Farming out legislative drafting to the private practitioner appears to be the answer. Unfortunately this only increases the problem of politicisation. As a matter of economics it takes a far longer time, far greater skill, and far deeper discernment to draft rules of law than it does to proclaim general principles and

policies. Like waiting around for communism to crumble this is the score on which it can take a similar lifetime to learn the intricacies of common law drafting. Even if superseded by some new-age legal system (already standing in the wings as Gorbachev was want to warn), the old common law will, quite naturally as a result of the tragic vacuum left by its demise, be given the classical respect deserved by every dead language. Since the point of no return seems passed, the best we can do is revive that classical respect once felt by the Common Law for Roman Law. Already the outcome depends more on drafting the dying lady's epitaph than on finding her successor. There are experts on the common law at Emgeoo who have already lived through similar aspirations for the Soviet system superseding the Common Law.

Continental principles

It was Sir Henry Maine in his writing on *Village Communities* who described the common law as the world's most exhaustive system of legal rules. The outcome for New Zealand legislation will depend on whether the common law reacts to continental principles with a resounding rise in litigation. That it may be already doing so is good news for Court lawyers – although not for the taxpayer who underwrites the provision of legal aid. It will also be exciting for jurists to watch whether Dicey was right in explaining United States litigiousness as substituting for legislation. In the long run, however, the risk is that sovereignty is passed from the legislative beyond our already overburdened Courts to the executive arm of government. Once again, this is a peculiarly Soviet solution. Is it any coincidence that our police force is being armed and re-armed with much the same momentum that we move towards continental methods of legislative expression?

Much of what passes for current legislation in both East and West is still on the lowly level of propounding policy. The common lawyer wouldn't credit it with having reached the departmental level of qualifying as instructions for parliamentary counsel. Instead of formulating rules of law to give effect to policy, the draftsmen, under increasingly Soviet standards of productivity, efficiency and accountability, and diverted from their traditional task of formulating rules by their need to find some non-sexist but otherwise plain language, have no alternative but to pass off the initial policy by way of purpose and object clauses and codes of principles.

It was quite naturally an Englishman who identified Russia as being the antipodes of Europe. This was Sacheverell Sitwell who actually went so far as to describe Russia as the antipodes of every nation – but I have yet to find that Sitwell ever visited New Zealand. In being "upside-down" it is not surprising that Russia and New Zealand should develop underground. Both legal systems can only be discovered by speluncean exploration. In our own far-flung antipodes, for example, deep-down Treaty principles have suddenly surfaced like Melville's *Moby Dick*. Thar' she blows – whether in schools, churches, hospitals or homes – the Treaty assumes priority without anyone knowing what it means. Once it was salute the flag; now it's honour the Treaty; both with the same religious fervour for cultural sensitivity and political correctness as the Soviets had in making little brass busts of Lenin.

All sorts of legislative principles take over from our accustomed form of rule-oriented legislation. These State principles – whether of privacy, health or resource management – are about to be joined by similar principles of parenthood. Rumour has it – as rumour usually has in every underground legal system – that the first priority of our newly appointed Childrens' Commissioner will be to make it an offence to smack a child. This will reinforce the repugnance against bottoms-up we feel in every upside-down society.

Once the legislative buck bypasses the judiciary, an increasing range of commissioners promote a rapidly rising culture of complaint. This runs counter not only to our Anglo-Saxon inheritance of muddling through but to our pioneering heritage of jollying-along. Bar-room jokes still relieve cultural and racial tensions no less than press cartoonists relieve political tensions. Not all such jokes are told in good taste, and so by heightening racial or cultural tension bar room jokes can bring about bar-room brawls as often as political cartoonists can bring down governments. Nevertheless the traditional English, Irish and Scotsman joke (as often told against oneself as against another) is more supportive of a united rather than a disunited kingdom. So also is it with our own Aussie joke or Billy T James brand of Hori humour. This earlier culture of laughing off our differences has withered away in the neurotic atmosphere of finding ourselves perpetually on guard against cultural insensitivity and political incorrectness. Not so long age we scoffed at "whingeing Poms". Now we cultivate the same complaining culture.

By harbouring grudges, this speluncean culture of complaint grows rapidly underground. It only rarely substitutes for litigation in the stiff-lipped surface world of legal rules. Not surprisingly, it is also a Soviet complaint. One of the shortcomings of the Slavic character, that we may quickly learn from the underground of Russian literature, is that it loves to agonise. This agonising underground is cruelly satirised by Professor Stephen Leacock in his *Sorrows of a Super Soul*. According to Professor Leacock the English text has been *Translated by Machinery, out of the Original Russian*. "My love is perfect" writes Marie Mushenough in her Memoirs. "It makes me want to die. Last night I tried again to commit suicide. Why should I live now that I have known a perfect love? I placed a box of cartridges beside my bed. I awoke unharmed. They did not kill me. But I know what it means. It means that Otto and I are to die together. I must tell Otto . . ." Next day's memoir begins with a question "Why does Otto seem to avoid me? Has he some secret sorrow that I cannot share? To-day he moved his camp-stool to the other side of the meadow. He was in the long grass behind an elderberry bush. At first I did not see him. I thought he had hanged himself. But he said no. He had forgotten to get a rope. He had tried, he said, to shoot himself. But he had missed . . .".

World literature awaits a similar satire to reveal the pseudo-agonisings of our own antipodean nation. Perhaps the Slavic super-soul will be symbolised by the Maori fiscal envelope – for our own soul-searching seems too easily diverted by some mythical horn of plenty. Once

we mistook the Crown for our super-soul, but now in presenting citizens with a Resource Management Act, our government fails to practise what it preaches by handing over and privatising every public asset within reach as if our resources were unlimited. Once we revered respectability as our super-soul, but when perfect justice is represented by everyman in his own rangatira who will hold tinorangatiratanga over all the different rangatira? Not so long ago, as custodian of our collective super-soul the Crown sucked the marrow of private initiative out of every institutional enterprise; but now, in the same name of private initiative, it claims the prerogative to distribute its ill-gotten gains as imperial largesse.

Problems of tribal societies

All this is nothing new. Turgenev only repeats the wisdom of Solomon. Every tribal society is stuck with similar problems. It was not for nothing that Karl Popper came to New Zealand to write *The Open Society and its Enemies*. The main enemy of the open society, as Popper saw it, is tribalism. Neither Scots, English, Irish, Slavs or Maori are immune – although New Zealand is more tribal than most – and at present probably more tribal than ever before. That indigenous communism which operates as the super-soul of every tribal society eats up and renders pointless all individual effort. It is the individual effort of former generations that now feeds the tribe. The loss of individual dignity among the aged in New Zealand is no different from that felt by the same generation in the former Soviet Union. In so far as this older generation led each nation through the same second world war it now falls victim to communal demands. These are relieved only by a culture of complaint. Once again personal initiative falls victim to communal lethargy, and so refocuses New Zealand's image as an apathetic nation. The good keen man, once in going bush but now in coming to town, has always been at risk of being swallowed up by tribal forces. Today's equivalent of the new-age Soviet "beesnessman", our entrepreneurial executive is most likely to be head-hunted as a form of intellectual cannibalism. Other names for this spirit of speluncean cannibalism endemic to convict colonies are the tall poppy syndrome and the clobbering machine. It is the same atavism that eats the heart our of the common law, yet we cheer on the action. Not for nothing were these islands of Aotearoa once called the Cannibal Isles.

Like the Soviet system, our own legal system is increasingly speluncean. Now, as for the Soviets our tribal values have burst openly above ground as individual values are reciprocally pushed deep down. From time to time tectonic forces reverse the trend, for our constitutionally conservative country is likely to be physically turned upside down and inside out by its position on the rim of fire. What was once an interactive concept of democracy uniting private and public life is rapidly becoming as restless as were the final years of the Soviet Union. Our own restlessness can be seen in terms of broken government promises, perverted principles of action, and the abuse of public positions by people who are unrestrained by rules from doing their own thing. Roman jurists once postulated an interactive relationship between such phenomena. They believed, for example, that homosexuality brought about earthquakes. This is a hard theory to prove unless you can talk to the survivors of Pompeii but of course Hebraic jurisprudence held the same theory for the survivors of Sodom and Gomorrah.

Irreconcilable differences

One speluncean solution to irreconcilable differences between superficial and underground legal systems is to accept and establish both as parallel legal systems just as one half of every American city prospers as the other half declines on opposite sides of the same railroad track. This solution increases the need for officialdom at what would otherwise be interactive frontiers. New postings are required – of diplomats, trade commissioners, immigration and customs officials – to ensure that each separate society keeps its distance from the other. At the expense of resolving life's real agony the result often upholds and sustains it. It does so by disguising the false agony of life that would be laughable when revealed. This speluncean solution is applied whenever any culture of complaint is institutionalised in legal form. We isolate above from below ground simply by increasing the number of ombudsmen and commissioners of this, that and the next thing. This creates a no-man's land governed by investigating complaints into what never should have happened in the first place. As for the quick fix of the Soviets who gave pride of place to the commissars, this is not a sign of good government. Can we accept, that to compare our growing culture of complaint, nurtured along by a rapidly developing system of commissioners in New Zealand, with a cheap imitation of an outmoded Soviet way of life dismisses that culture only by way of understatement?

No! It would take the Aotearoan equivalent of *One Day in the Life of Ivan Denisovitch* to make this point. The tragedy for New Zealand is that we don't have a Solzhenitsyn. English-speaking people have traditionally laughed loud and long at the Soviet Commissars. Russian writers, such as Gogol with his play *The Inspector General*, have helped along our humour. Much to the chagrin of Russian litterateurs, Danny Kaye played the part. Our scoffing reaps its own reward, however, for we are represented now by rapidly rising ranks of commerce, human rights, health, privacy and other commissioners. These need a culture of complaint in which to operate. Should complaint become the accepted norm and so substitute for common law litigation, however, then these institutions would soon be impotent. Consider the first year of work for Poland's newly appointed ombudsman. The office registered over 92,000 cases – which in one fell swoop completely incapacitated the newly created institution. To scoff at poor Poland overlooks what we're working up to, never mind working off, with the complaints that constitute our own Waitangi Tribunal's backlog.

If governments truly governed in accordance with carefully considered rules of law, there would be little need for commissars. By habituating ourselves to the extraordinary we change our legal values in accepting every further appointment as a good sign. That we now have banking ombudsmen – only indicates the fragile state of banking. Perhaps someday soon we will have gardening ombudsmen and sports ombudsmen. So much else is already controlled through tribunals and commissions, all relying on a

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that is not the case in relation to traditional employment related schemes. First, entry to such a scheme is limited to employees, which limits the number of persons who may use it directly for money laundering. Secondly, contributions are usually directly by deduction from salary, making it difficult to introduce dirty money. Thirdly, the terms of employment related schemes usually impose requirements such as retirement or other termination of employment before contributions can be withdrawn and include restrictions on giving security entitlements. This makes it more difficult for the launderer to extract the clean funds. If that is so, then it may be agreed that the provisions of the FTR Bill should reflect those factors rather than look at inappropriate criteria.

In the same way as for the Disclosure Proposals, the cost of compliance must be carefully evaluated and weighed against the benefits of covering employment related schemes. Only if the benefits outweigh the costs should employment related schemes be included in the proposal.

Final comments

Using the "offer to the public" test will catch not only the publicly marketed schemes but also the employment related schemes, and different policy considerations may well apply to those different types. Without an analysis of the type described above, it should not be assumed that it is appropriate to use the "offer to the public" test for the application of the Disclosure Proposals and the FTR Bill and therefore catch both types.

If, following that analysis, it is found to be appropriate to treat employment related schemes differently, it is suggested that much would be gained by looking back to the antecedents of the current definitions of "superannuation scheme" used for the exemptions in the Securities Act and the Unit Trusts Act.

Those older formulations provide useful guidance as to the way in which the employment link can be utilised as a threshold requirement for exclusion of certain superannuation schemes from regulatory regimes, where that is appropriate on policy grounds. □

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1 See *Proposals for Improved Investment Product and Investment Adviser Disclosure, A Consultative Paper, 28 February 1995* distributed by the Ministry of Commerce. Throughout this paper references to the Disclosure Proposals are to the proposals as set out in that consultative paper.

2 The implications of these issues are discussed in "Superannuation Schemes Subject to Proposed New Disclosure Requirements" by Victoria Stace, Super Benefits, Vol 26, No 1, p 14, April 1995, and are therefore not discussed here in detail.

3 Private Provision for Retirement: The issues (1991) and the further reports following from that.

4 In Part A of the Accord on Retirement Income Policies (scheduled to the Retirement Income Act 1993) superannuation schemes are referred to with other investment products and collectively defined as "savings products".

5 It is significant as an indication of the rise of the publicly marketed form that the Unit Trusts Association of NZ Inc changed its name to the Investment Funds Association of NZ, Inc in 1994, in order to increase its coverage to include those providing other products (including superannuation).

6 While the current Superannuation Schemes Act based exemptions do not make the rationale explicit, an examination of the earlier forms eg s 5(1)(j) of the Securities Act and the definition of superannuation fund in s 2 of the Land and Income Tax Act 1954, explicitly illustrates the employment link.

7 See, for example, paragraphs 77 to 84 of *Proposals for Improved Investment Product and Investment Adviser Disclosure, A Consultative Paper, 28 February 1995.*

8 The Disclosure Proposals refer to the issue in the following terms in paragraph 32 "However, almost all offers of financial investment products likely to be used for retirement savings will be made *"to the public"* within the meaning of the Securities Act except perhaps for some employer-sponsored superannuation schemes available to some employees only."

9 There are no cases on the point and little in the way of published material. For example, CCH's *New Zealand Superannuation Guide* published by Commerce Clearing House (New Zealand) does not refer to the Securities Act or the Securities Regulations 1983, beyond stating that registered schemes have the benefit of exemption from prospectus and other requirements.

Law and economics movement

Posner has been associated with what has been termed the law and economics movement. At the outset of *Overcoming Law*, however, he explains the wider basis of his approach to legal analysis which, briefly stated, entails an attachment to pragmatism, economics, liberalism and, up to a point, democracy. These in combination, with perhaps some assistance from common sense, can, it is argued, transform legal theory. In order to decide whether this claim is valid, it is necessary to trace out the way in which these key terms and resources are to be understood and the ways in which they can be brought to bear on legal questions. In a broad sense, after all, nearly everyone claims to be pragmatic rather than dogmatic, and liberal rather than illiberal, and hardly anyone, except perhaps a few economists, believes that economics is useless.

The main question about "the enterprise of law and economics" is how and where it can be used to resolve legal questions. Economics is described as "the instrumental science par excellence", and in its application to law it "embodies the ethic of scientific inquiry". In this spirit, for example, Judge Posner suggests that the question of suppressing pornography should be approached by balancing the costs of carrying out a widespread campaign of suppression against the gains in crime diminution, which scientific research shows (on some views) to be uncertain. Some difficult problems of quantification are obviously involved here, especially when it comes to assessing, in terms of social costs, the indirect damage that suppression may cause to civil liberties and similar disputable items in the socio-economic balance. If the cost-benefit technique is applied to the judicial as well as to the legislative process, the difficulties multiply. The economic approach sees the individual as one who bases all decisions on the costs likely to be incurred and the benefits likely to be reaped from alternative future courses of action. How is a rational Judge to make such a calculation? Whose costs and benefits are to be included? The Judges', the civil parties', or the defendants' or prosecutors' – or the benefits and costs to society as a whole? What would be necessary to the calculation seems to be either an effective Benthamite felicific calculus or a confident programme of rule or act utilitarianism.

Geoffrey Marshall
Times Literary Supplement
9 June 1995
Reviewing *Overcoming Law*
by Richard Posner

When is superannuation "offered to the public"?

By Lloyd Kavanagh, Barrister and Solicitor, of Wellington

Most superannuation schemes, both of the employment related and publicly marketed types are "offered to the public" in Securities Act 1978 terms. To date this has not been of any great significance to scheme trustees. However it has recently emerged as an important issue for the superannuation industry for the future.

The "offered to the public" question has become important as a result of two separate legislative proposals which it has been suggested should apply to superannuation schemes. They are:

- The Proposals for Improved Investment Product and Investment Adviser Disclosure[1] ("Disclosure Proposals"); and
- the Financial Transactions Reporting Bill ("FTR Bill").

In each case, the threshold which has been proposed to distinguish between those schemes to which the new regimes should apply and those schemes which should be excluded is the "offered to the public" test from the Securities Act.

The Disclosure Proposals would substantially increase the level of compliance with the Securities Act required of superannuation schemes. It is proposed that the present exemption should be removed, and superannuation schemes which are offered to the public will be required to comply. (Appendix 7 to the Disclosure Proposals.) In particular, schemes subject to the Disclosure Proposals will be required to:

- produce at least annually a prospectus complying with detailed requirements set out in regulations.
- produce an investment statement to prospective members.[2]

Allied to these requirements, is that the Financial Reporting Act 1993 (not to be confused with the FTR Bill) will apply to schemes to which the registered prospectus provisions of the Securities Act apply.

The FTR Bill contains an anti-money laundering regime. The main part of the proposed regime operates based on a definition of a "financial institution". The FTR Bill provides that the definition will include, among many other entities, a trustee or administration manager or investment manager of a superannuation scheme (which is in turn defined to mean a registered scheme in respect of which an "offer to the public" has been made). The principal obligations imposed on a trustee of an offered to the public scheme would include:

- to verify the identity of "facility holders" (ie members of a superannuation scheme) before allowing them to join the scheme;
- to verify the identity of any party to any transaction if it has reasonable grounds to believe that the transaction may be relevant to the investigation or prosecution of that person for a money laundering offence;
- to report to the police any transaction which the trustee has reasonable grounds to suspect may be relevant to the investigation or prosecution of any person for a money laundering offence; and
- to retain transaction records for not less than five years.

Both the Disclosure Proposals and the FTR Bill will involve substantial compliance costs which may be beyond the means of smaller schemes. It is therefore critical that the proposals should apply only to those schemes in respect of which the policy initiatives behind the proposals are appropriate.

This article will:

- comment briefly on the historical context of, and current treatment of, registered superannuation schemes under securities legislation;
- examine the circumstances in which an employment related superannuation scheme would be considered to be offered to the public in Securities Act terms; and
- comment briefly on the appropriateness of the "offered to the public" test for the current proposals.

I Context and current treatment under securities legislation

Context

Historically, the typical superannuation scheme has been regarded to be a trust set up by an employer to provide retirement benefits primarily for the employer's staff. (See eg the view expressed in CCH, *New Zealand Superannuation Guide*, ¶110, 21 August 1995.)

For many years most superannuation schemes were of this type. Typically, the structure of the scheme reflects closely the employer/employee relationship. Membership of the scheme is often provided for in the employment contract and non-employees are precluded from being members. The trustees will usually be employer representatives but will often also include employees or union officials. The scheme is often funded by a mix of employee and employer contributions. As Richardson J said in *Cullen v Pension Holdings Ltd* (1993) 1 NZSC 40,293 of this type of scheme:

> Superannuation benefits are part of the employment package and are described quite aptly as deferred salary. In terms of the employment relationship those pension rights are part of the pay employees receive subsequently for their current services.

However, this represents only part of the picture. Although superannuation traditionally arises in an employment context and is seen as delayed remuneration (at least to the extent of employer contributions), it is widely recognised that, where the employee makes contributions to the scheme, it also represents a form of saving by him or her.

The employee's contributions to the scheme clearly represent the setting aside by the employee of his or her money, in order to provide for retirement benefits. It is, for example, implicit throughout the Todd Report documents[3] and the Accord on Retirement Income Policies that all private superannuations represent "saving".[4] This is an important point because it is as a result of this savings element that superannuation is treated as part of the Disclosure Proposals.

Recent developments

Recent years have seen the rise of a new, publicly marketed, form of superannuation scheme. Although the new form is registered under the Superannuation Schemes Act, it differs from the traditional employer sponsored scheme in a number of respects.

The new form of scheme is usually promoted by an insurance company, bank or financial intermediary. It is typically marketed to the public by the promoter in direct competition with other investments such as unit trusts, group investment schemes and insurance products.[5]

Significantly, the new form has no direct connection with any employment relationship. Usually, it is funded solely by the contributions of the members. This form therefore is usually a pure savings product and does not constitute deferred remuneration.

These publicly marketed schemes are widely promoted by advertising in the media. The marketing takes a similar form to that used by insurance companies, banks and others in relation to their other products. They are available to anyone who walks through the door.

This publicly marketed form of superannuation has become popular. For example, in 1994, of the 57 registered superannuation schemes with over $50 million in assets, 18 were described by the Government Actuary as being sold to the public rather than being employer sponsored. (This information is sourced from a private inquiry made to the Government Actuary.)

Securities legislation

The dual nature of the traditional form of superannuation (part deferred remuneration, part savings product) has long presented a dilemma to those attempting to regulate investment structures.

The preferred approach in New Zealand has been to accept that a superannuation scheme will fall within the wide definitions used in securities legislation but to provide a specific exemption for certain types of scheme. This is a recognition that registered schemes are subject to their own regulation in other legislation, but also may be seen to reflect the employment link which has dominated historically.

One example is the Unit Trusts Act 1960 which, in recognition that a superannuation scheme would be caught by the main body of the definition of "unit trust", contains an exclusion in that definition. Originally, the exclusion was for funds approved by the Commissioner of Inland Revenue under s 2 of the Land and Income Tax Act 1954. Now, it is for schemes registered under the Superannuation Schemes Act 1989.

In a similar way, it is universally accepted that membership of a scheme would constitute a "security" under the Securities Act 1978. That term is defined in s 2 as meaning:

> any interest or right to participate in any capital, assets, earnings, royalties, or other property of any person . . .

This covers a wide range of collectivised investment arrangements and plainly includes a superannuation scheme which takes the usual form of a trust. More particularly, an interest in a superannuation scheme presently constitutes a participatory security, being a security which is not a debt security or an equity security. In this regard, it is noted that the Disclosure Proposals propose excluding interests in superannuation schemes from "participatory security" and making them into a discrete category. (See paragraph 1.1(e) of Appendix 7 to the Disclosure Proposals.)

In recognition of the fact that interests in a scheme are securities, an express exemption from particular sections of Part II of the Securities Act has been provided for certain superannuation schemes since the Act was enacted. The current formulation (contained in s 5(2B)) applies in respect of interests in schemes registered under the Superannuation Schemes Act 1989.

Importantly, as a result of the exemption, no prospectus, trustee or statutory supervisor, trust deed or deed of participation is required. The only provisions of Part II of the Securities Act which apply to registered schemes are the advertising provisions, restrictions on door to door sales, the liability and offence provisions and the Registrar's powers of inspection.

Tension

The rise of the new publicly marketed form of superannuation has introduced tension into the traditional securities legislation treatment. The current exemptions now cover a substantial number of schemes of a type which are unlikely to have been in the contemplation of the original drafters of the exemptions.[6]

The reaction of many (including the Disclosure Proposals working group[7]) has been to ask why superannuation products marketed publicly by financial institutions should be treated any differently from other savings products offered by them. Certainly the apparent rationale behind the current exemptions (if, as is suggested, it relates to the predominant employment link) does not apply.

In the same way the sponsors of the FTR Bill appear to have taken the view that superannuation schemes are as able to be used for money laundering purposes as competing investment products such as unit trusts.

The result is a movement away from providing exemption for all registered superannuation schemes

toward applying new regimes to all schemes which are offered to the public. The implication appears to be that exemption is appropriate only for those schemes which are not so offered. Two examples are the Disclosure Proposals and the FTR Bill referred to above.

If this new approach is to be adopted, it is critical that it is clearly understood what type of scheme will be included by using the "offered to the public" test. One area where there appears to be considerable ambiguity in the thinking of some participants in the industry is in relation to the application of the test to employment related superannuation.[8]

II When is employment related superannuation offered to the public?

Current relevance

This part of this article explores whether an invitation to join a typical employment related superannuation scheme is an "offer to the public of securities".

As noted above the interest of a member in a superannuation scheme constitutes a security. In addition, it is clear that an invitation to membership will normally be considered to be an offer. The remaining and key issue is whether the offer is made to the public.

The "offered to the public" test is an issue which already confronts the trustees of superannuation schemes because of the application of the advertisement and other residual provisions of the Securities Act not covered by the current s 5(2B) exemption.

However, in practice, these residual provisions do not present major compliance issues. If any doubt exists as to their application, trustees and their advisers can take the cautious course of complying, whether or not that is technically required. Accordingly, in practice, little time or analysis has been spent on this issue.[9]

Section 3: Construction of references to offering securities to the public

The relevant provisions in relation to offers to the public are contained, primarily, in s 3 of the Securities Act. It provides as follows:

> **3(1) [References to public offers]** Any reference in this Act to an offer of securities to the public shall be construed as including –
> (a) A reference to offering the securities to any section of the public, however selected; and
> (b) A reference to offering the securities to individual members of the public selected at random; and
> (c) A reference to offering the securities to a person if the person became known to the offeror as a result of any advertisement made by or on behalf of the offeror and that was intended or likely to result in the public seeking further information or advice about any investment opportunity or services, –
> Whether or not any such offer is calculated to result in the securities becoming available for subscription by persons other than those receiving the offer.
>
> **3(2) [When not an offer]** None of the following offers shall constitute an offer of securities to the public:
> (a) An offer of securities made to any or all of the following persons only:
> (i) Relatives or *close business associates of the issuer*;
> (ii) Persons whose principal business is the investment of money or who, in the course of and for the purposes of their business, habitually invest money;
> (iii) *Any other person* who in all the circumstances can properly be regarded as having been *selected otherwise than as a member of the public*.
> . . .
>
> **3(3) [Members of public]** *A person shall not be precluded from being* regarded as *a member of the public* in regard to any offer of securities *by reason only that he is* a purchaser of goods from, or *an employee* or client of, or a holder of securities previously issued by, the issuer or any promoter of the securities.
>
> **3(4) [Construction of public offer]** Any reference in this Act to an offer of securities to the public shall be construed as including a reference to distributing an advertisement, a prospectus, a registered prospectus, or an application form for the subscription of securities.
>
> [italics added]

The Court of Appeal decision in *The Securities Commission v Kiwi Co-operative Dairies Ltd* (1995) 7 NZCLC 260,828 is now the leading authority on the interpretation of s 3. The comments of the Court provide useful guidance in relation to the interpretation of s 3 in the current context. Those comments are considered in relation to the relevant parts of s 3 below.

Existing relationships – subs (3)

Looking at s 3, the first point to observe is that s 3(3) provides that a person is not precluded from being regarded as a member of the public by reason only that he or she is an employee of the issuer or any promoter of the securities. (See the box below for a discussion of these terms in the context of traditional superannuation schemes).

It was considered in the *Kiwi* case because it applies in a similar way to existing shareholders, as to employees. In the *Kiwi* case, it was emphasised that subs (3) means just what it says ie that restricting an offer to existing shareholders does not, in itself, assist at all in avoiding making an offer to the public. Some other distinguishing feature must exist.

Paraphrasing the judgment in the *Kiwi* case so as to apply it to employment related superannuation the position appears to be as follows: the effect of s 3(3) is that employees may still constitute a section of the public though they will not do so in all circumstances. To avoid constituting an offer to the public, it is necessary to point to something else – other than the simple relationship of employment – as the basis on which the offerees were actually selected, differentiating the offerees from the public generally and from that section of the public comprising employees of the issuer or promoter.

The inclusions – subs (1)

We now turn to s 3(1), bearing in mind s 3(3). The common law traditionally took a narrow approach to "offer to the public", for example, excluding offers to members of a

specified class only, on the basis that it was not open to any member of the public to accept the offer.

As a reaction against that, s 3(1) was drafted extremely widely and, in practice the Courts have treated it as being all inclusive, and potentially encompassing almost any offer of securities. (See *Robert Jones Investments Ltd v Gardner* (1993) 6 NZCLC 68,514.) It now specifically covers sections of the public, randomly selected individuals, and contacts identified through prior advertising.

In particular, the words "however selected" in s 3(1)(a) are capable of covering shareholders, debentureholders, employees and clients. It is now commonly accepted that:

> The language makes it clear that an offer of securities need not be made to the whole world or even a large part of it to be construed as an offer to the public. (*Morrison's Company and Securities Law* at V3/3428.)

Combined with subs(3), it can be argued that there is effectively a presumption that any offer to a group of employees is, prima facie, an offer to a section of the public. In a passage approved by Tipping J in *Robert Jones Investments Ltd v Gardner* [1988] 4 NZCLC 64,412 at 64,419), the authors of *Company Law and Securities Regulation in New Zealand* (Butterworths of New Zealand, 1st ed, 1985 at p 354) said:

> Where an offer is made and is limited to employees, prima facie, it is to a section of the public. Section 3(1)(a) appears to negate the effect of the New South Wales' case of *Corporate Affairs Commission v David Jones Finance Ltd* where an invitation to employees of a group was held not to be an invitation to the public as it was to a section thereof.

In the *Robert Jones* case, Tipping J went on to cite with approval further passages from that text referring to a United States case where the "need to know or need for protection" test was used to find that a public offering was involved in an offer of shares to key employees because it was not shown that they had access to the necessary information.

It seems relatively clear, therefore, that almost every employment related superannuation scheme will be "offered to the public" unless one or more of the exceptions in s 3(2) applies.

The exclusions – subs (2)

Section 3(2)(a)(i) and (iii) are the relevant provisions. We will look at paragraph (i) first. A preliminary point to note there is that the relationship is required to be *with the issuer* (*Barclays New Zealand Limited v Gillies* (1990) 5 NZCLC 66,657.) Given the intention to exclude superannuation schemes from participatory securities referred to above, it is not clear whether the employer or the trustee (or both) will be the "issuer", in respect of schemes. Based on the current approach it is likely that the employer will be the issuer. (However, the point will need to be considered carefully in relation to the facts of each case before relying on s 3(2)(a)(i) because if the employer is not the "issuer", it will not assist that the employer has the required relationship with the proposed member). On that basis, the issue is whether every one of the employees to whom the offer is made has the relationship of a "close business associate" with the employer. This means the individual relationship of each offeree must be considered. The clause does not envisage the exemption of an offer to a class.

The *Kiwi* case referred to above is the leading authority on both the general approach to be taken and those paragraphs. In that case the Court of Appeal accepted that the protective purpose of the Securities Act was of importance and the exceptions in s 3(2) should be interpreted with that in mind.

In deciding whether the offerees should be regarded as members of the public and therefore entitled to the protection of compliance with the Securities Act, Blanchard J considered it relevant whether each individual can be taken to have (or be readily able to obtain) the information which would be found in a prospectus, in order to make an informed decision about the investment. In the same way that the dairy supplier shareholders in that case were considered not to have access to that information, employees generally are unlikely to already hold the required information.

It is worth considering further what knowledge it is that may be relevant. Blanchard J referred to information necessary to make an informed decision *about the investment*. In the case of the dairy company issuing debt securities (ie taking deposits) this would mean the financial state of the company. However, in the case of a superannuation scheme, it can be argued that as membership of the scheme is the investment, it is the financial state of the scheme and the terms of membership of the scheme which are relevant rather than the financial state of the employer.

In the *Kiwi* case, despite having described the state of knowledge as relevant, the Court went on to set out the test in broader terms. The Court held that to constitute a close business associate, the offeree must have a relationship with the individuals who control the issuer which involved "a degree of intimacy or 'business friendship' in the relationship, though not necessarily a friendship away from business . . . sufficient to overcome any inequality which might otherwise be present in the relationship". No doubt, the level of knowledge is relevant as to whether "inequality" exists. In *Kiwi*, the required relationship was found not to exist between the directing minds of Kiwi and all its 2,652 shareholders. While each shareholder might be acquainted with at least one director, it was thought most unlikely that all shareholders and all directors would have the required relationship.

In the same way, this relationship is unlikely to exist between most sponsoring employers and all members of their scheme. Based on the *Kiwi* approach, it would be necessary to show that every employee to whom membership was offered was a business intimate of the employer, or where it is a company, of the directors as a whole.

This will be almost impossible to demonstrate for large schemes open to all employees, for example, of a manufacturing company. It will still be difficult to show for small schemes where all potential members do not know the directors well and do not have a good understanding of the state of affairs of the scheme. In the context of a company whose board contains independent directors, not known to the relevant

personnel, the required relationship is unlikely to exist.

The required relationship might however be found to exist in respect of a scheme which is offered only to the top level of management of an employer where that level of management also has a good understanding of the scheme.

Turning now to s 3(2)(a)(iii), which requires the offerees to be selected individuals from a class rather than to a class at large. This provision is often seen by commentators as being difficult to apply given s 3(1)(a) indicates that no regard should be had to the method of selection but s 3(2)(a)(iii) appears to say the method of selection is relevant. This was not argued by Kiwi before the Court of Appeal, the Judge at first instance having said the point presented a "particular difficulty" for Kiwi because there was no evidence to indicate selection otherwise than as members of the public when the offer was made to the shareholders at large.

Applied in the superannuation context, para (iii) will not assist employment related schemes, which are offered either to all employees or all employees of a particular class. It may, however, assist where employees are individually selected for invitation, not at random but because of individual characteristics. That will be relatively rare, again with the possible exception of a scheme which is available, for example, only to top management on individual invitation and not simply by reference to status or salary bands.

Numerical limits

As will be apparent from the above analysis s 3 of the Securities Act does not place minimum limits on the number of offerees before an offer to the public exists. It focuses on the relationship between the issuer and the offeree, and the manner of selection, as set out above. Theoretically an offer to one person if selected as a member of the public – would constitute an offer to the public.

For example the following cases have been held to involve an offer to the public:

- an offer which was assumed to have been made to 71 holders of convertible guarantee bonds (*Barclays New Zealand Limited v Gillies* (1990) 5 NZCLC 66,659);
- an offer allocated to 39 existing shareholders (*Robert Jones Investments Limited v Gardner* (1993) 6 NZCLC 68,514); and
- an offer to a single business acquaintance (*International Standardbred Partnership v Garland* (1992) 6 NZCLC 67,812).

These authorities reinforce the view that the number of employees involved is not directly relevant, even the smallest superannuation scheme may be offered to the public unless all the employees have the required relationship with the employer.

Meaning of "public" in other contexts

There are no cases dealing with the issue of offer to the public under the Securities Act in a superannuation context. However, some confirmation that the above approach is likely to be followed can be drawn from *Coburn v Human Rights Commission* [1994] 3 NZLR 323 (the BHP NZ Steel case). In that case, Thorp J considered whether an employment related superannuation scheme involved a supply of facilities or services "to the public or to any section of the public" in the context of s 44 of the Human Rights Act 1993. Thorp J said:

> The terms "public" and "section of the public" can encompass a variety of meanings and must be construed having regard to the purpose of the statute in which they are used. It is my view that the 1993 Act's apparent intention that it should apply to that section of the superannuation industry which is an adjunct to employment, assists the conclusion that the 1700-odd employee members and ex-employee pensioners, who are the present and intended beneficiaries of the Scheme, come within the term "section of the public" as this is used in the statute.

It seems therefore that what constitutes an offer to the public for Securities Act purposes must be examined principally by looking at the wording of that Act and the policy behind it, rather than by reference to decisions like *Coburn* which relate to other legislation. However, *Coburn* is useful to illustrate that employees will constitute at least a section of the public in some contexts.

Conclusion

The conclusion is that the typical employment related superannuation scheme, no matter how many employees are involved, is likely to be offered to the public in Securities Act terms. It is likely to be only where there is a relationship of "business friendship" between the directing minds of the issuer and each employee or the members are individually selected that it will not be so offered. In reaching this conclusion, the Court will be influenced by the degree of knowledge of the scheme and its financial position which can be assumed to exist on the part of each potential member.

In practice, it is likely that only the smallest schemes, membership of which is restricted to individuals in the top level of executive management of the employer, which may not be "offered to the public".

III Is the test appropriate?

It is evident that the promoters of the Disclosure Proposals and the FTR Bill believe that not all superannuation schemes should be subject to those regimes. They have specifically included the "offered to the public" threshold rather than simply including all superannuation schemes.

Presumably, this is because there is some acceptance philosophically that the proposals should not apply to some superannuation schemes. It is assumed that the core of what the promoters of those proposals have in mind as being appropriate to be covered are the publicly marketed schemes.

However, as demonstrated above, in practice almost every employment related superannuation scheme will be caught by the "offered to the public" test which is currently proposed. The result is that in practice very few schemes will not be subject to compliance with the Disclosure Proposals and FTR Bill proposals with the costs that that will entail.

To decide whether or not the offered to the public test is appropriate, it is necessary to decide whether or not it is appropriate for

employment related schemes to be covered, in addition to the publicly marketed schemes. If so, then the offered to the public test may well be the appropriate threshold. If no, then it will be necessary to devise another test.

To decide whether employment related schemes should be covered by each of the proposals, it is submitted that the correct approach is to identify the policy objectives behind that proposal, and then to carry out a cost/benefit analysis for each proposal in respect of the inclusion of employment related schemes. To do that is beyond the scope of this article but some observations can be made. Those are set out below.

Disclosure Proposals

The Disclosure Proposals have been put forward in order to satisfy the requirements of Part 4 of the Accord on Retirement Income Policies as scheduled to the Retirement Income Act 1993. The relevant section provides as follows:

> **4.1 Disclosure about savings products**
> Having considered the recommendations of the Task Force, the Parties agree that in respect of unit trusts, superannuation schemes, life insurance, and other financial investment products *offered to the public* (referred to as "savings products" in this Accord), legislation should be enacted to provide that:
>
> (a) certain statutory minimum disclosure requirements should apply in respect of all savings products (both when the initial commitments are made and on an annual basis thereafter);
> (b) the disclosure requirements should require the cost effective disclosure of information which meets the reasonable needs of the prudent but non-expert investor;
> (c) the disclosure requirements should facilitate comparisons between savings products.

It is suggested that the parties to the Accord would have had in mind, in their reference to superannuation schemes "offered to the public" the publicly marketed schemes described above rather than the traditional employment related schemes. The Accord document was, after all, an agreement between political parties rather than a document intended to be interpreted in a technical legal manner.

Therefore, it may not be correct to simply translate the words "offer to the public" into Securities Act terms. For example, it would be perfectly possible to interpret them in the usual common law manner applying the ordinary literal meaning of those words. That approach would not include a superannuation scheme offered to employees only. In other words, the freedom to choose whether or not to include employment related schemes exists within the scope of the Accord.

If that is the case then the first step should be to review the policy reasons for imposing the Disclosure Proposals generally and consider whether they apply with full or partial force in relation to employment related superannuation schemes. As part of this process, it would be necessary to re-examine the original policy reasons for the current exemptions from the disclosure regimes in the Securities Act and the Unit Trusts Act for superannuation schemes and to see to what extent those considerations continue to be valid today.

It is suggested above that the various historical exemptions for superannuation schemes in securities legislation to date have been aimed primarily at the employment related schemes. This was presumably on the basis that to impose full disclosure obligations would discourage employers from sponsoring employment related superannuation schemes and that, at least where the employer makes contributions, such schemes are to be encouraged. It, therefore, needs to be considered carefully whether those reasons continue to be relevant today or not.

There is at least an argument to be considered that there is something special in the employment relationship (as recognised by the Court-implied obligation of good faith) which counterbalances the need to impose the requirements of full compliance with the Disclosure Proposals and other securities legislation.

In this regard, a parallel may be drawn between employment related superannuation schemes and employee share purchase schemes. Such schemes are accepted to usually fall within the "offered to the public" test in the Securities Act. However, in recognition of the special policy considerations involved, the Securities Commission has provided substantial exemption from the Securities Act requirements. The Securities Act (Employee Share Purchase Schemes) Exemption Notice 1991 disapplies substantial portions of the prospectus and other requirements where the employer is a listed company. The rationale for restricting the exemption to listed companies is, no doubt, that they are required to provide annual reports, which would, in part at least, meet the disclosure requirements.

Once the policy reasons for applying the regime have been clearly identified, the next step is to identify the costs of doing so and to balance them against the benefits received. It is beyond the scope of this article to measure the costs. However, readers are referred to the discussion of this in relation to the cost of compliance in relation to floating a company in *"Play it [again], Sam": Offers to the Public in the New Zealand Context* by Peter Fitzsimons [1995] Company and Securities Law Bulletin 63). It is interesting to note that Fitzsimons concludes that the costs of public capital raising (including Securities Act compliance) are significant (or at least perceived to be significant) and impact to a material extent upon decisions as to whether or not to raise funds by that method.

If the cost of compliance for smaller schemes represents any significant proportion of typical income each year, it may be questioned whether application of the Disclosure Proposals is in the interests of members of such schemes. A result which would not be in anyone's interests would be if small schemes which are currently considered to be operating satisfactorily, were to be wound up by their members or sponsoring employers rather than meeting the cost of compliance.

Alternatively, if members benefit by increased transparency of their retirement savings choices and the ability to make more informed rational investment decisions, without an inappropriate level of cost, then the application of the Disclosure Proposals would be highly desirable.

Financial Transactions Reporting Bill

In the same way, it is important to identify the policy reasons why superannuation schemes should be classified as financial institutions under the FTR Bill to ascertain what is the appropriate carve out.

No published material in this regard has been identified by the author. Therefore it is necessary to make assumptions about the thinking behind the inclusion.

It is presumed that what is intended is to catch superannuation schemes where "black money" may be paid in and then either withdrawn afterwards or used as security for borrowing, in each case to allow the funds to be withdrawn in a laundered form.

If this is the case, what is intended to be caught is a superannuation scheme, in which it is relatively easy to make an investment and, once invested, the funds are reasonably accessible or able to be used as security for a borrowing. This may well be the case for the publicly marketed scheme where access and transportability are often a key selling feature.

However, it can be argued that

Issuer or Promoter

In applying s 3 it is necessary to identify the relationships of the sponsoring employer and the trustees of the superannuation scheme, in Securities Act terms, so that it is clear how the principal provisions operate. The two terms used in the relevant parts of the Act are "issuer" and "promoter". (As noted above, the Disclosure Proposals proposes excluding superannuation schemes from the definition of "participatory securities".) However, until the details of what is proposed are available, it is necessary to approach these issues on the assumption that the current definitions will be followed.

"Issuer" is defined in s 2 of the Act as meaning:

> (b) In relation to a participatory security, or to an advertisement, prospectus, or registered prospectus or to a deed of participation that relates to a participatory security, the manager.

In turn, "manager" is also defined in s 2. The definition is as follows:

> "Manager", in relation to a participatory security means the person or persons acting in the promotion or management of the arrangement or scheme to which the security relates.

These concepts do not fit easily with the traditional structure of an employment related superannuation scheme when the main parties are a trustee and an employer who share responsibility for day to day administration, and the trustee has responsibility for investment decisions. Typically, a superannuation scheme will not have any party who is called a manager (although the trustee may from time to time retain an investment manager, that is a different role to that contemplated by the definitions). The definitions appear to have been drafted more with the typical unit trust structure in mind, where the "manager" is the driving force behind the structure and the trustee has a secondary role. Nevertheless, at present, the Securities Act requires these definitions to be applied.

The definition of "issuer" makes it clear that it is being used in a special sense. The fact that the trustee would be considered to be the issuer in its ordinary meaning appears to be irrelevant. It is the party which promotes or administers the scheme which is caught. The principal candidate to be the issuer in respect of most employment related schemes will be the sponsoring employer. The sponsoring employer will usually be acting in the "promotion" and often in the "management" of the scheme. The employer will promote the scheme by inviting employees to join it. In addition, the employer will often administer the scheme because it will be the employer's human resources personnel who will carry out important roles such as preparing the members' booklet, maintaining registers of members, collecting contributions and distributing benefits. However, the facts of the particular case will be relevant. It is conceivable that in relation to a scheme administered, for example, by an insurance company and promoted by them through the employer, that the insurance company rather than the employer would be the issuer.

In addition, the trustees are also likely to fall within the definition of a manager. They are acting in the promotion or management of the scheme in making many of the administrative and investment decisions required to be made by them under the typical trust deed.

The term "promoter" is also defined in s 2 and the relevant part of the definition reads as follows:

> . . . means a person who is instrumental in the formulation of a plan or programme pursuant to which the securities are offered to the public . . . but . . . does not include . . . a person acting solely in his professional capacity

In the context of employment related superannuation, to the extent an offer to the public is involved, the employer will usually also be a promoter in that the employer will be an integral part of the development and structuring of the scheme, and of offering it to the employees. In addition, in many cases the trustee may also be instrumental in the formulation of a plan, and would not usually have the benefit of the professional capacity exception.

It is outside the scope of this paper to consider whether investment and administration managers and other service providers may be either "issuers" or "promoters", beyond noting that they will need to consider their positions carefully.

that is not the case in relation to traditional employment related schemes. First, entry to such a scheme is limited to employees, which limits the number of persons who may use it directly for money laundering. Secondly, contributions are usually directly by deduction from salary, making it difficult to introduce dirty money. Thirdly, the terms of employment related schemes usually impose requirements such as retirement or other termination of employment before contributions can be withdrawn and include restrictions on giving security entitlements. This makes it more difficult for the launderer to extract the clean funds. If that is so, then it may be agreed that the provisions of the FTR Bill should reflect those factors rather than look at inappropriate criteria.

In the same way as for the Disclosure Proposals, the cost of compliance must be carefully evaluated and weighed against the benefits of covering employment related schemes. Only if the benefits outweigh the costs should employment related schemes be included in the proposal.

Final comments

Using the "offer to the public" test will catch not only the publicly marketed schemes but also the employment related schemes, and different policy considerations may well apply to those different types. Without an analysis of the type described above, it should not be assumed that it is appropriate to use the "offer to the public" test for the application of the Disclosure Proposals and the FTR Bill and therefore catch both types.

If, following that analysis, it is found to be appropriate to treat employment related schemes differently, it is suggested that much would be gained by looking back to the antecedents of the current definitions of "superannuation scheme" used for the exemptions in the Securities Act and the Unit Trusts Act.

Those older formulations provide useful guidance as to the way in which the employment link can be utilised as a threshold requirement for exclusion of certain superannuation schemes from regulatory regimes, where that is appropriate on policy grounds. □

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1 See *Proposals for Improved Investment Product and Investment Adviser Disclosure, A Consultative Paper, 28 February 1995* distributed by the Ministry of Commerce. Throughout this paper references to the Disclosure Proposals are to the proposals as set out in that consultative paper.

2 The implications of these issues are discussed in "Superannuation Schemes Subject to Proposed New Disclosure Requirements" by Victoria Stace, Super Benefits, Vol 26, No 1, p 14, April 1995, and are therefore not discussed here in detail.

3 Private Provision for Retirement: The issues (1991) and the further reports following from that.

4 In Part A of the Accord on Retirement Income Policies (scheduled to the Retirement Income Act 1993) superannuation schemes are referred to with other investment products and collectively defined as "savings products".

5 It is significant as an indication of the rise of the publicly marketed form that the Unit Trusts Association of NZ Inc changed its name to the Investment Funds Association of NZ, Inc in 1994, in order to increase its coverage to include those providing other products (including superannuation).

6 While the current Superannuation Schemes Act based exemptions do not make the rationale explicit, an examination of the earlier forms eg s 5(1)(j) of the Securities Act and the definition of superannuation fund in s 2 of the Land and Income Tax Act 1954, explicitly illustrates the employment link.

7 See, for example, paragraphs 77 to 84 of *Proposals for Improved Investment Product and Investment Adviser Disclosure, A Consultative Paper, 28 February 1995.*

8 The Disclosure Proposals refer to the issue in the following terms in paragraph 32 "However, almost all offers of financial investment products likely to be used for retirement savings will be made *"to the public"* within the meaning of the Securities Act except perhaps for some employer-sponsored superannuation schemes available to some employees only."

9 There are no cases on the point and little in the way of published material. For example, CCH's *New Zealand Superannuation Guide* published by Commerce Clearing House (New Zealand) does not refer to the Securities Act or the Securities Regulations 1983, beyond stating that registered schemes have the benefit of exemption from prospectus and other requirements.

Law and economics movement

Posner has been associated with what has been termed the law and economics movement. At the outset of *Overcoming Law*, however, he explains the wider basis of his approach to legal analysis which, briefly stated, entails an attachment to pragmatism, economics, liberalism and, up to a point, democracy. These in combination, with perhaps some assistance from common sense, can, it is argued, transform legal theory. In order to decide whether this claim is valid, it is necessary to trace out the way in which these key terms and resources are to be understood and the ways in which they can be brought to bear on legal questions. In a broad sense, after all, nearly everyone claims to be pragmatic rather than dogmatic, and liberal rather than illiberal, and hardly anyone, except perhaps a few economists, believes that economics is useless.

The main question about "the enterprise of law and economics" is how and where it can be used to resolve legal questions. Economics is described as "the instrumental science par excellence", and in its application to law it "embodies the ethic of scientific inquiry". In this spirit, for example, Judge Posner suggests that the question of suppressing pornography should be approached by balancing the costs of carrying out a widespread campaign of suppression against the gains in crime diminution, which scientific research shows (on some views) to be uncertain. Some difficult problems of quantification are obviously involved here, especially when it comes to assessing, in terms of social costs, the indirect damage that suppression may cause to civil liberties and similar disputable items in the socio-economic balance. If the cost-benefit technique is applied to the judicial as well as to the legislative process, the difficulties multiply. The economic approach sees the individual as one who bases all decisions on the costs likely to be incurred and the benefits likely to be reaped from alternative future courses of action. How is a rational Judge to make such a calculation? Whose costs and benefits are to be included? The Judges', the civil parties', or the defendants' or prosecutors' – or the benefits and costs to society as a whole? What would be necessary to the calculation seems to be either an effective Benthamite felicific calculus or a confident programme of rule or act utilitarianism.

Geoffrey Marshall
Times Literary Supplement
9 June 1995
Reviewing *Overcoming Law*
by Richard Posner

Law, Justice and State:
A reply to Robertson

By Alan Cameron, Victoria University of Wellington

Bernard Robertson's review of *Voices for Justice* in the June issue of this journal ([1995] NZLJ 192-195) has already produced a response from the author of the chapter on Catholic social teaching ([1995] NZLJ 294). As one of the editors of the book, and author of the chapter, "Law, Justice and the State" I propose to briefly respond to his criticisms which refer to my own contribution.

One of these criticisms concerned a claim made in the preface of *Voices* that, although the seminar from which the book arose encouraged a range of perspectives, all the authors share a commitment to social justice. Robertson thinks my essay proves this not to be true because I provide a number of reasons for rejecting the notion of social justice. Robertson, however, fails to appreciate the distinction between a commitment to the rather loose and indeterminate *conception* of social justice, which underlies the Statement, and a shared commitment to addressing the *concerns* to which "social justice" refers. In so far as all of the contributors share a desire to expound and apply in practice a biblical-Christian idea of justice for addressing those concerns (eg poverty, unemployment), the claim of a common commitment to social justice on behalf of all the contributors, including myself, is not contradicted by my criticism of the use of "social justice". My intention was to provide a more sharply differentiated conception of justice as a way of better analysing and addressing those common concerns.

This brings me to Robertson's criticisms of my own account of justice. He detects an apparent inconsistency in my argument for rejecting the notion of social justice", or indeed any qualifier before the word "justice", when I introduce my own idea of "public justice" which, according to Robertson, is supposed to suffer from that very same defect, in fact suffers "from all the defects of social justice" (192). The gist of my criticism of "social justice" was that, both logically and scripturally, the first and basic idea to be explained is justice simpliciter. Nowhere does my argument state or imply that it is a mistake to qualify "justice". What I did say was that the qualifier "social" as employed in the Statement fails to give insight into the way in which justice is differentiated into kinds of justice within the structures and processes of society. It is my claim that "public justice" does not suffer from the defects of "social justice" because it refers to a type of justice falling within the competence and realm of a societally distinct sphere, that of the state which addresses those issues of justice falling within its sphere in a typically public-legal manner.

Whilst there may be an element of truth in Robertson's point that the imprecision in the Statement's conception of social justice makes it "inimical to the rule of law", the same, I would argue, is not true of my conception of public justice. The thrust of Robertson's argument seems to be that any attempt by the state to address concerns of social justice, whether in terms of the imprecise conception in the Statement or via my "public justice" notion, violates any "meaningful" conception of the rule of law. Robertson's idea of a meaningful definition or conception of the rule of law seems to be arbitrarily confined to a conservative-liberal definition or conception. However, there are equally plausible social-democratic conceptions (eg MacCormick, 1982). At the very least, the ideas of law justice and state set forth in my chapter are *not inconsistent* with some "meaningful" conception of the rule of law. The central notion of the state as a *public-legal* institution surely suggests some such conception.

The idea of law and state as societal institutions qualified by the norm of justice implies a strong substantive conception of the rule of law.[1] It includes values which Robertson (192) believes should characterise any idea of the rule of law. These values, I think he would agree, can be summarised in Lon Fuller's eight "desiderata" comprising the "inner morality of law". My conception goes further by requiring *in addition* some substantive requirement of justice understood in both a private and public law sense, including notions of distributive justice as well as those of freedom and formal equality. But it is the inclusion of substantive ideas of distributive justice to which Robertson objects. His objection, however, should be expressed as a rejection of the political-legal perspective that informs the conception rather than as a denial of the "meaningfulness" of any conception of rule of law which is inconsistent with his own conservative-liberal perspective. Robertson is quite entitled to espouse his own version and reject others but the reverse must also be true.[2]

Robertson's complaint is that a conception of political justice that includes ideas of distributive or social justice is incompatible with any meaningful conception of the rule of law, yet produces little or no argument to sustain this thesis. From the fact that there are *difficulties* in defining what are excessive disparities in income and wealth and in determining who is to decide what those disparities are and how they are to decide (192), it does not follow that they are issues *impossible* of solution. Surely these are just the sort of issues which the democratic process enables us to decide, what the new MMP political environment is supposed to facilitate with its increased opportunities for political consensus through compromise. There appears to be in Robertson's objection, however, an unarticulated Hayekian assumption that the state and law are *incapable* of effectively addressing gross inequalities of wealth and income, however we choose to define what are gross inequalities or disparities, at least without violating the rule of law. Again I am not questioning

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New General Editor for *The Laws of New Zealand*

October 1992 saw the publication of the first title in Butterworths' *The Laws of New Zealand*, an encyclopaedic collation of the statute law of New Zealand together with all the relevant decisions of the New Zealand Courts under some 142 different categories of law in 28 volumes.

At its launch, the Right Honourable Sir Robin Cooke, Editor in Chief, commented: "Like other Commonwealth countries New Zealand is inevitably and increasingly acquiring its own legal identity. This work is a stage in the process. It aims at a concise account of the whole law of New Zealand, with a judicious selection of overseas references."

The Joint General Editors have been Pat Downey, OBE, in charge of commissioning leading legal experts as contributing authors, and Hellen Papadopoulos.

With the commissioning phase of *The Laws of New Zealand* now substantially complete, Hellen Papadopoulos will become General Editor in charge of coordinating and guiding ongoing work on the project. She has been a Managing Editor for Butterworths since 1987 and is a qualified Barrister and Solicitor graduating with an LLB from Victoria University in 1982.

Consulting Editors to the project remain the Right Honourable Justice Gault, the Honourable Justice Smellie, the Honourable Justice Tipping, the Honourable Justice Fisher, the Honourable Justice Thomas, and the Honourable Justice Penlington.

Fifty-one titles have been published to date, authored by some of New Zealand's most eminent Judges, practitioners and academics. These include Colin Pidgeon QC contributing on *Civil Procedure* (High Court, Privy Council and Court of Appeal); the Right Honourable Justice McKay on *Defamation*, Professor Webb on *Partnership and Joint Ventures*, and Colin Withnall QC on *Negligence*.

Ninety-five further titles and contributors have been commissioned and are under development. These include the Honourable Justice Greig on *Censorship*; Paul Cavanagh QC and Jennifer Caldwell on *Environment*; Gary Judd QC on *Equity*; Alan Galbraith QC and Peter Stubbs on *Forestry*; and Nadja Tollemache on *Information*.

Pat Downey prepared the working plan for this enormous publication, and as well as fulfilling the role of Joint General Editor (Commissioning) and is, himself, a contributor on *Copyright, Weights and Measures*, and *Breach of Peace, Riots, and Unlawful Assembly*.

In a letter to members of the Advisory Board and Authors, to tell them of the change, Mr Downey said he felt they could be proud, as he was, of their involvement with *The Laws of New Zealand*.

Mr Downey will continue his relationship both with Butterworths, and with *The Laws of New Zealand*.

Butterworths' Managing Director Philip Kirk paid tribute to Mr Downey's contribution to the project: "without which I really doubt we could have succeeded in such a big project".

As the sole General Editor in charge of further development of *The Laws of New Zealand*, Hellen Papadopoulos says "*The Laws of New Zealand* is an exciting project to be involved in. With the large and varied body of titles already published it is very rewarding to see the publication taking its place as the cornerstone of legal practice in New Zealand. The release of upcoming titles will enhance this position." □

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Robertson's right to espouse such a view, I merely object to his attempt to present as an argument against "social" or "public" justice what, in actual fact, is merely an unargued assertion.

Robertson's anxiety to have "definitions" (of law and social justice) seems to blind him to the implicit conception of rule of law contained in my chapter and calls to mind H L A Hart's doubts about the value of seeking elucidation of legal ideas through analysis of definitions. ("Definition and Theory in Jurisprudence", 1953.) □

1 For another substantivist conception see Blauu, (1990) 107 SALJ pp 76-96.

2 For example MacCormick's social-democratic critique of Hayek's conservative liberal conception in "Spontaneous order and the rule of law: some problems", (1986).

Response from Bernard Robertson

Mr Cameron proposes to add some undefined "notions" to Fuller's eight requirements. Legislation pursuing these "notions" will either comply with Fuller's eight points or it will not. But I challenge Mr Cameron to explain how Judges and the judicial system can pursue equality of outcome while the law complies with Fuller's requirements. If we start "balancing" Fuller's requirements against the new ones, then we are not adding but subtracting.

At any rate, Cameron has made clear that an "excessive disparity" in income is a disparity which the majority thinks excessive. In this case his "implicit conception of rule of law" can only mean that whatever the majority thinks is law.

To Ms Smithies I would reply that I have indeed read the entire Social Justice Statement but it does not take one much further. The obvious response to Smithies' letter is to say that Christians are entitled to live as they like and to attempt to persuade others to do likewise. The question is whether they are entitled to compel others to live the same way.

The key question in all constitutional debate is "what limits should there be to the power of the majority to interfere with the individual?" The answer that seems to be lurking in both Cameron and Smithies' responses seems to be "none". □

Correspondence

Dear Sir

I write with reference to the article "Criticism of Judges, Courts and Judicial Decisions, especially by Politicians" by Mr Guy Chapman, published at [1995] NZLJ 267.

Mr Chapman appears to misunderstand some of the issues involved in criticisms of Judges and judicial decisions.

The Honourable John Banks accepted that in his comments about District Court Judges he had breached Cabinet rules. Mr Banks upon becoming a Cabinet minister agreed to abide by those rules.

Secondly, I wrote directly to Mr Banks subsequent to his comments asking for an apology. He gave it.

Thirdly, I wrote to the Attorney-General with copies to the Prime Minister and the Minister of Justice because it seemed to me clear that Mr Banks had breached Cabinet rules. The Judiciary's responsibility is to stay out of politics, the Cabinet minister's responsibility is to accept the restrictions provided in the Cabinet rules.

Mr Chapman suggests that this was all an attempt to stifle debate about the Judiciary and judicial decisions. There can be no objection at all to debate about a Judge's decision. There can be every right to object when the Judge is denigrated. There is, and should be, debate about the way Judges are appointed and there is, and should be, debate about Judges' decisions.

Mr Chapman complains that I went "straight to the politicians and asked Cabinet colleagues of the Minister to consider 'an appropriate course of action'". He complains that this action of mine hardly showed "judicial independence". As I have said, the Prime Minister is responsible for ensuring his Ministers obey the rules. Who more appropriate to write to?

Finally, surely Ministers are not in the category of "ordinary citizens". Do they not have a special responsibility because of the influence they must have within the community, to deal with the issues rather than with the people involved. Mr Chapman suggests the Minister has been shut down by the Judiciary. Not so at all. He continues to discuss and criticise decisions of the Judiciary. He has mostly kept away from personalities. I have not tried nor would I wish to stop this debate. This is the point that Mr Chapman has missed. It is the criticism of the individual Judge that is offensive, rather than any debate about the individual Judge's decision.

R L Young
Chief District Court Judge

Comment by Mr Guy Chapman on response of the Chief District Court Judge

Responding briefly to the Chief Judge's comments, I would make the following points:

1 The undoubted right of Ministers, politicians, or anyone, to criticise Judges, Courts and judicial decisions, is basic and sacrosanct in a democracy.

2 The Cabinet Manual is not a set of legally cognisable "rules". And whatever (hazy) status it might possess, it is not policed by the judiciary! The Cabinet Manual is what it says it is: guidelines and information for Ministers and others.

3 Regardless of its status, or lack of (legal) status, the Cabinet Manual would seem to go too far in discouraging Ministers from criticising judicial decisions and Judges, being based on inappropriate "separation of powers" notions, instead of focusing on the intrinsic value of a politically independent judiciary, but one which we all have an interest in ensuring is kept "up to the mark".

4 The Minister (Hon J A Banks MP) did not, in the particular case, "denigrate" any Judge. He brought to public attention the matter of the quality of appointees to District Courts. Whether the Minister was right or wrong in his views is not the issue. He raised an issue which should not be swept under the carpet, but should be openly and frankly examined, and debated.

5 A suggestion seems to be that Ministers should be under special constraint, unlike "ordinary citizens" (to use the Judge's term). There is no basis for that. If anything, people in public life, such as elected representatives holding high political office, have a signal responsibility to raise issues which they consider should be of public concern.

Judges and lawyers should be wary of appearing a self-serving and self-protective coterie when such issues are raised. The Minister raised a general and significant issue. He did not attack a person.

G B Chapman

Note

In the original article by Mr Chapman "Criticism of Judges, Courts and judicial decisions, especially by politicians" there was a typographical error in the citation of *R v Gray*. The correct citation is *R v Gray* [1900] 2 QB 36 (Full Court).

Judicial review: Review of the merits?

By John Caldwell, University of Otago

In the opening paragraph of his excellent book on Judicial Review: A New Zealand Perspective *GDS Taylor notes that judicial review is an assessment by the Courts of what is needed for the good of society to supervise or control the activities of government-related authorities. He goes on to explain the limitations on this general principle; and to point to developments that were taking place in this area of law. In this article Mr Caldwell considers the question of "substantive unfairness" as a stated judicial basis for review. He argues that the recent case law would indicate that the test for review is no longer whether the decision is lawful or procedurally fair, but it is also a question whether, in his words, the decision can be tolerated by the adjudicating Judge.*

The dictum of Lord Brightman in *Chief Constable of North Wales v Evans* [1982] 1 WLR 1155 at 1173 that judicial review is concerned not with the decision but rather with the decision-making process has frequently been endorsed as an authoritative pronouncement on the limits of judicial review (eg see *Fraser v SSC* [1984] 1 NZLR 116 at 127 per Richardson J). For many, the dictum seemed to encapsulate an immutable truth.

Accordingly, some intriguing judicial hints in the 1980s from Cooke P that fairness might not be confined to procedural matters (eg *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 149 and *Fraser v State Services Commission*, supra, at 121) excited considerably more interest amongst the academics and students of Administrative Law than its practitioners. To a practitioner arguing the case on an application for review before the High Court, the apparently unorthodox dicta of Cooke P appeared to be but an academic divertissement. However since the case of *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641 where all three members of the Court of Appeal, with differing emphases, came to embrace "substantive unfairness" as a named basis for review, practitioners can no longer afford to bypass the gate leading into the once forbidden field of the merits.

Even if, as Fisher J in the Court of Appeal would have it, an applicant arguing substantive unfairness would still need to identify a specific administrative law ground of review, it must be stressed that some of the existing grounds of review, and presumably some of those yet to be developed, already contemplate review on the merits in certain cases. Now that the appellate Judges have accepted the terminology of "substantive unfairness", however, it must be ever more likely that the *quality* of the decision, as well as its process, can be openly subjected to challenge and a degree of review (eg see Cooke P at 652).

Traditional grounds of review

In *Council of Civil Services Union v Minister for the Civil Service* [1985] AC 374 Lord Diplock, pointing out that his list was not necessarily exhaustive, enumerated three grounds of review: illegality, irrationality, and procedural impropriety (at 410).

In the terms of Lord Brightman's dictum, only the ground of "procedural impropriety" could truly be said to be focused solely and purely on the *process* of decision-making. Even illegality, the very heart of traditional judicial review, could only be so described with some bending of language. When, for instance, the Court is dealing with an alleged illegality based on relevant and irrelevant considerations in the exercise of a discretionary power, it is obliged to examine very closely the substantive thinking of the decision maker in order to determine what factors were material to the final decision on the merits. This is sometimes said to be an examination of the deliberative process; but, in plainer terms, the Court, in cases like this, is scrutinising more the substantive decision itself than any extrinsic process.

More obviously, "irrationality", once more commonly termed "unreasonableness", has always authorised full-blown substantive review of the merits of the substantive decision, albeit on an ostensibly restricted basis. Given the undisputed existence of this ground of review, Lord Brightman's dictum, and any other assertion that a Court of review never concerned itself with the merits or policy of a decision, have always been a little misleading.

Irrationality – its history and scope

Although lawyers tend to speak of "*Wednesbury*" unreasonableness, the principles of review on the grounds of reasonableness long predate the decision of the Master of the Rolls in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. The so-called "*Wednesbury*" unreasonableness is but a "legal convenient legal shorthand used by lawyers" (see *Nottinghamshire County Council v Secretary of State for the Environment* [1986] 1 All ER 199 at 203 per Lord Scarman speaking of the wider dicta in the *Wednesbury* case). Lord Greene MR's judgment crystallised but did not create the principle of reasonableness review, and as Cooke P tartly observed in *Hawkins v Minister of Justice* [1991] 2 NZLR 530 at 534 the "geographical epithet adds nothing".

(i) Older cases on unreasonableness

In significant judicial discussion on reasonableness in the early decades of this century, "unreasonableness" in administrative law was not restricted by the Judges to the extreme types of situation hypothesised by Lord Greene MR, involving outrages such as a dismissal of a teacher for the colour of her hair.

For instance in *Williams v Giddy* [1911] AC 381 the Privy Council examined the award of a gratuity of but one penny per year of service in the exercise of a discretion by the Public Service Board. The facts were indeed extreme and perverse, but, delivering the opinion of their Lordships, Lord Macnaghten did not postulate extremity as the requisite test. Indeed, the approach of Lord Macnaghten was not dissimilar to that now favoured by Cooke P. His Lordship asked rhetorically, whether the action of the Board was ". . . reasonable . . . fair?" (at 385); and Lord Macnaghten announced simply that the statutory discretion was to be exercised ". . . reasonably, fairly and justly" (ibid).

Similarly, in the well-known House of Lords judgment of *Roberts v Hopwood* [1925] AC 578 Lord Wrenbury insisted that a person in whom a discretion is vested was to exercise the discretion on reasonable grounds. His Lordship then proceeded to define the duty to act reasonably in simple terms: ie the duty required the decision maker to ". . . ascertain and follow the course which reason directs" (at 613).

At common law unreasonableness had long been a ground for invalidating local authority bylaws. In the leading English case decided in the 19th century Lord Russell CJ did expound a rigorous test redolent of Lord Greene MR's later dicta, claiming that unreasonableness would be found if bylaws were

> . . . manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the eyes of reasonable men (*Kruse v Johnson* [1898] 2 QB 92 at 99-100).

However, in the leading New Zealand bylaws case under the Bylaws Act 1910, *McCarthy v Madden* (1914) 33 NZLR 1251, a much lighter approach was adopted by Denniston and Edwards JJ in their joint judgment on the reasonableness of bylaws. Their Honours laid down a number of guiding principles, but stressed that reasonableness was a question of fact without any single defining test. Applying these principles to the facts, the Court found that the particular bylaw in question, dealing with the driving of cattle through streets, was invalid for unreasonableness, though it was never open to suggestion that the bylaw could be characterised as manifestly absurd or unjust.

These early influential cases, and there are others of a similiar ilk, illustrate that the Courts were not unwilling to subject the exercise of discretion to a reasonableness test; and, barring Lord Russell CJ's reserve at the end of the 19th century on review of bylaws, the test adopted was more or less consistent with the ordinary understandings of the concept.

(ii) The Wednesbury *notion of unreasonableness*

It is not always appreciated that the judgment of Lord Greene MR in *Wednesbury Corporation* contains inherent conceptual ambiguity in its analysis of unreasonableness (which mirrors, incidentally, the judicial divergence over substantive unfairness revealed in the *Thames Valley* case). Thus, at one point in his judgment, Lord Greene MR noted that unreasonableness could be used as a generic term to describe the various grounds of review for the exercise of discretion, such as a failure to take into account relevant considerations. Lord Greene MR was there suggesting that unreasonableness could be used as an umbrella term to describe the so-called "Wednesbury principles".

At another point in his judgment, however, Lord Greene MR indicated that unreasonableness could found a independent ground of review where ". . . a decision on a competent matter is so unreasonable that no reasonable authority could have come to it" (at 230). This latter aspect constitutes the so-called "Wednesbury unreasonableness". On Lord Greene MR's reasoning it would require something "overwhelming" to prove, and would be ". . . something so absurd that no sensible person could dream it lay within the powers of the authority" (at 229). This was unreasonableness of the red-headed teacher dismissal kind.

The theoretical problem with the severity of the independent test, as Lord Greene MR himself seemed to recognise obliquely but did not explore, is that an action of such absurdity must almost inevitably involve the taking into account of irrelevant matters and/or bad faith. Not only would the ground "run into" the traditional grounds of review, as Lord Greene MR put it, it would be coincident with them and have no separate existence. As well, from a more practical perspective, instances of such egregious capriciousness in decision-making would be truly exceptional. As with the ground of bad faith, the unreasonableness ground would have virtually no practical application.

*(iii) The post-*Wednesbury *definitions of unreasonableness*

Despite these problems with the *Wednesbury* test, restatements of the definition from the House of Lords in the 1980s continued to reflect the same stringency. In the *CCSU* case, supra, Lord Diplock offered "irrationality" as a specific, named ground of review, and held it would require "something outrageous in its defiance of logic or of accepted moral standards" (at 410). Earlier in *Secretary of State for Education and Science v Tameside Metropolitan Borough* [1977] AC 1014 Lord Diplock had defined "unreasonableness" in the administrative law context as being something "no sensible authority . . . would have decided to adopt" (at 1064). Other judgments of members of the House of Lords revealed equal restraint.[1] On the other hand, Sir Robin Cooke, speaking extra-judicially, made a plea for the argument that "reasonable means reasonable" and deprecated "minatory exaggeration".[2] Yet despite Sir Robin's wish for reasonableness to be treated as a "simple and straightforward term", his judicially favoured dictionary test for unreasonableness as a decision "outside the limits of reason" (*Webster v Auckland Harbour Board* [1987] 2 NZLR 129 at 131) itself connoted the need for senselessness. A more simple and straightforward test might have been the alternative Oxford dictionary mean-

ings of "tolerable, fair" – those dictionary meanings being well captured by Fisher J's description of *Wednesbury* unreasonableness as "the power to be wrong only in moderation" (*Martin v Ryan* [1990] 2 NZLR 209 at 225).

(iv) Examples of the New Zealand judicial approach to unreasonableness

As discussed above irrationality, or unreasonableness, is usually treated as a head of review quite independent of that based on relevant and irrelevant considerations (*Mackenzie District Council v Electricorp*) [1992] 3 NZLR 41 at 44 per Richardson J). Needless, to say, claims on this basis have frequently been pleaded in the New Zealand Courts without success.[3]

However, given the theoretical stringency of the test it is more remarkable how frequently the claims have been successful, and there have been a number of High Court decisions that have found unreasonableness on the facts. For instance, unreasonableness was found to exist where there was an absence of evidence concerning the need for a District Court Judge to make an ex parte order to sell matrimonial property (*Martin v Ryan*, supra); where there had been computer processing of claims for special benefits without regard to an applicant's special circumstances (*Ankers v Attorney-General* [1995] NZFLR 193); where unfavourable findings of fact had been made against an applicant for a fishing quota without supporting evidence (*Pohio v DG of Agriculture and Fisheries* (High Court, Wellington, CP 463/90, 1 September 1993, Greig J), and where a decision-maker had failed to weigh positive factors in favour of a plaintiff against a sole detrimental factor in refusing an application for permanent residence (*Chan v Minister of Immigration*, High Court, Auckland, CP 80/89, 8 May 1989, Barker J).

Similarly the Court of Appeal, in at least two reported cases, has also found there to be unreasonableness in the exercise of a statutory discretion. Citing the *Tameside* test, the Court of Appeal held that a ministerial decision which provided that a married woman teacher, with a financially non-dependent spouse, would receive less by way of transfer expenses than a married male teacher was unreasonable: *Van Gorkom v Attorney-General* [1978] 2 NZLR 387. The Court of Appeal also held that an immigration decision refusing an applicant permanent residence because of his failure to disclose a minor criminal offence of dishonesty, but without regard to his mens rea in non-disclosure, was vitiated for unreasonableness: *Chiu v Minister of Immigration* [1994] 2 NZLR 541.

The significance of the above examples is that in many of the cases the impugned decision could not truly be described as irrational, senseless or perverse. For instance, in the context of the 1970s, and in the prevailing socio-economic thinking and structures of the time, the differentiation between male and female married teachers would have been characterised by many as unenlightened, but not exactly in the same class as differentiation between teachers on the grounds of hair colour. Today, in the present climate of social opinion, one hastens to add, it probably would. Similarly a failure to take into account mens rea in an applicant's failure to disclose a criminal conviction might today seem harsh, but not exactly senseless, perverse, or outrageous in its defiance of accepted moral standards.

In truth, the Courts have often found decisions to be "unreasonable" in the more ordinary meaning of that word. The above are not examples that fall comfortably within the compass of the specialised, severe administrative law meaning.

The general notion of fairness

Even prior to the *Thames Valley* case, Sir Robin had been pointing out extra-judicially that fairness was being used in a variety of administrative law contexts beyond the traditional boundaries of the procedural rules of natural justice;[4] and recently, for example, fairness was held to require consistency in decision making (*Northern Roller Milling Co v Commerce Commission* [1994] 2 NZLR 747).

Sir Robin had also argued both judicially and extra-judicially that "reasonableness" and "fairness" were clearly closely related concepts which overlapped. The closeness of the relationship between the two grounds was neatly explained by Dunn LJ who surmised that "an unfair action is seldom a reasonable one": *R v Secretary of State for the Home Department ex p Khan* [1985] 1 All ER 40 at 52. Accordingly, there have been a number of New Zealand cases where the tests of fairness and reasonableness have been run together.[5] In such cases the fairness concept served to colour the test of reasonableness; for when fairness and reasonableness are run together the *Wednesbury* severity has been overtly abandoned.

Newer grounds of review

With the Courts frequently paying only lip service to the extreme rigidity of the *Wednesbury* test, the existence of unreasonableness as a ground of review almost certainly helped facilitate review for areas traditionally regarded as out of bounds for the Courts. For instance, it was stated that a Court could review the weight placed by the decision maker on relevant matters if the weighing of factors was outside the limits of reason (*NZ Fishing Industry Assn v MAF* [1988] 1 NZLR 544 (CA) at 552; and see *BCNZ v Broadcasting Tribunal* (1986) 6 NZAR 171 and *Chan v Minister of Immigration* (High Court, Auckland, CP 80/89, 8 May 1989, Barker J). It was likewise asserted that factual findings could be reviewed if an assessment on the facts was not open to a reasonable authority (*Jenssen v DG of Agriculture and Fisheries*, CA 313/91, 16 September 1992 at 3 per Cooke P and *Pohio v DG of Agriculture and Fisheries* (High Court, Wellington, CP 463/90, 1 September 1993, Greig J).

In addition to such applications of the protean reasonableness concept, the New Zealand Courts' willingness to move beyond review based strictly on issues of legality and vires was heralded by the adoption of new grounds of review. For instance, "mistake of fact", which first surfaced as a ground for review in the English Court of Appeal, was taken into the New Zealand armoury (see eg *Daganayasi v Minister of Immigration*, supra, at 145-149, *Fowler and Roderique v Attorney-General* [1987] 2 NZLR 56 at 77, and *NZ Fishing Industry Assn v MAF* supra at 552, though there does remain the occasional judicial reservation about this ground). The ground of review for mistake or

misrepresentation by one of the parties, which materially affects the decision, was also created as an entirely indigenous ground of review in New Zealand (*Martin v Ryan*, supra). Additionally, on appeal from New Zealand, the Privy Council extended the normally procedural rules of natural justice to require logically probative evidence and reasoning of a logically consistent nature (*Re Erebus Royal Commission* [1983] NZLR 662 at 671).

In England, the English Courts now seem increasingly relaxed with the civil law concept of proportionality, though it is unclear whether this is an independent basis for review or merely an aspect of *Wednesbury* unreasonableness.[6] Additionally, inconsistency, tied to fairness, seems well-established as a ground for review in the English jurisdiction (*R v IRC ex p Mead* [1993] 1 All ER 772 at 783; *HTV v Price Commission* [1976] ICR 170 (CA)), though, for the time being, it seems that the New Zealand Courts would prefer to examine inconsistency as an aspect of *Wednesbury* unreasonableness (see eg *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606 and *Faris v Medical Practitioners Disciplinary Committee* [1993] 1 NZLR 60).

What is clear, from both the New Zealand and English cases is that the Courts are no longer content to confine review to narrow questions of process and statutory interpretation. A number of camouflages may have been used, disclaimers have often been uttered, but the Courts have been positioning themselves for merits-based attack.

Consideration of merits in relief

One of the defining characteristics of the review jurisdiction concerned the nature of remedial relief once a ground of review had been made out. Orthodox theory dictated that even where the Court of review had its own clear view as to what the correct decision should be it could not substitute its own decision for that of the decision maker successfully reviewed (eg *Spectrum Ltd v Minister of Conservation* [1989] 3 NZLR 351, 372). Rather, the Court should simply send the decision back to the decision maker for reconsideration.

On occasions, however, New Zealand Courts have been prepared to grant declarations of entitlement on the basis that only one conclusion is justifiable (eg see *Fiordland Venison Ltd v Minister of Agriculture* [1978] 2 NZLR 341; *Darvell v Auckland District Legal Services Subcommittee* [1993] 1 NZLR 111 and *Montgomery v Attorney-General* (High Court, Auckland, CP 1445/86, 8 March 1988, Henry J). This is a remarkable breach of traditional theory. For no matter how understandable or expedient that course of action may be, the Courts in making such declarations are inevitably passing judgment on the merits of substantive matter. Without doubt, the Courts have on these occasions stepped into the shoes of the decision maker. Similar judicial interest in the merits of the decision has also been apparent when, in the exercise of its discretion to grant or refuse relief, the Court has decided that a remedy should not be granted, despite some administrative law breach, because the decision, in the Court's view, would have been the same even without the breach (eg see *Maddever v Umawera School Board* [1993] 2 NZLR 478 and *Kim v Butterfield* (1994) 7 PRNZ 461).

As well, in New Zealand, there has been a strong line of cases where a "holistic" approach has been taken to the application for review (eg see *Destounis v Minister of Fisheries* (High Court, Wellington, CP 1/87, 11 February 1993, McGechan J at 60). For instance, it has been suggested in the Court of Appeal that the Court would stand back and look at the case as a whole in deciding on relief (*NZ Fishing Ind Assn v MAF* at 557); and the High Court has suggested that in making a decision on an alleged abuse of discretionary power it must ask whether "such doubt has been thrown on a decision itself to make it unsafe to allow the decision to stand" (*Barton v Masterton District Council* [1992] 1 NZLR 232 at 248 per Gallen J). All this is consistent with an early observation of Cooke J that a determination by the Court whether or not to set aside an administrative decision is dependent less on clear and absolute rules than on an "overall evaluation" (*Burr v Mayor of Blenheim* [1980] 2 NZLR 1 at 4).

The notion of substantive unfairness

(i) Origins

The developments discussed above doubtless helped promote the flowering of the substantive unfairness concept in the *Thames Valley* case. Although the notion of substantive unfairness is a New Zealand development, with its conception traceable to undeveloped dicta of Cooke J in *Daganayasi v Minister of Immigration*, supra, Cooke P in the later *Thames Valley* case was keen to find implicit support for the concept in judgments of English Courts. Accordingly, the President cited two judgments of the House of Lords delivered in the 1980s which seemed supportive of wider grounds of review: *Preston v Inland Revenue Commissioners* [1985] 1 AC 835, where a breach of representation was stated to amount to potentially reviewable unfairness by Lords Templeman and Scarman (at 866-867, and 852), and *Wheeler v Leicester City Council* [1985] 2 All ER 1106 where review seemed to be based on the basis of an unfair coercive object being pursued by the Council. Moreover, Cooke P prayed in aid the innominate ground for review identified by Lord Donaldson MR where something "had gone wrong of a nature and degree which required the intervention of the Court" (*R v Panel on Take-overs and Mergers, ex p Guinness* [1990] 1 QC 146, 160).

(ii) The Thames Valley *case – the facts and history*

The Thames Valley Electric Power Board had prepared a plan for allocation of shares in a new energy company. Under the plan, 80 per cent of the shares would be allocated to electors on the electoral rolls of constituent local authorities, and the remainder given to the local authorities themselves. The companies seeking judicial review contended that the plan did not reflect the contribution made by them through past purchases to the Thames Valley resources. They accordingly argued that the plan did not allocate sufficient shares to them.

In the High Court, Hammond J agreed with the essential argument. However, his Honour held that the decision could not be characterised as unreasonable in the administrative law sense, as it was always recognised that allocation of shares to local electors was a possibility. Nevertheless, Hammond J held that substantive unfairness was a ground for review and, having articulated several criteria for the ground, his

Honour found there was substantive unfairness on the facts. His Honour said that the matter was a question of "just deserts"; and, in his Honour's view, it was ". . . morally unappealing to say that others are entitled to intercept all the fruits of the plaintiff's economic input over the years".

On appeal, the Court of Appeal agreed with Hammond J that there had been no unreasonableness. The three members of the Court of Appeal also agreed that substantive unfairness was a basis of review, though there were differing emphases. On the facts of this case, however, the three Judges were unanimous that no substantive unfairness could be found.

(iii) The Thames Valley *case – the judgments in the Court of Appeal*

(a) The judgment of Cooke P

The President of the Court of Appeal declared that substantive unfairness was a legitimate ground of review, "shading into but not identical with unreasonableness". It allowed, he said, for the "*quality*" of an administrative decision to be open to a "degree of review".

The categories of substantive unfairness, Cooke P held, could never be defined with exhaustive precision, and they could be affected by changes in social and political thinking. However, one specific type of substantive unfairness that his Honour was prepared to identify was where the "procedure and the decision of an administrative body, although possibly just surviving challenge if viewed separately were in combination so questionable" as to require the intervention of the Court.

(b) The judgment of Fisher J

Fisher J held that substantive unfairness could only be used as a descriptive term for some existing recognised ground for review, included in which were the newer grounds such as inconsistency, and mistake and misrepresentation. Whilst his Honour conceded that the list of available grounds for review would remain open to development, his Honour stated that the expression "substantive unfairness" could only be used when a more principled and specific ground for intervention had been identified.

(c) The judgment of McKay J

McKay J also inclined to the view that the term "substantive unfairness" was but a generic term. However, his Honour appeared a little readier than Fisher J to allow for the possibility of substantive unfairness spilling beyond presently recognised grounds.

McKay J thus declared that substantive unfairness must be of "the kind" illustrated by the cases, or of a "similar nature" based on the same principles. Then, echoing Cooke P's essential approach, McKay J stated that in each case the Court needed to decide whether the unfairness relied on was such as to justify the intervention of the Court. But, his Honour cautioned, the mere fact that something is "unfair" would be insufficient.

(d) Appraisal

If unfairness is to be treated as a discrete, segregated ground of review, available when the intervention of the Court is seen as required, then the *Thames Valley* case highlights the difficulties that will be faced by legal practitioners when advising their clients on their prospects of success.

In the *Thames Valley* case both Cooke P and McKay J were of the view that there was no unfairness on the facts. Cooke P stated that Hammond J had drawn the unfairness line in the wrong place, because there was no objective unfairness. McKay J indicated that Hammond J had been led into the error of thinking that "anything that is 'unfair' will be sufficient".

Yet Hammond J had taken considerable pains to lay down firm criteria for intervention on the grounds of "unfairness". Included in the High Court Judge's criteria was the requirement that the unfairness was "objectively demonstrable"; and Hammond J was insistent that the principle of substantive unfairness could not apply where reasonable people could differ. However, in his Honour's view the share allocation plan was demonstrably and objectively unfair. For Hammond J, this was not a case where reasonable people could differ. The view of the Court of Appeal Judges, of course, was to the contrary. In their estimation the plan was objectively fair (see eg Cooke P at 653).

The judicial divergence offers a vivid illustration of the objection made by some towards recognition of substantive unfairness as a separate ground of review. Critics argue that the doctrine of fairness is inherently indeterminate, and relies on intuitive judicial decision making (see eg McLachlan "Substantive Fairness" (1991) 2 PLR 12); it is suggested that whether or not substantive unfairness will be found to exist is dependent almost entirely on an individual Judge's tolerance towards a decision that appears to that Judge to be wrong.

The history of the *Thames Valley* case reveals that the criticism is not without some validity, and indeed it was subsequently judicially admitted by McGechan J in *Taiaroa v Minister of Justice* (High Court, CP 99/94, 4 October 1994) that substantive unfairness is ultimately a question of "degree and in the end of perception and judgment" (at 68).

Conclusion

Substantive unfairness may well be intrinsically uncertain, but it must be said that certainty was never a feature of the traditional grounds of review based on vires and process. Hence, Fisher J's approach of treating substantive unfairness as a generic term would provide only marginally more certainty and predictability in the area. After all, the specific, principled grounds of review include the ever-expanding notion of unreasonableness, and, at least for that ground, the response of a particular High Court Judge towards the merits of the decision must be of critical importance.

But, even leaving aside unreasonableness as a ground for review, the Courts have, in truth, always had a choice as to whether or not to intervene on applications based on legality or procedural impropriety. That was the specific objection of Lord Denning MR to the Courts' former purported distinction between "jurisdictional" and "non-jurisdictional" errors of law, which Lord Denning discerned was a mere artifice to disguise the judicial choice (*Pearlman v Governors of Harrow School* [1979] 1 All ER 365 at 372).

The same exercise of choice has been perceptible in many other judicial determinations on the traditional grounds. Take, for example, the central ground, of relevant and irrelevant considera-

tions in the exercise of discretionary power. There, questions as to whether a factor is implicitly mandatory or merely permissive, or as to whether a factor is irrelevant or not in the exercise of statutory discretion, are frequently questions of choice rather than legal dictate. This explains, for example, how the Court of Appeal and Privy Council could disagree on whether a factor taken into account by the Minister of Finance was relevant or not under the Reserve Bank Act 1964 in *Rowling v Takaro Properties* [1975] 2 NZLR 62 (CA); [1988] 1 All ER 163, 174-176 (PC). In a rather different context, that also explains why the Privy Council in *Petrocorp Ltd v Minister of Energy* [1991] 1 NZLR 641 adopted as correct the dissent of Richardson J, a known advocate of restraint, rather than the views of Cooke P and the Court of Appeal majority.

The Judges themselves, of course, have not generally been prepared to acknowledge openly the significance of choice and value judgment in the law of judicial review. At least in the past, such an admission would have been perceived to be too damaging to the pure theory of judicial review, which was premised on the view that Judges must not usurp for themselves the decision-making powers and discretion vested in expert decision makers. Yet the significance of that judicial value judgment has long been apprehended by practising lawyers and commentators. We might not like to hear it trumpeted too loudly or publicly, but Administrative Law cases have often been dependent not only upon their particular facts and particular statutory provisions, but upon their particular deciding Judge.

Wherein, then, lies the significance of the concept of substantive unfairness? The answer must be that the language and terminology used by the Courts acts as a kind of weather vane to reveal whether the prevailing judicial winds are those of judicial activism or restraint. Hence, when the Courts were governed by a controlling principle of vires, with the one narrow exception of *Wednesbury* unreasonableness test, the Courts were signalling to the legal profession, and to the public at large, that merits-based review should be contemplated only in the rarest of circumstances. The language of *Wednesbury* unreasonableness was therefore a declaration of self-restraint.

That restraint became weaker with the looser expositions of the unreasonableness test, the emergence of the newer grounds of review, and the assessment of the merits of the decision in deciding on relief. The Courts thereby helped create a climate of activist theory, though not necessarily of practice, whereby the legal adviser needed to turn his or her attention not only to matters of legality and statutory boundaries, but also to issues of the justice and merits of the case.

The formal recognition of the doctrine of substantive unfairness in the *Thames Valley* case, whether as a descriptive term for the newer grounds of review per Fisher J, or as a further lessening of the unreasonableness doctrine per Cooke P, has reinforced this movement towards merits-based review. Formal recognition means that although future Courts are likely to continue to insist religiously that review is not to be equated to appeal, they cannot peremptorily dismiss applications for review founded upon argument that a decision is substantively unfair.

It is, of course, important to reiterate that in the *Thames Valley* case both Cooke P and McKay J (and indeed Hammond J in the Court below) insisted that mere unfairness was insufficient to establish a case of judicial review. Some unfairness, it seems, might need to be accepted in the interests of allowing efficient administration (*Destounis v Minister of Fisheries*, supra at 59). Accordingly, the plaintiff as a heavy burden of proof in showing that the unfairness pleaded has reached a level that the Court should intervene. For many Judges the requisite threshold level is likely to be high, and the cases where the applicants are successful in discharging their burden are likely to be few. As Cooke P once put it, "progress [in Administrative Law] is not synonymous with giving judgment for plaintiffs" (*Stininato v Auckland Boxing Assn* [1978] 1 NZLR 1 at 29). Nevertheless, the very opportunity given to applicants to base arguments around reasonableness and fairness must surely result in the inherent right of review being perceived more and more as a limited, qualified right of appeal.

In brief, it appears the goals and scope of judicial review may need to be restated. Judicial review, it would seem is no longer concerned solely with the protection of the individual from decisions that are unlawful or procedurally unfair decisions, but also with protection of the individual from decisions which are overtly unjust. As McGechan J stated in *Taiaroa v Minister of Justice*, substantive fairness can arise when the Judge:

> . . . adds one small doubt to another; and says "neither by itself would be enough, but taking all altogether it is too much to allow". The Millard stand would understand (at 67).

In summary, then, the test for review is no longer simply whether the decision is lawful or procedurally fair; as well it is a question of whether the decision can be tolerated by the adjudicating Judge. Opinions will differ on whether the Millard stand would understand. □

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1 For example, see *In re Westminster CC* [1986] AC 668 at 706 per Lord Oliver; *Pulhofer v Hillingdon Borough Council* [1986] AC 484 at 518 per Lord Brightman; and *R v Secretary of State for the Environment ex p Hammersmith and Fulham LBC* [1903] 3 WLR 898 at 962 per Lord Bridge.

2 "The Struggle for Simplicity" in *Judicial Review in the 1980s* (ed Taggart, OUP, 1986) at 14-15.

3 Examples include *Glaxo New Zealand Ltd v Attorney-General* (1991) 4 TCLR 170; *Society for the Promotion of Community Standards v Everard* (1987) 7 NZAR 33; *Barton v Masterton DC* [1992] NZLR 232; *Tay v Attorney-General* [1992] 2 NZLR 693; *ARA v Local Government Commission* (High Court Wellington, CP 526/89, 25 August 1989, Jeffries J); *Ludke v Attorney-General* (High Court, CP 336/93 15 December 1993, Doogue J); *Nixon v War Pensions Appeal Board* (High Court, Wellington, CP 360/91, 5 March 1993, McGechan J).

4 See above, n 2 and "Fairness" (1989) 19 VUWLR 421.

5 *NZ Fishing Ind Assn v MAF*, supra at 552. More recently see *Carmichael v DGSW* [1994] NZFLR 769 (where Smellie J cited the dicta of Cooke P in the *Thames Valley* case) and *Woolworths NZ Ltd v Wellington City Council* (High Court, Wellington, CP 385/94, 15 May 1995, Ellis J).

6 See, Jowell and Lester, "Proportionality: Neither novel nor dangerous" in *New Directions in Judicial Review* (ed Jowell, Stevens, 1988) and *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720.