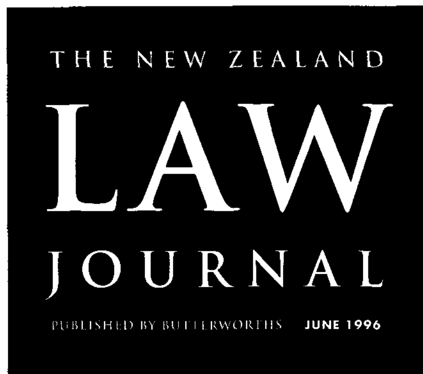

The role of the Governor-General

A new conventional wisdom is appearing on the appropriate role of the Governor-General after the next election. This is that the Governor-General should play a "neutral role" which, being translated, means not taking any part in government formation, but leaving politicians to sort matters out for themselves. This view has been espoused, in varying forms, by Alison Quentin-Baxter, by Dr Stockley in an article in this issue, by the authors of *New Zealand under MMP* and, most significantly perhaps, by Sir Michael himself.

New Zealand under MMP is written by Jonathan Boston, Stephen Levine, Elizabeth McLeay and Nigel Roberts and published by Auckland University Press. Although it covers the whole political scene, comments here will be limited to the question of the Governor-General and government formation. The authors raise what they describe as an issue of the utmost constitutional sensitivity, namely "from whom should the Governor-General seek advice on whom to appoint: the incumbent Prime Minister alone, or all the party leaders?" In fact none of these have any right to tender advice, in the constitutional sense, on this issue at all. All that they can do is advise the Governor-General as to whether they personally can form a government. In particular, it would be quite improper for an outgoing Prime Minister to attempt to advise the Governor-General whom to appoint. The last time the Queen succumbed to such blandishments, Her Majesty found herself portrayed as the unwitting accomplice to Mac the Knife's most ruthless stabbing.

The authors then ask how the Governor-General should execute the convention that he appoints the person who commands the confidence of the House. Should he start with the leader of the largest party or turn to another person who may command the confidence of the House? Again, on the authorities the answer seems clear. The only applicable convention is that the Governor-General appoints the person who commands the confidence of the House. There is no authority for the proposition, attributed to the Attorney-General in Dr Stockley's article, that the Governor-General is obliged to give the leader of the largest party first refusal. Clearly, the leader of the largest party will frequently be the person who can command the confidence of the House, but there is no rule giving that person any privileged position. Nor *pace* Mrs Quentin-Baxter, need the person appointed be a party leader. The Labour Party is now talking about adopting a mechanism for selecting a leader other than election by the parliamentary caucus. This could quite plausibly lead to the foisting on the caucus of a "leader" not supported by the majority of MPs. The Governor-General would then be put in the position of working out which Labour MP commanded caucus support.

The authors complete their study of this subject by suggesting the creation of a publicly appointed panel of experts who would advise the Governor-General if necessary. This is a possible remedy for an alleged flaw in current arrangements, which, they say, provide insufficient accountability for advice which might be tendered. In talking about tendering advice the authors inappropriately use the language of constitutional arrangements. When advice is tendered by responsible persons the Governor-General is obliged to act according to it, save under certain extreme circumstances. When considering whom to appoint as Prime Minister however, Governors-General act on their own deliberate judgment. If a formal panel of advisers is appointed is the Governor-General bound to follow their advice? If so, the panel has simply become the arbiter in place of the Governor-General and it is unclear why "senior academic lawyers" and the Chief Justice would be any more accountable for the outcome than the Governor-General is at present. If, on the other hand, the Governor-General is not bound to act on the advice of this panel then presumably there is nothing to stop him or her seeking the advice of others, in which case the whole exercise is a waste of time. As might be predicted from the list of authors, *New Zealand under MMP* is a mine of useful information and discussion on the political side, but lacks a sure touch on the more arcane constitutional issues.

All the above named writers seem united in the view that the Governor-General should be as passive as possible and allow politicians to negotiate an agreement which the Governor-General blesses. The Governor-General himself has visited Denmark and Ireland and is impressed by what occurs there. But past preference in the Westminster system has always been to have a government. In 1974 for example, the Queen acted swiftly to appoint the Mr Wilson as Prime Minister of Britain. The Liberals subsequently argued that this forced them to support the minority Labour government and deprived them of the opportunity to negotiate their way into coalition. Presumably this preference

for swift appointment of a government is now regarded as part and parcel of the old First Past the Post system. As the authors of *New Zealand under MMP* say, many people today have forgotten what their expectations were when they voted for MMP, but I do not remember supporters of MMP arguing that these conventions should be abandoned and conventions imported from Ireland and Denmark. It is clear from the precedents that for the Governor-General to adopt a passive stance and allow the politicians to devise a solution is not the neutral position it is touted as. It is a course which encourages coalition as opposed to minority government and potentially awards fringe parties leverage out of proportion to their size.

The precise effects of any course of action cannot be predicted until the election result is seen. What is clear however is that whatever the Governor-General does will advantage someone and disadvantage someone else. There is no neutral course. What is required of an impartial Governor-General is not that he steers a non-existent neutral course, but that he acts in good faith to ensure that New Zealand has the government which effectively commands the confidence of the House. It is not a constitutional requirement that that confidence is bought with promises of seats in cabinet and concessions on particular policies, as is inevitably the consequence of stringing the process out.

This leads to special votes. The official result will not be known until ten days after the election when these have been counted. At the next election special votes are likely to affect the ultimate issue. Small parties may refuse to negotiate until it is clear how many seats they are entitled to, or indeed whether they will be represented at all. The rule that a party which obtains one electorate seat is entitled to list seats may mean that up to five seats may hang on the result of a close vote in one electorate.

It is time this came to an end. In some other countries voters are instructed at which polling booth they are to vote, let alone in which electorate. Voting is a serious and responsible business. It is not acceptable that there should be expensive arrangements made and political uncertainty created so that people can go fishing for the weekend and cast their votes at their favourite fishing spot. Postal votes and overseas votes should be cast in advance so that they can be counted on election day. Then, the morning after, we can get down to serious business.

Judges in control?

Chief Judge Goddard recently said in *New Zealand Air Line Pilots Association v Airways Corp*, unreported, 15 December 1995, WEC72C/95: "I find it quite unacceptable, that Court orders and obedience to them should end up as bargaining counters in the course of negotiations."

This was actually obiter, as there was no suggestion that the alleged disobedience had been negotiated over. Nonetheless, it raises fundamental questions about the role of Judges and Courts.

Coase's Theorem states, roughly speaking, that if trade is free rights will end up in the hands of those who value them most whatever the initial distribution. This means that a Court case is not a substitute for negotiation, but a prelude to it. The role of the Court case is to clarify and allocate the legal rights so that we can then negotiate over them wisely. This is a valuable safeguard against inefficiency. If the Judge allocates the right to the party who values it less it will nonetheless get traded into the hands of the party who values it more.

But more than efficiency is at stake. Personal freedom and autonomy are also in issue. The ordering of a free society is achieved by the interactions of individuals. The ordering of a commanded society is achieved by instruction from above. Judges have not traditionally been commanders and controllers of our society. Their role is the limited one of allocating legal rights. The ultimate destination of those legal rights is a matter for us to work out by freely bargaining with one another.

Our procedural system reinforces this. Judges have no way of even knowing whether an order is being obeyed, unless one of the parties chooses to return to Court and complain that the other party is not complying. In this way, as so often, the apparently arcane procedure of the common law creates the framework for a free society far more effectively than any rival legal system.

It is increasingly evident, however, that some Judges are not content with this limited role. They are frustrated at their inability to use their position actually to order society in the way they think fit. Indeed Chief Judge Goddard's comment reveals an underlying assumption that that is their role and that the procedures of the common law are irritating obstacles. Some High Court Judges have suggested compromise solutions to problems rather than clearly allocating the legal right, ignoring the fact that once they have allocated the right the parties may well set about negotiation to arrive at some kind of compromise.

Of course, once Judges start trying to order society they fall into the same traps that politicians fall into. The key problem is knowledge. Court procedure is clearly not geared to telling Judges what they need to know in order to make clever policy choices. The result is agitation to change Court procedures so that Judges can become more informed. Thus we hear of increasing use of amici curiae, expert evidence about social and economic consequences of possible decisions and so on. In other words Judges want to emulate the way bureaucrats make decisions.

One of the intellectual tools that some Judges and lawyers have seized on to help them make decisions is economics. By doing so they miss the central lesson of economics, a lesson most bureaucrats have grasped, that no one person or body can rival the accumulated knowledge and judgment spread through society and reflected in prices. As Professor Epstein says in his paper published in this issue, nineteenth century Judges made sounder decisions with less knowledge of economics, but with a surer instinct for the protection of liberty and property.

To an extent this new role is forced on Courts by recent lawyer/politicians who failed to distinguish between the rule of law and the rule of Judges. Thus the Human Rights Act awards the High Court a dispensing power and the Resource Management Act integrates a judicial body into the process of deciding how a policy goal is to be pursued. This kind of development doubtless leads Judges to believe that their decisions are more or less self-executing. Not only does this lead to economic inefficiency but, if they adopt this stance the Judges abandon their real role, the only reason for maintaining their independence and all that flows from it, the defence of individual liberty. ❑

Events

Photo Universal Pictorial Press & Agency Ltd, London

Lord Cooke of Thorndon on the occasion of his introduction into the House of Lords, with his supporters Lords Woolf and Goff.

Letters

Dear Sir

Your editorial of 21 April, 1996 "Restorative injustice" is disappointing. You do fail to acknowledge any merit in the concept of restorative instead of merely retributive criminal justice. *Hall on Sentencing* (Appendix VII) deals with the acceptance of the Restorative Justice concept in our Youth Justice:

> "The thrust of the Act is towards a restorative rather than a punitive system of justice: *Police v James (a young person)* 1991 8 FRNZ 628, 638" and a number of other authorities – latest *RE v Police* (1995) NZFLR 433.

Principal Youth Court Judge Brown has also made reference to this feature of the Act in (1994) 6 *Criminal Justice Quarterly* when he said:

> We are encouraged to pursue twin goals of ensuring that young people face up to the reality of their offending and its effects on others and to seek ways of responding which reduce the likelihood that further offending will occur – ways that focus less on treatment and punishment (often indistinguishable in the perceptions of young people) and more on putting right the wrong that has been done.

Can there be much doubt that what is appropriate for the young in this field may also be appropriate in some matters to those over 16 years of age?

To discuss in what instances this may be appropriate would have been a better way of dealing with this important topic than the use of language which belittles both the topic and one of its most articulate proponents, whom many of us in Christchurch admire and respect.

W Rosenberg
Barrister
Christchurch

Terminating a contract

Alan Ringwood of Bell Gully Weir, Auckland

considers two recent decisions on termination of contract

There have been two recent High Court decisions in relation to the termination of contracts: *Gore District Council v Power Co Limited* [1996] 1 NZLR 58 and *BP Oil NZ Limited v BA Motors (NZ) Limited* [1996] 1 NZLR 425.

By way of background to the first of these decisions, the Court of Appeal had to consider in *Minister of Education v De Luxe Motor Services (1972) Limited* [1990] 1 NZLR 27 the right of the Wellington Education Board to terminate unwritten school bus run contracts entered into with De Luxe Motor Services. The Board sought to terminate those contracts in order to put them out to tender. In the course of deciding that the Board was entitled to terminate the contracts on reasonable notice, Cooke P (as he then was) commented (at 31):

> Whether it can be put as high as a presumption is doubtful, but we think that most Judges and practitioners today would expect to find cogent reasons in the nature of terms of the particular contract before placing on it the interpretation that there is no right to determine on reasonable notice. Counsel did not cite to us any case later than *Llanelli Railway and Dock Co v London North Western Railway Co* (1875) LR 7 HL 550 where a contract of indefinite duration has been held to be not so terminable.

That drought has at last been broken after some 120 years with the decision of Barker J in *Gore District Council v Power Co Limited*. The Southland Electric Power Board (predecessor of Power Co Limited) saw fit to enter into a deed in March 1927 with the Gore Borough Council (predecessor of the Gore District Council) on the express basis that "The provisions of this deed shall be binding upon the Board and Council for all time hereafter". In February 1995, some 68 years later, Power Co gave 15 months' notice of termination of the agreement. The reason for this was that under clause 15 of the deed Power Co supplied all of the council's electrical energy requirements "at the price of one penny per unit". At the rate of one penny per unit (now apparently 85 cents) the council was only paying $16,639 for electricity which would normally cost $204,529. It was argued by Power Co that the agreement was terminable on reasonable notice; that there was an implied term to that effect; that the contract had been frustrated by reason of inflation and increased demand for electricity; and that the entering into of the agreement had been a fetter on the statutory power of the Southland Electric Power Board.

There was some authority to support each of these arguments. The Court of Appeal decision in *Minister of Education v De Luxe Motor Services* (referred to above) suggests strong judicial leaning towards the terminability of contracts of indefinite duration, and the Minister succeeded in part in that case because to hold that the bus run contracts were not terminable would be to fetter the discretion of the Director-General of Education to provide such school transport assistance as he thought necessary. In *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387 Lord Denning had discerned (albeit in a widely criticised judgment) a principle emerging that circumstances may change so radically that a contractual clause may cease to bind, and had held that such a result could be brought about by severe inflation.

Justice Barker took the side of the critics in disagreeing with Lord Denning's views on the possible effect of inflation on the enforceability of contracts. Barker J discussed nine factors which pointed to the agreement being intended to be perpetual, including the respective bargaining powers of the parties and the benefits and burdens of the contract. It might however have been sufficient for the learned Judge to have finished his deliberations with his first factor, which was (at 69):

> The words of the agreement are clear. It is difficult to imagine a clearer way a drafter could impose a permanent obligation than to say "the provisions of this Deed shall be binding on [the parties] for all time hereafter". Had the parties wished to make the agreement determinable on reasonable notice, it is safe to assume that they would have done so.

Thus His Honour was able (at 70) to

> uphold the plain meaning of the 1927 agreement. To imply a term to the contrary would be not only to rewrite the contract, but also to disturb the likely intentions of the parties.

It is refreshing to read a judgment which upholds rather than subverts agreed contractual terms (particularly in a "hard case"). The decision is also interesting as an example of two Southern bodies availing themselves of the jurisdiction of the Commercial List in Auckland under s 24C(4) of the Judicature Act to determine the disputed construction of a contract.

In the second recent decision, *BP Oil NZ Limited v BA Motors (NZ) Limited*, the Court had to consider the termination provisions of a written supply agreement whereby BA Motors agreed to purchase petroleum products from BP for "the term specified in the First Schedule to the agreement", which was "From: 1st December 1988; To: 30th November 1993". There was a termination clause which provided: "The Buyer shall be required to give the Seller 12 months notice in writing of its intention to terminate this Agreement on or after the due expiry date specified in the First Schedule".

As the expiry date of the agreement approached the parties discussed future arrangements but 30 November came and went without a new agreement and without any notice being given under the termination clause. The Court had to decide two issues. The first was simply a factual issue of

whether an oral agreement had been reached to continue supply on a month by month basis (it was held that no such agreement had been reached). The second was what (if any) notice BA Motors was required to give to BP, when notice could be given, and whether it had been given.

BP argued that there were two possible interpretations of the termination clause: *termination* had to be on or after the due expiry date; or *notice* had to be given on or after the expiry date. In either case it was argued that 12 months' notice had to be given and that the contract continued to remain in force until cancelled by BA Motors in accordance with the termination clause. BA Motors argued that the agreement, taken as a whole, was a fixed-term agreement, and pointed to external evidence as to how the parties conducted themselves in support of the fixed-term premise.

Justice Hammond noted that the two commercial parties had chosen to reduce their negotiations to writing and that the contract had its own meaning. He declined to go outside the terms of the contract in interpreting it. He found however that the termination clause had two plausible meanings. It could, taken at face value, support BP's argument that notice could be given at any time, even after the expiry of the five year term; or, in the context of the agreement as a whole, it could require notice to be given during the five year term, such that the maximum term of the agreement (if notice were given on the last day of the original five years, to expire one year later) was to November 1994.

The difficulty of this dichotomy of plausible meanings was resolved in the following way (at 430):

> Once there are two reasonably plausible meanings for the clause (as I think there are in this case) then the one which is less favourable to the party who supplied the language is to be preferred. This contra proferentem ("against the profferer") principle is much resorted to by Courts in disputes relating to standard-form contracts. And it has been particularly useful in relation to unequal bargaining situations (such as Draconian exemption clauses in consumer contracts). But I know of no authority, I see no reason in principle, why it should not apply even between parties with equal bargaining strengths. I appreciate that at the end of the day, contra proferentem is really a rule of resolution, as opposed to something which can properly be said to be an intrinsic test assisting in the ascertaining of the meaning of something. Thus the benefit of the rule is functional rather than intrinsic; it is a tie-breaker, and penalises the careless drafter of documents. But the present case is a good illustration of the utility of the principle. In the result, on the application of this principle, I prefer the second interpretation.

"It is refreshing to read a judgment which upholds rather than subverts agreed contractual terms particularly in a 'hard case'"

BA Motors had eventually given notice in October 1994. Depending on the construction of the termination clause, the contract either ran until October 1995, or could not extend beyond November 1994. By the application of the contra preferentem rule the contract was construed against BP, and it was held that the contract could not run beyond November 1994. BP's loss of profits claim was therefore restricted to the period October-November 1994. Questions of the quantum of any damages were deferred to a further hearing.

The contra proferentem rule can be viewed as a risk allocation mechanism, requiring the party responsible for a contractual ambiguity to accept the least favourable construction. It should only be resorted to when other rules of construction fail. In this case the Court found two plausible constructions, thereby opening the way for the application of the rule to break the deadlock. The judgment however gives the distinct impression that the other usual rules of construction could have given the same result. Justice Hammond identified several objections to reading the clause at face value, but noted that the clause made sense when taken in the context of the agreement as a whole. The same result could therefore have been achieved simply by preferring the latter construction. The use of the contra proferentem rule to break a tie between parties of equal bargaining strength is also not as novel as the judgment suggests. While most often encountered in the context of exclusion clauses, the rule of construction against the grantor is a rule of general application in cases of ambiguity, when other rules of construction fail, irrespective of the bargaining strengths of the parties. See for example *Chitty on Contracts*, paras 12-071, the cases there cited, and the quotation from Coke:

> It is a maxim in law that every man's grant shall be taken by construction of law most forcibly against himself.

As Justice Hammond correctly noted the decision is nonetheless a useful reminder of the utility of the contra proferentem rule as a potential tie-breaker when other rules of construction fail. ❑

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The role of the Ombudsman

Judge Anand Satyanand, Ombudsman

considers his role in a paper delivered at the AIC Administrative Law Conference in Wellington in April 1996. The author began a five-year term as an Ombudsman in 1995 after serving since 1982 as a District Court Judge.

Definition

> An Office provided for by the Constitution or by action of the Legislature or Parliament and headed by an independent, high-level public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against Government agencies, officials and employees, or who acts on [his] own motion, and who has the power to investigate, recommend corrective action, and issue reports.

This contemporary definition of the term "Ombudsman", compiled by the Ombudsmen Committee of the International Bar Association, is not universally accepted but serves as a starting point in defining the role. The Scandinavian "grievance person" model of relatively recent times is also said to set a standard. The Romans installed an officer called the "tribune", being a person appointed to protect the interests and rights of the plebeians from the patricians. There are also writings in both India and China which suggest that three thousand and more years ago, special officials were designated to function in the manner of Ombudsmen. In China for example during the Yu and Sun dynasties it was the duty of the incumbent, who was called the "control yuan", to "report the voice of the people to the Emperor and to announce the Emperor's decrees to the people" and to thereby undertake a similar kind of role.

During the last century Sweden appointed an official entitled the "justitie Ombudsman" in 1809, this person having the ability to inquire into actions undertaken by the government administration, including the military, the Courts and otherwise and whose installation was said to be a reaction "to state absolutism and an assertion of individual rights and dignities of the citizen". Nearly 100 years later Finland appointed a similar person and Denmark followed likewise in 1954.

During the post World War II period, there was considerable discussion in many countries, including the United Kingdom and New Zealand, regarding the establishment of a process to examine things undertaken by the administration, alongside and beyond the formal means of redress available through the Courts or through Parliament itself, or by means of the Press. The welfare state models in many countries from the 1930s had produced very large government bureaucracies. There was concern in many quarters that a simple independent means of redress needed to be provided for the individual citizen. The problem was phrased in this way by Professor D C Rowatt in an article suggesting institution of an Ombudsman Institution in Canada in *28 Can J Econ & Poli Sc 543* –

> It is quite possible nowadays for a citizen's right to be accidentally crushed by the vast juggernaut of the government's administrative machine. In this age of the welfare state, thousands of administrative decisions are made each year by governments or their agencies, many of them by lowly officials; and if some of these decisions are arbitrary or unjustified, there is no easy way for the ordinary citizen to gain redress.

In that country and elsewhere, it was simply no longer possible to say that every person adversely affected in an unfair manner, would have the resources or ability to engage a lawyer to take action. The Court procedures themselves could be both lengthy and expensive. The right of a person to consult the individual Member of Parliament or to write to the newspaper, to organise a petition or to raise a deputation to see a Minister of the Crown could all be considered equally difficult to undertake. In England a committee of the International Commission of Jurists, chaired by Lord Whyatt, had suggested towards the end of the 1950s the establishment of some kind of parliamentary commissioner.

In New Zealand a similar debate was under way in a number of quarters – political, academic and policy forming, with quickening pace after the abolition at the beginning of the 1950s of the Upper House of Parliament. Consideration was being given to such things as an Administrative Court. The establishment in 1954 of an Ombudsman responsible to the Danish Parliament or "Folketing" was observed in this country with interest. In 1960 and forward, a policy initiative of the then Government through its Minister of Justice, the Hon J R Hanan, was followed by intensive work by the Secretary for Justice, Law Draftsman and Solicitor-General in order to produce the 1962 legislation. At the time of introduction, it was made clear that the Ombudsman would not review decisions of the Courts nor undertake investigations where there was already a right of review to an administrative tribunal. The notion was that of supplementing existing procedures. Neither was the Ombudsman to be able to question matters of policy. It was decided that the Ombudsman should be appointed following a resolution of Parliament and that the appointee should have the confidence of all members of Parliament.

In 1962 accordingly, New Zealand was the first English-speaking country to enact this kind of legislation, although there were a number of other jurisdictions in which Bills had been introduced or where the matter had been canvassed. The succeeding 34 years have seen Ombudsmen installed in a great many more countries with the international Ombudsmen community now numbering 133 out of 44 countries because the office has been created in both federal and provincial situations.

The political science writer, Professor Larry B Hill in *"The Model Ombudsman" Princeton University Press 1976*, set out to develop what he called a "comprehensive definition" of the classic Ombudsman model. "The Office" Hills wrote at 12 –

> should be legally established, functionally autonomous, external to the administration, operationally independent of both the executive and legislature, specialist, expert and non-partisan, normatively universalistic, client centred but not anti-administration, and both popularly accessible and visible.

Put more simply but with perhaps more charm, one of the Pacific region's long-serving Ombudsmen, Sir Moti Tikaram, Ombudsman of Fiji in the 1970s and early 80s observed that the Ombudsman was one of the few people entitled, in a modern context, to sign correspondence with the phrase "Your obedient servant".

Scope of jurisdiction of the Ombudsman

When describing the jurisdiction conferred upon the individual Ombudsman, it must first be emphasised that the term "Ombudsman" may itself be somewhat misleading. Close analysis of what may be undertaken is often required to see what the individual office holder may do. For example, in many jurisdictions, including the United Kingdom, the citizen may not approach the Ombudsman directly, as in New Zealand. In the United Kingdom and Northern Ireland a citizen approaches the local Member of Parliament, who in turn makes a case to the Ombudsman. In many jurisdictions there is an emphasis on the Ombudsman being the person who redresses breaches of human rights, whereas in New Zealand since 1977 that function has been undertaken by the Human Rights Commission. In a number of other countries, inclusive of the Pacific and Asia, the Ombudsman may be charged with a specific responsibility of inquiring into allegations of corruption. Additionally, the question of appointment and therefore tenure from a constitutional point of view bears attention. Whilst a New Zealand Ombudsman is appointed by Parliament and receives funding from that source, in many jurisdictions the appointment may be by the erstwhile governing party and funding for activity may become dependent upon a determination of the Government of the day.

In New Zealand, the focus has remained for 30 years upon the Ombudsman being an Officer of Parliament who in the name of that body inquires into and reports upon, assertions of maladministration on the part of the Executive. The original legislation covered government departments and organisations, but in 1975 was extended to cover local government also, and later still to cover organisations such as school bodies.

As a footnote, the Ombudsmen in New Zealand have also been furnished by Parliament with the adjunctive role in regard to cases involving the release of official information. A former New Zealand Ombudsman, Sir John Robertson, has written that this role, which was grafted on to the original in 1982, was appropriate because, as he wrote, "[it] brought the Ombudsman into the interface between Government and people at all levels and provided an excellent base for a wider role in the future".

Mention of jurisdiction leads immediately to the observation that from the classic Ombudsman role as described above, there have developed, here and elsewhere, different kinds of "Ombudsmen", some of whom use similar investigative methodology, but whose role may be limited by circumstances or area. If one is to describe the essence of the Ombudsman role as defending an individual citizen against the unfair administrative actions of the state, Human Rights Commissioners can be seen as undertaking a kind of Ombudsman role, but are restricted to alleged breaches of Human Rights. In this quadrant also, one can see specific persons such as Commissioners for Children, Health and Disability Commissioners and Police Complaints Authorities undertaking Ombudsman-like work, but in a specific area.

Alternatively, if one defines the role of the Ombudsman as being a person who investigates complaints, that model has led to the development of industry Ombudsmen, notably in New Zealand in the banking and insurance industries, these offices having been created during the 1990s. It has recently been observed by the former Ombudsman for Northern Ireland, Dr Maurice Hayes, that the Ombudsman concept is one of the few to have passed from the public sector to the private sector at a time when the tide of ideas is flowing in the opposite direction. There has also developed overseas, the notion of "organisation Ombudsmen". In some countries, if one has a dispute with a department store, university or a local authority, the person designated to deal with that complaint, may be termed an "Ombudsman".

Even the foregoing brief summary is not complete, because in Australia some Ombudsmen deal with complaints about behaviour of the police and in Sweden and Finland complaints about the conduct of the Courts are dealt with by Ombudsmen.

In New Zealand, it was thought important that the term "Ombudsman" not lose its currency. Accordingly legislation was passed in 1993 requiring the restricted use of the term "Ombudsman" unless the particular industry which uses the term is able to guarantee certain kinds of delivery of service and is able to gain the approval of the erstwhile Chief Ombudsman.

To sum up the question of jurisdiction and its extent, it is pertinent to quote Wellington barrister and former in-house counsel to the New Zealand Ombudsman, Dr Graham Taylor, who in a paper published in *"Judicial Review of Administrative Action in the 1980s" ed Taggart OUP 1986*, described administrative review in New Zealand as being available by three broad means – first in the Courts, secondly due to coverage under the Official Information Act and thirdly by referral to the Ombudsmen. If the jurisdiction of the third of these is to remain meaningful, there needs to be, in this writer's view, regular review and reappraisal of the role, by way of ensuring that the Ombudsmen are able to operate in an independent fashion, that they are encouraged to be flexible in resolving items – particularly where dispute has occurred – and thirdly that they retain credibility both with the public and with those organisations subject to coverage.

Legal description of the Ombudsmen's role

The susceptibility of the Ombudsmen to judicial review has led to a number of contemporary statements about the nature and efficacy of the role. Although many citations abound, the following examples suffice.

In 1984 in Canada, Justice Dickson delivering the unanimous decision of the Supreme Court of Canada in *British Columbia Development Corpora-*

tion and another v Friedmann [1984] 2 RCS 447, 460, 463 said –

> The limitations of Courts are also well known. Litigation can be costly and slow. Only the most serious cases of administrative abuse are therefore likely to find their way into the Courts. More importantly, there is simply no remedy at law available in a great many cases.
>
> Read as a whole, the Ombudsmen Act of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated. It represents the paradigm of remedial legislation. It should therefore receive a broad purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil.

The judgment is also authority for the proposition that the phrase "matter of administration" – which frames the Ombudsman's area of jurisdiction, is to be construed widely "encompassing everything done by governmental authorities in the implementation of government policy", see 474. The judgment held that only the activities of the legislature and the Courts should be excluded from the Ombudsman's scrutiny.

Earlier in that country when the role of the Ombudsman was challenged in 1970 in Alberta, Chief Justice Milvain said in *Re Ombudsman Act* (1970) 72 WWR 176, 190 and 192 –

> ... the basic purpose of an Ombudsman is provision of a "watchdog" designed to look into the entire workings of administrative cases. ... [he] can bring the lamp of scrutiny to otherwise dark places even over the resistance of those who would draw the blinds. If [his] scrutiny and reservations are well founded, corrective measure can be taken in due democratic process, if not no harm can be done in looking at that which is good.

In New Zealand, the Ombudsman's authority has also been challenged in the Courts on a number of occasions and there are a number of citations to be mined, describing the jurisdiction. Many of the leading cases, have been connected with the scope of the Ombudsman's authority regarding official information cases and are therefore outside the framework of this present article.

Is the outreach sufficient?

A question often posed to the New Zealand Ombudsmen is whether the redress offered by the service is sufficiently understood by the New Zealand community. This is not any area for complacency. Although the legislation has been in force for more than 30 years, and whilst the daily workload of the Ombudsmen sees several hundred cases open at any given time and some thousands dealt with each year, there needs to be a continuing emphasis upon publication on the work of the Office; in the media, through this country's ethno-minorities, in school publications and by receiving the benefit of public airing in Parliament and before its Select Committees. The office continues to handle more complaints. In 1965 the annual total was 743; in 1975, 1163; in 1985, 1994 and in 1995, 4707.

Additionally, in the 1990s, the Ombudsmen's Office undertakes regular community clinics in various parts of New Zealand. During these the opportunity is taken to receive requests and complaints in the field, to progress cases already under way by discussion with the parties, and to generate some degree of mention and information about the Office on local radio and in the press.

The issue of publicity being undertaken by the Ombudsmen's Office is interesting, because the notion of the Office being one of last resort for the community must be preserved. It also seems appropriate to ensure that the office is reactive to wishes expressed by individuals and is not engaged in what might be termed artificial solicitation of complaint. It seems to be generally agreed that low key but regular publicity and dissertation regarding its services meets the matter best.

What is the future for the Ombudsmen's Office?

It might be thought that the Ombudsmen's Office, by having grown incrementally for over 30 years, would have an assured position in the modern framework, and that nothing has emerged which might replace it. Again, it is this writer's view that there is no room for complacency because whilst the Office can certainly be said to have been embraced by New Zealanders by one generation and maybe two, the Public Service or government administration of the mid-1990s is of a far different size and some would say with much less influence on contemporary life in this country than its precursors. Numbers in the Public Service are fewer; many of those people are working under contract and for shorter periods. Additionally, successive Governments have adopted a funder/provider split with many of the providing functions being delivered by the private sector rather than by government departments. In terms of the above it could be argued that the need for an Ombudsman service has been lessened.

However, if the writer's first 15 months in Office are any example, the core Government departments, such as Social Welfare, Education, Customs, Inland Revenue and Agriculture and Fisheries, all continue to provide a large number of matters to tax the Ombudsmen and investigating staff.

Additionally, the Ombudsmen's Office has, more than once, been demonstrated to have the capacity and expertise to deal with particular problems. For example, it was decided in 1995 that there be, for a two-year period, a concentration on the country's prisons. The service has generated some 2,000 matters in its first 12 months, ranging in seriousness from a small number of deaths and episodes of self-mutilation by inmates in custody, through complaints affecting custodial conditions, both on remand and on sentence, eligibility for transfer, and eligibility for parole. This figure of 2000 straddles the 1995 and 1996 reporting years. Prison complaints comprised 15% (numerically) of the office caseload in the 1995 reporting year. It seems that the Ombudsmen's Office offers objectivity and a guarantee of seeing matters through whether raised by prison staff or inmates and that the Ombudsmen's presence provides a useful safety valve.

Is it worth the citizen's while to seek redress against maladministration?

This is an intriguing question because the term "redress" usually connotes the ability to obtain an order against or some kind of sanction bringing against a department or organisation. That ability to bring down sanctions is one reserved to judicial tribunals. The Ombudsmen have, in New Zealand, never

continued on p 212

MMP and New Zealand business

Clayton Cosgrove, Consultant, Christchurch; Gordon Walker, University of Canterbury; Mark Fox, Lincoln University

find out how your business clients view the transition to MMP.

The decision to change the method of electing governments has precipitated the most significant change in New Zealand's political environment since the proclamation of responsible government. The new system is described in A McRobie's "The Electoral System" in P Joseph, ed, *Essays on the Constitution* (1995), 312.

As New Zealand nears its first MMP election on 12 October 1996, one theme that has gained prominence is the effect of MMP on the business community. Here, public debate has focused on foreign investment. The policies of New Zealand First and the Alliance – which could wield the balance of power in the forthcoming election – are clearly inimical to foreign investment (on foreign investment see generally, K McConnell and G Walker, "Foreign Direct Investment in New Zealand" in G Walker and B Fisse, eds, *Securities Regulation in Australia and New Zealand* (1994), 191). The Alliance proposes a 10 per cent increase in tariffs on all imports and a return to interventionist policies. The New Zealand First Party continues its campaign against foreign investment: for adverse comment see "Investment Ignorance" The Press, 29 April, 1995, 19. ACT New Zealand recently cited cases where the potential influence of the New Zealand First Party under MMP had allegedly led foreign investors to regard the New Zealand business environment as unstable: "Asian Firm put off Deal – ACT" The Press, 16 April 1996. In one of these cases a Singaporean firm – observing the anti-Asian sentiments of New Zealand First – allegedly decided to invest $400 million in a construction project in Brisbane, rather than in New Zealand. Another example cited by ACT relates to the insurance company, AMP, who said that they would not increase their investment in New Zealand firms because of political instability relating to MMP – a decision that means that $200 million worth of investment will go elsewhere. Any increase in this effect may have implications for corporate governance since opportunities for the potential disciplining effect of institutional investors on companies would decrease: see M Fox and G Walker, "Institutional Investment in New Zealand Listed Companies" (1994) 12 C&SLJ 470.

MMP obviously has significant implications for businesses, especially when we consider that much of the equity in New Zealand's largest companies is foreign controlled. Overseas investors now own 58 per cent of the equity in NZSE Top 40 companies: N Bennett, "Foreigners substantially increase ownership of top NZ companies" The National Business Review, 12 April 1996, 14 (citing M Fox and G Walker, "Further Evidence on the Ownership of NZSE Top 40 Companies" (1996) 14 C&SLJ forthcoming). There is also evidence that over 50 per cent of all NZSE companies are foreign controlled: for a general review of the data, see M Fox and G Walker, "Evidence on the Corporate Governance of New Zealand Listed Companies" (1995) 8 Otago Law Review 317-349 and M Fox and G Walker, "Overseas Control of NZSE Listed Companies" (1996) 14 C&SLJ forthcoming.

We now turn to the results of a recent survey which sought to investigate the impact of MMP on businesses in New Zealand: C Cosgrove, *The Impact of MMP on the New Zealand Business Community* (unpub MBA project, Canterbury University, 1996). Hereafter "Cosgrove Survey".

Questionnaires were sent to the Chief Executive Officers (CEOs) of the 500 largest companies in New Zealand. These are the 500 largest companies in New Zealand based on turnover. Of those 500 CEOs sent questionnaires, 191 responded – a response rate of 38 per cent.

Political advice

CEOs were asked if their company had personnel, part of whose function is to provide strategic political advice: 32 (17 per cent) did; 159 (83 per cent) did not. Hence, most large New Zealand companies rely upon external advice on the impact of politics on the busi-

Table one:
Sources of political advice
(69 companies)

Source:	No.	%
Cabinet Ministers	39	56
Industry association/federation	34	49
Law firms	26	37
Public relations firms	26	37
Backbench MPs	26	37
Company directors	26	37
Business consultancy	17	25
Parliamentary advisers	11	16
Political lobbying firms	11	16
Accountancy firms	10	15
Banking organisations	8	12
Journalists	3	4

Source: Cosgrove Survey

Table two:
Assessments of increased risk under MMP (191 respondents)

Area:	No.	%
Interest rates	132	69
Foreign exchange rates	124	65
Business forecasting	113	59
Taxation	113	59
Employment of staff	69	36

Source: Cosgrove Survey

ness operations. Of the 191 CEOs responding to our survey, 69 (36 per cent) said that within the last five years their company had sought political advice from outside the company. This advice was sought from a variety of sources (refer Table 1). The major sources of political advice were cabinet ministers (sought by 56 per cent of companies) and industry associations/federations (sought by 49 per cent of companies). Also, 37 per cent of companies gained advice from each of: law firms; public relations firms; company directors and backbench Members of Parliament. Interestingly – and contrary to what we would expect – both parliamentary advisers and political lobbying firms did not rank highly in terms of being a source of advice for companies (only 16 per cent of companies used each of these sources of advice).

Knowledge of MMP

Knowledge of MMP by CEOs mirrors that indicated by the public in opinion polls: 50 per cent of CEOs claimed they had either a total or high level of understanding of MMP; 49 per cent said they had a basic understanding and 1 per cent said they had no understanding at all. Clearly, such claims should be regarded with some scepticism. One could argue that such a lack of detailed knowledge of MMP has contributed to perceptions that the first MMP general election will lead to economic uncertainty and intensified commercial risk. The fact that 50 per cent of CEOs either have a basic or no understanding of MMP, may have resulted in many companies failing to observe the positive benefits that may accrue under an MMP environment. For example, short-term legislative paralysis may be a result of the first MMP election. This might lead to economic stability because the legislative status quo would be maintained.

Business risk

On the whole when talking about risk, companies focused on the money markets and their ability to forecast them. Little attention was paid to legal aspects of political risk: on this point see P Comeaux and N Kinsella, *Legal Aspects of Political Risk* (1996). The areas of greatest concern were interest rates and foreign exchange rates (69 and 65 per cent of respondents respectively believed that MMP would lead to higher risks for their business in this regard). Fifty-nine per cent of CEOs believed that risks associated with taxation and business forecasting would be higher under an MMP environment. Only 36 per cent of CEOs believed that MMP would lead to a higher risk in the employment of staff. This suggests that despite the money markets having a high level of uncertainty ascribed to them, businesses believe that the underlying economic characteristics resulting from restructuring over the last 10 years are not threatened. Hence, companies appear to believe that the gains made over the last few years with respect to reducing unemployment will not be relinquished.

Reaction to risk

Companies were asked what methods they would deem appropriate in dealing with the risks associated with MMP (refer Table Three). The action deemed appropriate by most CEOs (88 per cent) was to have more effective communication, and lobbying of, the legislature. Increasing technological inputs into their business and product diversification were also deemed appropriate by a large percentage of CEOs (64 and 59 per cent respectively).

Some CEOs perceived that various actions which might be harmful to the New Zealand economy would be appropriate methods of controlling business risks under MMP. In this regard: 36 per cent mentioned staff reductions; 34 per cent mentioned reducing capital expenditure in New Zealand; 25 per cent mentioned partial relocation of operations; 12 per cent mentioned liquidating New Zealand investments and 1 per cent mentioned total relocation of operations. In light of our earlier finding that a large proportion of CEOs had only a basic or no understanding of MMP, these findings should be treated with caution – they may indicate a lack of understanding on the part of CEOs.

A Possible Scenario

Any radical political challenge in the new MMP environment – whether it be from the extreme left or the extreme right of the political spectrum – in terms of major economic policy reversals would constitute a political risk to the business sector. As Roger Kerr states:

> There is a high level of agreement in the investment community that the only major risk now facing New Zealand is political risk ... The outstanding question is whether the political consensus behind the economic reforms will be maintained: R Kerr, "Public Policy Making Under MMP" Speech to the IIR Conference on Public Affairs and Lobbying, 21 February 1995, 1.

The economic framework which is critical to promoting a sound commer-

Table three:
CEOs judging various mechanisms appropriate for controlling business risks under MMP (191 respondents)

Reaction	No.	%
Effective communication/lobbying with legislature	168	88
Increasing technological inputs	122	64
Product diversification	113	59
Staff reductions	69	36
Reducing capital expenditure in New Zealand	65	34
Partial relocation of operations	48	25
Liquidating New Zealand investments	23	12
Relocation of entire operations	2	1

Source: Cosgrove Survey

cial environment centres around the following legislative and economic premises (for a recent review, see C Campbell-Hunt and L M Corbett, *A Season of Excellence? An Overview of New Zealand Enterprise in the Nineties* (NZIER Research Monograph 65, 1996)):

The Reserve Bank Act 1989:

The primary function of this legislation is to empower the Reserve Bank to formulate and implement monetary policy, the key objective being to achieve and maintain price stability within the domestic economy.

The Fiscal Responsibility Act 1994:

This is closely linked to the Reserve Bank Act. It aims to create stability in the management of public finances, especially as this applies to prudent debt levels, and to align this with price stability. The Act imposes unprecedented levels of government disclosure about fiscal management.

The Employment Contracts Act 1991:

The purpose of this legislation is to introduce flexibility in terms of employer/employee contractual relations. The Act is based on freedom of association and freedom of contract. For the business sector, this Act gives enterprises the flexibility to respond rapidly to new technological developments, customer requirements and the competitive position of industry rivals.

An open and deregulated economy:

It has been acknowledged that it is no longer possible for New Zealand to exist in a state of "economic quarantine" from the rest of the world and thereby attempt to ignore international commercial realities through adopting a strategy of artificial industry regulation as occurred in the 1970s and early 1980s (the "Fortress New Zealand" policy): see generally, M Clark and A Williams, *New Zealand's Future in the Global Environment* (1995), 21ff. Thus, industry protection through government subsidies has been discarded and tariffs on imports significantly reduced over the last decade. This philosophy of fostering an open economy has forced the business sector to become innovative and efficient by increasing technological inputs and forcing the withdrawal from unprofitable commercial ventures. Further, it can be argued that globalisation makes the fostering of an open economy inevitable, especially for a small trading nation like New Zealand: see G Walker and M Fox, "Globalization: An Analytical Framework" (1996) 3 Indiana J of Global Leg Stud (forthcoming).

Election results

One increasingly unlikely scenario proposed by commentators suggests that a National Party dominated centre-right coalition is likely to gain power at the next election. If this proves correct then the key elements of the economic framework will remain intact. Current monetary policy will be maintained, debt reduction and expenditure reduction will remain the primary focus of fiscal policy, tax rates will be reduced, labour market structures will remain flexible through the preservation of the Employment Contracts Act and competition policy will be enhanced through further reductions in tariff rates in line with the General Agreement on Trade and Tariffs (GATT) (now the World Trade Organisation): R Clements, *New Zealand Political Outlook* (Buttle Wilson, 22 August, 1995), 4 Under this scenario the commercial sector has little to fear – there is unlikely to be any erosion of either the business environment or the key elements of the economic framework. But recent opinion polls do not support this likelihood.

Commentators have noted that for the National Party to remain in office (even though opinion polls for May 1996 show the Party gaining only 46 of 120 seats in Parliament), it will require a coalition partner(s) who can gain at least 15 parliamentary seats: *The Press*, 4 May 1996, 1, 3. At present potential coalition partners, who support the present economic framework exist in the form of United New, ACT, ROC (now the Conservatives), the Christian Democrats, Christian Heritage and the Progressive Greens. None of these parties has as yet broken the 5 per cent threshold required to gain parliamentary representation. If National cannot establish a coalition partnership of value then it faces the real possibility of either gaining power as a minority government (and thus relying on the support of other parties for political survival), or being defeated at the election by an Labour/Alliance/NZ First, centre-left coalition. Here, polls in May 1996 show New Zealand First gaining 36 seats and Labour gaining 26 seats (a total of 62 seats in coalition): *The National Business Review*, May 3 1996, 1.

It can be argued that under a centre-left coalition government, key elements of the existing economic framework would be threatened. This proposition flows from the inherent contradictions which exist within the policy platforms of the coalition partners. For example, in respect of monetary policy, the Labour Party has suggested that the inflation rate should be widened to a target level of – 1 to 3 per cent whilst the Alliance proposes a higher rate with emphasis on decreasing the value of the dollar. NZ First is committed to a monetary policy which will take a similar form to Labour's but the details have not been defined.

Perhaps the greatest risk is in the areas of fiscal policy, taxation, labour market reform and competition policy. It is clear that a centre-left coalition would embark on an economic regime of higher tax rates (both company and personal), and heavy increases in public spending levels. To this end the Alliance is advocating $13 billion of spending commitments together with the restoration of social welfare benefits to pre-1990 levels and the abolition of the ethos of user charges. It is also clear that the Employment Contracts Act will be either heavily modified in order to favour collective bargaining or, as the Alliance is advocating, repealed altogether and replaced with largely union dominated collective bargaining. In the area of competition policy, major contradictions exist. For example, the Labour Party proposes lower tariff levels and a cessation of the current asset sales programme.

Current policy settings will be preserved under a centre-right coalition government, however, further rapid economic reform will be unlikely given the consultative nature of the new MMP Parliament. Under a centre left coalition government, the key pillars of the current economic framework will be eroded.

Political risk should not only be seen in the context of radical departures from the existing economic framework. Many commentators have argued that because MMP will require inter-party negotiations and consensus on almost all major policy issues, fundamental policy shifts will be a rarity and thus MMP may actually lock in the existing drift in New Zealand's current economic direction. Superficially this so-called "policy stagna-

tion" may give the commercial sector some comfort and reassurance in terms of stability. But it does present a significant political risk. Indeed the requirement for political parties, especially those engaged in a coalition, constantly to seek consensus could lead to policy paralysis and thus governments of the future may be unable or unwilling to make continual adjustments to the economy in line with changes in the global economic environment.

Political risk may also be seen in the context of market instability and uncertainty. Modern business must have, as an absolute requirement, a commercial environment which gives it the ability to determine and implement short, medium and long-term strategic plans, targets and goals. The quality of this planning process is heavily reliant on the level of consistency with which successive governments and Cabinet Ministers within those governments administer policy. As previously noted, the MMP environment will see an erosion of the traditional centrally-based power of the executive which has traditionally been able to propel legislation through both caucus and Parliament. The tenure of Ministers in respect of their portfolios may change. Rapid changes in coalition partnerships may lead to a higher frequency of cabinet reshuffles. In this situation, Cabinet Ministers, especially those engaged in the financial portfolios, will have little time to build up sufficient credibility with the market and thus promote confidence and stability within the domestic economy.

This point is demonstrated by the turbulent reactions of the financial sector immediately following the 1993 departure, of the then Minister of Finance, Ruth Richardson. It was not until both the Prime Minister and the new Finance Minister had made repeated public statements declaring that economic policy would not change that an air of stability returned to the financial sector.

Perhaps the greatest political risk to the business community can be seen in terms of the level of understanding of the MMP system by the voting participants. Professor Keith Jackson and other commentators have noted (optimistically, in our view), that the period of transition, wherein voters gain a high level of understanding of the new system and thus voting trends and patterns can be identified, may take as long as a decade. Alan Bollard also focused on this notion when he stated:

> Voters and politicians [will] not change their behaviour immediately. Changes of this magnitude involve learning as the system evolves. Because general election voting usually only happens three yearly, this learning would take quite some time: voters and politicians would still be experimenting with the new system in the next century: A Bollard, "The Economic Consequences of Electoral Reform" Address to the AGM of the NZIER, 29 September 1993, 29.

The first MMP election will be vital in terms of which political entities gain power and thereby influence subsequent elections. It is in this context that business confidence may decline until the MMP system has surpassed the transition phase, political parties are established and voting behaviour is embedded so that it can, to some extent, be predicted. ❑

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continued from p 208

been granted such powers and neither have any ever been sought. Professor Larry Hill, in his book *"The Model Ombudsman"* op cit, has described the matter thus –

> ... one of the institution's most interesting puzzles is its apparent effectiveness, despite minimal coercive capabilities".

The emphasis has rather always been on the Ombudsmen's ability to persuade the parties to some kind of resolution. It seems fair to say that the Ombudsmen's Office recommendations have developed an enviable record over the years of being adopted, even if not in the short term, then certainly in the medium and longer terms.

The spectre of people seeking redress when something has gone wrong is rising, particularly as a result of legislation such as the New Zealand Bill of Rights Act 1990 which more clearly defines people's rights. Moreover, decisions such as *Simpson v Attorney-General, [Baigent's Case]* [1994] 3 NZLR 667 have suggested that compensation may lie in the wake of rights being breached. The interaction of the Office of the Ombudsmen with citizens' rights vis à vis breaches of the New Zealand Bill of Rights Act by administrative actions is an interesting area in which to forecast action in the future. The same could be said in regard to breach of provisions of the Treaty of Waitangi by administrative actions.

How can citizen's redress be better facilitated in the future?

For citizen's redress to be delivered where appropriate, it seems important first, for the viability of the Ombudsmen's Office to continue to be something dependent upon Parliament and in being responsible back to that body. In other words the citizen may perhaps be best served, in the long term, so long as there is some immutable kind of guarantee of individual consideration of grievance. Successive administrations have confirmed that the Ombudsmen's office should be aside from any matter dependent upon the individual Government of the day. Secondly, a question arises as to whether the Ombudsmen's Office should only be one that is reactive to people's complaints. It seems, at least to this writer, to be suitable to suggest that the Ombudsmen's Office continue to receive encouragement to pursue a more pro-active role, say by publishing of guidelines and articles and by undertaking of seminars and discussions among the professional communities as well as among the lay public. It seems to this writer at least, that so long as those pro-active measures are based upon an understanding of the principles which should underpin any administrative organisation – and particularly the government – then the community can benefit. The Ombudsmen's office likewise will benefit from keeping as close as it can to the community.

To conclude, the challenge to be met was perhaps put much better more than three centuries ago by John Milton in *"Aereopagitica"* when he wrote –

> For this is not the liberty which we can hope, that no grievance should ever arise in the Commonwealth, that let no man in this world expect; but when complaints are freely heard, deeply considered and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for. ❑

The Governor-General and MMP

Dr Andrew Stockley, University of Canterbury

disagrees with the role many commentators see the Governor-General playing after the election.

Introduction

Later this year Parliament will be dissolved and New Zealanders, for the first time, will elect MPs under a proportional representation system (MMP). Our new Governor-General, Sir Michael Hardie Boys, will have to come to terms with his role under an electoral system quite different from that experienced by his predecessors. For the last sixty years, elections held under the first-past-the-post system have produced single-party governments possessing majority support in the House. Not since 1951, however, has the elected government received a majority of the popular vote. Sir Michael can expect that no one party will win a majority of seats in the new MMP Parliament and that he will have to oversee the formation of a coalition or minority government.

A variety of political leaders and academic commentators have suggested that MMP will require a more activist Governor-General. In 1993 Sir Michael's predecessor, Dame Catherine Tizard, said she would "rather avoid" the "awesome responsibility" of having to use her reserve powers to form a government from a mix of parties, and expressed gratitude that "by the time of the first election under the new system, I will no longer be the Governor-General." ("Spotlight on Dame Cath", *Evening Post*, Wellington, 8 November 1993; Tizard, "Crown and Anchor: The Present Role of the Governor-General", public address, Wellington, 26 June 1993, at 5.) In March 1994, when issuing his call for New Zealand to become a republic, the Prime Minister, Jim Bolger, argued that "MMP could prove to be the catalyst, given the possible greater role for the head of State". (539 NZPD 121, 8 March 1994.) Former Prime Ministers Sir Geoffrey Palmer and David Lange have made similar comments. According to the former, "the reserve

"Dame Catherine Tizard, expressed gratitude that 'by the time of the first election under the new system, I will no longer be the Governor-General'"

powers of the Governor-General are likely to be of enhanced importance under MMP. The personal discretion of the Governor-General has a potential to come into play more often than it has in the past in New Zealand". (Palmer, "Now is Not the Time to Think of Making New Zealand a Republic", *The Press*, Christchurch, 7 February 1994; see also Lange, "Governor-General's Unenviable Job", ibid, 23 May 1995.) The Leader of the New Zealand First Party, Winston Peters, has similarly argued: "the role of the Governor-General will be particularly crucial under MMP, when the incumbent will be required to do far more than the ceremonial duties which are currently involved." (Quoted in "After Dame Cath", *The Press*, Christchurch, 13 June 1995.)

Various constitutional commentators have concurred, Professor Brookfield writing that the Governor-General "is likely to have a far greater role" under MMP, Alan McRobie suggesting that he or she may "be required to use the (so-called) reserve powers more frequently", and Mai Chen claiming "[t]his will give the Governor-General more opportunities to exercise control over the government". (Brookfield, "Republican New Zealand: Legal Aspects and Consequences" [1995] NZ L Rev 310 at 318; McRobie "The Electoral System" in Joseph, *Essays on the Constitution* (1993) 312-43 at 338; Chen, "Remedying New Zealand's Constitution in Crisis: Is MMP Part of the Answer?" [1993] NZLJ 22 at 33.) One may suspect that a concern to ensure a "safe pair of hands" lies, at least in part, behind the appointment of a Court of Appeal Judge to the position.

It is, however, flawed logic to assume that MMP will require a more interventionist Queen's representative. Part II of this paper will suggest that a modern-day Governor-General has little involvement in constitutional affairs. Part III will contend that there is no reason for this situation to change under MMP. Part IV proposes that steps be taken to ensure a non-activist, non-political role for the office.

The modern-day Governor-General

It is instructive to begin by outlining the present-day position of the Governor-General.

Symbolic power

The Governor-General's primary role is a ceremonial and community-affirming one. Dame Catherine Tizard has noted that a New Zealand Governor-General "does not exist to say 'no' or 'go' – to forbid such-and-such a policy or to insist that programme x should be run differently. Yet there are many people who write asking me to ban this or that; to sack the government; to refuse to sign a bill into law ..." She went on to say: "If we can, we are supposed to assert and instil civic virtues .... I have come to believe that the chief role of a New Zealand Governor-General is more and more the one of *affirming* things, certain ideas and ideals." (Tizard, above, at 2.) By giving support to organisations carrying out good works, a Governor-General can accentuate the positive and provide recognition to individuals and causes in a way in which a more partisan political figure may find difficult. By standing above and outside party politics, the Governor-General can provide a point of unity for the nation and can perform a

representative function within New Zealand and overseas.

In constitutional terms, the Crown remains symbolically all-powerful. It is the Governor-General who appoints the Prime Minister, summons and dissolves Parliament, and signs bills and regulations into law. The underlying reality, however, is that in almost all instances the Governor-General must exercise his or her legal powers according to the advice of ministers. Political power rests with elected parliamentarians, not an unelected Queen's representative. To intervene in politics is to imperil the Crown's neutrality, as witnessed by the divisions in Australia when the Governor-General dismissed the Prime Minister in 1975.

Constitutional facilitator

In the New Zealand context, suggestions that the Governor-General possesses reserve powers for use in emergencies have not amounted to much during the last sixty years. It is sometimes argued that the Governor-General can act as a bridging mechanism between Parliament and the executive – deciding whom to appoint as Prime Minister and whether to agree to a dissolution of Parliament. He or she serves as a "constitutional facilitator", seeking to give effect to the principles of democratic government and, in particular, the convention that ministers must possess the support of a majority of MPs – at least on matters of confidence.

Yet up until now, the choice of Prime Minister has been relatively obvious. Throughout New Zealand's recent history, no third party has been able to capture more than a handful of seats at any election, meaning that either National or Labour has always had a majority in the House of Representatives. The Governor-General has had no real discretion, being under a clear duty to invite the appropriate leader to form a government.

Premature dissolutions of Parliament have been rarely requested and never refused. Here too a Prime Minister with a majority in the House has the whip hand: if refused a dissolution he or she might resign, in which case the Opposition would lack the numbers to form an alternative government. The Governor-General would then either have to recommission the Prime Minister and grant a dissolution, or incur a charge of partiality by granting a dissolution to a new ministry after having refused its predecessor.

Single-party government, a small caucus, and tight party whipping have meant that the Governor-General has not had to answer the question of whether a Prime Minister who has lost majority support is entitled to request fresh elections. Orthodox opinion suggests that the Governor-General would be advised to grant a dissolution in such cases. (The obvious exception being when the Prime Minister is already under a duty to resign – for example, having just lost an election.) Refusing a dissolution on the basis that there appears to be a possible alternative ministry might well prove speculative and, if incorrect, forces the Crown to grant a dissolution to the Opposition, having previously refused the Government. This is what happened in June 1926 when the Canadian Prime Minister, Mackenzie King, requested a dissolution nine months after having been granted an election. His Liberal coalition government had lost a number of seats and had only been able to continue in office with the support of independent MPs. The Governor-General, Lord Byng, refused a fresh dissolution, believing that the Leader of the Opposition (Meighen) could form an alternative government, having gained the backing of most independent MPs. In the event, Meighen found himself unable to command a majority. He advised a dissolution and this was granted on the basis that neither major party had been able to form a government. Mackenzie King won the ensuing election and, claiming that the Governor-General had been partisan, had Lord Byng recalled.

"the reserve powers must be a recourse of the last resort, an ultimate weapon which is liable to destroy its user"

Constitutional backstop

Constitutional theory posits a role for the Governor-General, not only as a mediator between Parliament and the Executive, but also in situations where his or her ministers seek to abuse their control of Parliament so as to act unconstitutionally, or should some other crisis require intervention to protect the Constitution or the nation. According to this conception, the Governor-General could defer or refuse the royal assent, dissolve Parliament, or dismiss the government should his or her ministers seek to subvert the democratic basis of the Constitution.

Stepping in to protect the Constitution is fraught with risk. The entitlement to act may well become subjective. Eugene Forsey, a well respected constitutional lawyer, suggested that the Crown was entitled to intervene in order to forestall any move towards socialism. (Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943) at 124, 270.) Sir John Kerr believed (controversially) that he was able to dismiss the Australian Prime Minister after the upper house blocked the passage of supply and threatened financial chaos in late 1975. Of necessity, the Crown must hesitate before employing the reserve powers in order to avoid being seen as partisan. One commentator has aptly noted that "this, the most dramatic form of royal initiative, must be a recourse of the last resort, an ultimate weapon which is liable to destroy its user." (de Smith and Brazier, *Constitutional and Administrative Law* (1989) 6ed at 116.)

Hesitation should not, however, be confused with inaction. The Governor-General of Fiji arguably hesitated for too long during the coup initiated by Colonel Rabuka in 1987. Ratu Sir Penaia Ganilau failed to stand up to an unconstitutional régime, using his powers to concur in the deposition of his elected Prime Minister and then making appointments from those involved in the revolution. King Juan Carlos of Spain, by way of contrast, took decisive action to end a military coup attempt in 1981. The Court of Appeal of Grenada has held that, in an emergency situation, the Governor-General is not only entitled to make full use of the Crown's legal powers, but is also authorised by the doctrine of necessity to act outside of the law in order to protect the Constitution and the nation. (*Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35 at 88-9 per Haynes P.)

But how likely are the situations which arose in Fiji, Spain and Grenada in the New Zealand context? It is all well and good to say that our Governor-General is one of the few legal restraints upon the power of an elected ministry in a sovereign Parliament. It is theoretically correct to say that he or she has the right to question ministers and serves to ensure that they retain the

confidence of Parliament and act in accordance with the constitutional basis of government. But there is a danger of overstating the case, and arguing that it is the Crown that somehow keeps the government in line, that protects judicial independence and upholds the democratic order. (See for example Downey, "The Monarchy, the Judges and the Constitution" [1994] NZLJ 161-2; "Constitutional Essays" [1994] NZLJ 277.) The situations in which the Governor-General can properly intervene are in fact extremely rare. New Zealand's economic and social policies have been dramatically altered over the last decade but, as Dame Catherine has aptly noted, it is not for the Governor-General "to forbid such-and-such a policy or to insist that programme x should be run differently". The media, the Opposition and the Courts are of much more influence on a day-to-day basis. The Governor-General can only intervene in emergency situations – when the constitutional order is itself under threat. In a country such as New Zealand, with a long history of political stability and democratic government, it is not the Governor-General who prevents such a crisis from occurring. It is the force of public opinion – and the acceptance of democratic norms and values by both politicians and the public as a whole – which is of much greater significance.

The impact of MMP

What then will change under MMP? The "constitutional backstop" role will continue to be a legal fiction for all intents and purposes. Equally, in terms of forming governments and dissolving Parliament, the best course of action will remain to do as little as possible in order to safeguard the Crown's neutrality.

Forming Governments

The Governor-General's obligation is to appoint a ministry which can command majority support in Parliament. If a single party or an established coalition of parties wins a majority of seats at an election, the Governor-General will appoint the leader of that party or coalition to be Prime Minister. Should the results of an election prove less certain, the Governor-General must wait for the politicians to negotiate the formation of a government. This may require extensive discussions between the various party leaders and might end in the formation of a multi-party coalition government (possessing majority support in the House) or in the establishment of a minority government (comprising one or more parties) which, while failing to command a majority of seats, can at least count upon the support of a sufficient number of other MPs to survive any vote of no confidence in the medium-term future.

The point to emphasise is that if election results fail to suggest an obvious government, it is a matter for the politicians, not the Governor-General,

"if election results fail to suggest an obvious government, it is a matter for the politicians, not the Governor-General, to resolve"

to resolve. Constitutional lawyer Mai Chen has argued that it is for the Governor-General to intervene and commission someone to try and form a government, and that he or she should start with the leader of the largest party and work downwards:

> The Governor-General may be left in some doubt as to who is his or her responsible advisers and may have to exercise reserve powers, powers which have not been exercised in New Zealand in modern times. If there is one party which has more seats than the others (but still less than 50 per cent of the seats in Parliament) the Governor-General could be guided by convention, asking that party to form a coalition government. If they fail, then the party with the second greatest number of seats is asked to attempt to form a government and so on down the line. In the event that no government is able to be formed, a "caretaker" government is created. (Chen, above, at 32.)

The Attorney-General, Paul East, has adopted a similar position, arguing that the Governor-General "will go to the party that has the most number of seats and say 'You form a Government'. [He or s]he then has to make a decision at some stage whether or not they are capable of forming a Government and go onto the next person." He suggests that if a right-wing party won 42 seats, and two left-wing parties 40 and 38 seats respectively, the Governor-General must go to the right-wing party first. That party might then spend six months seeking to form a government "and keep on in Government while they are trying to do it, not wanting to give up power [but without] ... a hope of forming [a viable government] really". (East, Interview with Anna Young, Appendix B in Young, "MMP: Electoral Change – Unfinished Business?", LLB(Hons) Paper, University of Canterbury, July 1994, at 4.)

Focusing upon the numerically largest party has the effect of distorting the options available to the Governor-General. MMP is, at least in part, directed at increasing the power of Parliament – not at reviving Crown involvement in the selection of governments. If it is unclear who should form a government, this should be left to the members of Parliament and their party leaders to determine. Suggestions of an enhanced vice-regal initiative are inappropriate. The best advice the Governor-General can be given starts from the opposite premise – to do nothing for as long as possible, or, as stated by Professor Winterton, to "decline to exercise any independent discretion unless it is absolutely unavoidable". (Winterton, *Monarchy to Republic: Australian Republican Government* (1986) at 37.) If, after an election, no party or coalition holds a majority of seats, the Governor-General should retain the incumbent Prime Minister in a caretaker capacity (unable to take any new policy initiatives except in an emergency). The Governor-General should then sit back and leave the matter for the politicians to deal with. Overseas experience shows that negotiations might take several days, several weeks, or even longer. But this is a matter for the politicians to determine – it is not one in which the Governor-General must necessarily or immediately intervene.

Agreed, there is a possibility that inter-party negotiations might break down, become unduly prolonged or unreasonably difficult – but it should also be noted that MMP offers an incentive for politicians to avoid appearing unnecessarily obstinate. The formation of unlikely coalitions in Italy and Japan during 1994 demonstrates that constitutional impasse is not always as much of a problem in practice as it might appear in theory. The continued survival of the Bolger Government during the last two years, despite losing its majority in the House, shows that New Zealand politicians are not incapable of adapting to the exigencies of multi-party Parlia-

ments and coalition governments without any need for vice-regal intervention.

Even supposing post-election negotiations collapse or get bogged down, the role of the Governor-General is not necessarily to select a Prime Minister. Why should he or she succeed when the political parties have failed? It is instead to appeal to the party leaders' sense of responsibility and loyalty to the country, and to seek to provide momentum where this is needed. If, at the end of the day, nothing can still be agreed, Parliament meets but proves incapable of determining upon a new government, then, and only then, might the Governor-General suggest a solution. By now both the politicians and the public are more likely to accept the need for either fresh elections or provisional support of a minority government.

The Governor-General's task is, as far as possible, to remain out of politics and what are inherently political decisions. To maintain the neutrality and reputation of the Crown, he or she should, to the greatest possible extent, leave the formation of governments to elected parliamentarians. In order to avoid controversy and dispute, the Governor-General should require party leaders to submit their views in writing. If the parliamentary situation is unclear, majority support of a prospective government should be confirmed in writing or, if necessary, tested by a vote of confidence in the House, before the Governor-General appoints a new Prime Minister. (In support of this view refer Keith, "Changing the Way We Govern: MMP in a Wider Context", Address to the Institute of International Research, March 1994, at 9; Morris, "The Governor-General, the Reserve Powers, Parliament and MMP: A New Era" (1995) 25 VUWLR 345 at 357-8.)

Dissolving Parliament

A request to dissolve Parliament prematurely should also be referred to, and dealt with, by Parliament itself. MMP increases the risk of a ministry collapsing before the parliamentary term ends, and the Prime Minister, now in a minority, seeking to hold an early election. Should he or she be able to do so if, for example, a junior coalition partner defects to the Opposition, giving it a majority in the House? This occurred in the former West Germany in 1982. The result was a change of government, not fresh elections.

Refusing a dissolution must depend upon the Governor-General being certain that an alternative government can indeed be formed. He or she may be best advised to defer answering a Prime Minister's request to dissolve Parliament, and to take the opportunity to talk to opposition leaders and seek to gauge that an alternative ministry would, rather than might, command a majority on the floor of the House. If the possibility of an alternative government appears uncertain, the Governor-General must accede to the Prime Minister's request in order to avoid a repetition of the 1926 Canadian debacle. If an alternative ministry is, on the other hand, patently viable, overseas experience suggests that priority should be given to maintaining the life of an existing Parliament and avoiding the disruption of frequent elections.

"MMP reinforces the importance of Parliament – it should not be interpreted as reviving anachronistic Crown discretions"

MPs wishing to replace a government with an alternative ministry (as opposed to bringing down the government to force fresh elections) would be advised to pass what is termed a "constructive" no confidence vote; that is to say, a motion of no confidence in the Government which also expresses confidence in someone else as Prime Minister. An alternative ministry having received the support of the House, the Governor-General would be expected to refuse to dissolve Parliament and to appoint the named MP as Prime Minister.

In 1993 the Republic Advisory Committee to the Australian Government suggested there was general agreement that:

> after a general election, the Governor-General should refuse to follow the advice of the incumbent Prime Minister to dissolve the House before the House has met and had an opportunity to consider in whom it has confidence; [and]
>
> the Governor-General should also refuse to follow the Prime Minister's advice to dissolve the House if the House has expressed confidence in someone else as Prime Minister.

The situation was, however, less certain:

> if the government has lost a vote of confidence in the House and the House has not named a person in which it would have confidence, but it appears that an alternative government *could* be formed. (Emphasis added. Republic Advisory Committee, An Australian Republic: The Options (1993) Volume I, at 91.)

The best answer is that already stated: in such a situation, the Governor-General may delay responding to the request for a dissolution, but unless the prospect of an alternative government is borne out (by written confirmation from party leaders or a vote in the House), must ultimately accede to that request. The Republic Advisory Committee makes the sound recommendation:

> Perhaps the best way of approaching the issue is to bear firmly in mind that, in a system of parliamentary democracy, the choice of a government is one for the members of the popularly elected ... House of Parliament, and to require the House to make that choice if it wishes to avoid dissolution. It would follow that a Prime Minister who had lost the confidence of the House would be entitled to a dissolution unless the House had, within a reasonable period, expressed confidence in someone else. (Republic Advisory Committee, above, Volume II, at 267.)

In order to avoid dissolutions of Parliament becoming a matter for subjective vice-regal discretion, the Governor-General may be advised to pass responsibility over to the MPs themselves, giving them a limited time period to establish the viability of an alternative ministry if they are to avoid a dissolution.

Keeping out of politics

The Crown's reserve powers exist as remnants of the legal puissance once exercised by monarchs who ruled as well as reigned. Mai Chen's contention that "MMP may require reserve powers to be used more often" and that this "will give the Governor-General more opportunities to exercise control over the incumbent government" (Chen, above, at 33) is surely misplaced. Modern conceptions of parliamentary democracy and constitutional government demand that "matters ca-

pable of being resolved by politicians should be left in their hands". (Winterton, "Reserve Powers in an Australian Republic" (1993) 12 Univ of Tasmania LR 249 at 256.) MMP reinforces the importance of Parliament – it should not be interpreted as reviving anachronistic Crown discretions.

Despite various claims that MMP will require a politically active Governor-General, it is reassuring to note that Sir Michael Hardie Boys himself has recognised the limits of his office. Interviewed last year, he said the Governor-General should be called on only as a last resort. He described his role as a facilitating one, "to help the elected people come to their own decision. I think in the end the choice of government is one for the parliamentarians to make. It's only right at the end of the road, as it were, that the Governor-General is exercising authority. I don't imagine that's likely to happen." ("Judge Thought Hard About Taking Top Job", *The Press*, Christchurch, 18 August 1995.)

The need for reform

Practice and convention under MMP should emphasise a non-activist, non-political role for the Governor-General. But if this is to be ensured (and not just hoped for), several legal changes need to be adopted. A statute should be passed providing for Parliament to appoint the Governor-General (preferably by a weighted majority), extending security of tenure to that office, and relocating the Crown's constitutional powers in Parliament itself.

Appointing the Governor-General

If the Governor-General's primary role is one of performing ceremonial and community-affirming functions, recognising meritorious individuals and worthy causes, serving as a point of unity for the nation and representing New Zealand both at home and abroad, it is essential that the occupant of the office stand above and outside party politics. At present the Governor-General is effectively appointed by way of prime ministerial nomination, a fact criticised at the time of the last appointment by the leaders of both the Alliance and New Zealand First parties as being inconsistent with the MMP era of multiparty Parliaments and enhanced consultation. In the end the nomination of Sir Michael Hardie Boys was widely accepted even if the manner of the nomination (and the Prime Minister's insistence that he had the sole right to make it) was not.

The danger of prime ministerial nomination is that, on occasion, this might result in a political appointment. Sir Keith Holyoake, nominated by Robert Muldoon in 1977, is the obvious example. Sir Keith was himself a former National Party Prime Minister and still held Cabinet office at the time he was nominated. Sir Paul Reeves and Dame Catherine Tizard, appointed on the advice of Labour Party Prime Ministers, both had some although less overt political affiliations. Sir Paul took part in Labour's 1975 "Citizens for Rowling" campaign. Dame Catherine was a Labour Party Mayor of Auckland whose former husband had been Deputy Prime Minister under Rowling and whose daughter is a Labour Party MP. This is not to deny that these Governors-General have been individuals of some considerable stature. But it does suggest that prime ministerial nomination may on occasion compromise the political neutrality the office requires.

"The most important reform I wish to suggest involves denying the Governor-General any discretion in constitutional matters and relocating the appropriate powers in Parliament itself"

A better course would be for the House of Representatives to nominate the Governor-General, preferably by a weighted majority, for example two-thirds or three-quarters of all MPs. The concurrence of a number of political parties would be required, ensuring that the person selected was seen as non-partisan and possessing widespread support. If ministers recognise the need for political impartiality when advising appointments to the judiciary, and if Ombudsmen are only appointed with the consent of both Government and Opposition, the same ought to pertain to New Zealand's de facto head of state.

Providing security of tenure

A second, and related, reform is to remove the ability of the Prime Minister to advise the Queen to dismiss the Governor-General.

The vulnerability of the Governor-General should not be overstated. Professor Brookfield argues that the Queen may question, delay acting upon, or possibly even refuse such advice. (Brookfield, "The Governor-General and the Constitution" in Gold, *New Zealand Politics in Perspective* (1992) 3ed at 81.) Recall of the Governor-General may, in any case, be of little benefit given that, until a replacement is appointed, his or her powers are exercised by the Administrator, namely the Chief Justice or next most senior member of the judiciary.

There is nevertheless some evidence that the Australian Governor-General's premature dismissal of his Prime Minister in 1975 was motivated at least in part out of fear for his own position. The Queen enjoys security of tenure for life. High Court Judges and Ombudsmen can only be removed upon an address of the House of Representatives on specified grounds. (Constitution Act 1986, s 23; Ombudsmen Act 1975, s 6.) There seems no obvious reason why the position of Governor-General should be any less secure.

Relocating the reserve powers

The most important reform I wish to suggest involves denying the Governor-General any discretion in constitutional matters and relocating the appropriate powers in Parliament itself. This would leave the Governor-General constitutionally neutered, but freed from political controversy and better able to concentrate on representing the nation in a solely ceremonial and community-affirming role.

The extent of change is a matter for personal evaluation. One extreme is to deny the Governor-General any constitutional powers beyond the merely formalistic – he or she might, in a ceremonial sense, still promulgate laws and swear in ministers, but would have no choice in such matters, the Crown's residual legal discretion having been removed.

The King of Sweden and the Emperor of Japan have been stripped of their former legal powers. Neither has any role in the formation of governments, the dissolution of Parliament, or the resolution of political crises. These matters have been left to the politicians. The Japanese Constitution provides in arts 3 and 4:

> The advice and approval of the Cabinet shall be required for all acts of the Emperor in matters of state,

> and the Cabinet shall be responsible therefor.
>
> The Emperor shall perform only such acts in matters of state as are provided for in this Constitution [promulgation of laws and treaties, convocation of Parliament, dissolution of the House of Representatives, awarding honours, receiving foreign ambassadors and officials, performing ceremonial functions ...] and he shall not have powers related to government.

The Japanese Emperor and the Swedish King nevertheless continue to serve as popular symbols of national unity, valued for the representative and community functions they perform.

It is submitted that in situations of dire emergency, even a constitutionally powerless head of state would, under the doctrine of necessity, be entitled to act if no other government authority was capable of doing so (witness the actions of the Governor-General of Grenada in 1983, despite the fact that he had been denied any real legal powers since 1979; refer *Mitchell v Director of Public Prosecutions*, above).

Even if it was decided not to go as far as Sweden or Japan, but to allow the head of state to retain sufficient legal powers to be able to serve as an ever-vigilant constitutional watchdog (despite the fact that our Governor-General has never had to act as such), it would still be possible to deny the Governor-General any discretion when appointing the Prime Minister or deciding upon a request to dissolve Parliament, the situations most likely to cause controversy under MMP.

In some countries the head of state is insulated from involvement in negotiations to form a new government. In Sweden and Norway, the Speaker of the House has the leading role in canvassing the different political parties and determining who is in the best position to form a government. In the Netherlands, the monarch appoints an equally impartial figure as "informateur" to carry out the same function.

Removing the process one step further, the power to appoint the Prime Minister could be effectively located in the House of Representatives itself. A clause similar to the following would suffice:

> whenever it is necessary for the Head of State to appoint a Prime Minister, the Head of State shall appoint that person who commands the support of the House of Representatives expressed through a resolution of the House. (Republic Advisory Committee, above, Volume I, at 102.)

The Constitution of Tuvalu simply says: "The Prime Minister is elected by members of the Parliament" (art 63).

Following a general election, the incumbent Prime Minister would continue in office (in a caretaker capacity) until party leaders had negotiated the formation of a new government with either a majority of seats in the House or, if a minority government, one able to survive a confidence motion. Rather than the head of state having to determine which leader might attract what support, this task is, by law, left to Parliament itself. The experience of countries as diverse as Japan, Ireland and Germany – not to mention the Cook Islands and the Australian Capital Territory – demonstrates that such a system is quite workable. (Refer Constitutions of Japan, arts 6 and 67; Ireland, art 13.1.1; Germany, art 63; Cook Islands, arts 13 and 14; Australian Capital Territory (Self-Government) Act 1988, s 40.)

"If a stalemate genuinely cannot be resolved, and neither the Government nor any alternative can obtain the House's support, a fresh election would seem preferable to continued impasse"

The decision whether to allow an early election could similarly be transferred to Parliament. For example, a dissolution could become automatic if requested by a resolution of the House but non-allowable in all other circumstances. This would continue to enable a Prime Minister with majority support to obtain a dissolution (although provision could also be made restricting snap elections to the last few months of the parliamentary term if this was felt desirable; see the Constitution of Papua New Guinea, art 105). It would, however, prevent a Prime Minister who had lost majority support from dissolving Parliament unless MPs felt there was no other recourse, the unlikelihood of forming an alternative government necessitating an early election.

A different way of achieving the same result would be to provide for an automatic dissolution if the House passes a no confidence vote in the government and fails to elect a new Prime Minister within a specified time period. A constructive no confidence vote would thus avoid a dissolution. If the House has expressed its confidence in an alternative Prime Minister, there is clearly no need for an early election.

Some New Zealand commentators have suggested following the German model of limiting confidence motions to constructive no confidence votes. (Joseph, "New Zealand Constitutional Developments in 1993" in Saunders and Hassall (eds), *Asia-Pacific Constitutional Yearbook 1993* (1995) at 161; Jackson, "Coalitions: the Efficient Swiss Model or the Rackety Italian One?", *The Press*, Christchurch, 10 July 1995; "After Dame Cath", ibid, 13 June 1995.) Article 67 of the German Constitution provides that the lower house can only express its lack of confidence in the head of government by electing a successor at the same time. The alternative set out above has the advantage that it prohibits a dissolution if the House does elect a successor Prime Minister, but (unlike Germany) it allows this if, after a specified time period, the House proves incapable of doing so. If a stalemate genuinely cannot be resolved, and neither the Government nor any alternative can obtain the House's support, a fresh election would seem preferable to continued impasse.

Conclusion

There has been considerable speculation as to the role of the Governor-General under MMP. At present the Crown is symbolically all-powerful, but in almost all instances constitutionally shackled. I have argued that there is no reason for MMP to presage an era of revived reserve powers or a constitutionally active Governor-General. MMP is about giving more power to Parliament, not restoring it to the Crown. Our elected representatives, not an unelected Governor-General, should make the essential choices of selecting a Prime Minister and determining if and when to end the life of Parliament. In order to avoid doubts on this matter Parliament should, as soon as possible, pass a statute along the lines suggested. MMP promises uncertainties enough without leaving open the danger of entangling the Governor-General within them. ❑

Litigation

A regular feature edited by Andrew Beck

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Briefs of Evidence

The new rules relating to exchange of briefs of evidence in High Court litigation (RR 441A to 441L) are set to make witness statements a feature of all proceedings. The rules are similar to those introduced in English procedure in 1992, so it is of interest to note what has caused difficulty in the English experience. Order 38 r 2A requires the Court to make an order for exchange of witness statements at the summons for directions. As in the case of the New Zealand rules, this amendment reflected the practice which had in any event become commonplace.

"The new rules relating to exchange of briefs of evidence in High Court litigation are set to make witness statements a feature of all proceedings"

Privilege of statements

There have been very few decisions on the English rules, and there are apparently no reported decisions relating to the rule in its post-1992 form. One of the problems which has arisen, however, relates to the change in nature of witness statements. In the past, witness statements were always privileged under the general heading of litigation privilege. Now that they are required to be disclosed before trial, it hardly makes sense to continue to describe them as privileged documents.

Rule 441J(a) is similar in form to the English rule prior to the 1992 amendments, providing that nothing in the rules relating to exchange of briefs deprives a party of the right to treat a communication as privileged. This provision led to a challenge on the ground of ultra vires, but the Courts held that the rules providing for exchange did not compel a party to disclose privileged information: *Comfort Hotels Ltd v Wembley Stadium Ltd* [1988] 3 All ER 53.

The English Courts have also decided that a witness statement which has been exchanged is not privileged as against the other party: *Black & Decker Inc v Flymo Ltd* [1991] 3 All ER 158. Prior to exchange there is, of course, no guarantee that the document will ever be disclosed, and the privilege presumably enures.

Another question which has arisen is whether a party who receives witness statements is entitled to use them for purposes other than those connected with the extant proceeding. As the statements have not been compulsorily produced pursuant to the discovery process, they do not fall under the general rules governing discovered documents. In *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 3 All ER 878, Hobhouse J stated (at 890):

> [I]t is clear that there is no blanket restriction of the use of documents and information acquired in the course of litigation. Prima facie there is no restriction. The compulsion exception is confined to documents and information which a party is compelled, without any choice, to disclose. Where a party has the right to choose the extent to which he will adduce evidence or deploy other material, then there is no compulsion even though a consequence of such choice is that he will have to disclose material to other parties.

However, that is not the end of the matter. Hobhouse J went on to hold (at 894) that it has to be inferred under the rule that a party receiving a witness statement may only adduce it in evidence at the trial of the proceeding if the relevant witness is called; and that the material may not be used for any purpose other than the proper conduct of the proceeding. The information may not be passed on to anyone else, and the Court can, if necessary, enforce this obligation.

This approach is confirmed by R 441J(e), which provides that nothing in the rules allows a party to use a statement for any other purpose or in any other proceeding before it has been given in evidence. The rule is not conclusive, because it does not state that a party may not use the statements for other purposes. It can, however, be deduced that, although there may be no compulsion to disclose anything, the intention is for witness statements to be dealt with in much the same way as documents obtained on discovery.

The analogy which Hobhouse J in *Prudential Assurance* found to be most appropriate was with the rules governing without prejudice communications. Adopting the same approach, he concluded that, if a witness statement is not produced in evidence for whatever reason, the statement remains a privileged document in the sense that its production cannot be compelled by any other person, and it may not be used against the maker without the maker's consent (p 894). Although this is only a restricted form of privilege, the analogy seems to be a useful one, and it is likely that the Courts will adopt this approach.

Non-compliance

One of the difficulties surrounding exchange of briefs of evidence in the past concerned the action to be taken where a party failed to produce them. The problem was particularly acute where exchange only took place close to trial, leaving insufficient time to apply for an order.

Some Courts recognised that a sanction for non-compliance was needed, but acknowledged that, in most cases, an order for costs was the only viable option. In appropriate circumstances, the order could be made

against solicitors: *Kamo Sports & Dive Ltd v Harrison Sports (Kamo) Ltd* (1993) 7 PRNZ 321.

The new regime is very different. In the first place, exchange is required shortly after the filing of the praecipe unless otherwise ordered. This will effectively compel plaintiffs to prepare their briefs before signing a praecipe, and ample opportunity will be available to compel defendants to supply briefs well before trial.

The consequences of failure to provide briefs are also more severe. Rule 441G provides that oral evidence in chief may only be adduced at trial if it is in response to evidence adduced by another party, or if the Court grants leave. The circumstances under which the Court may grant leave are very limited, generally being restricted to evidence in explanation or response, or evidence which was not available at the time briefs were prepared. There is a general discretion to admit evidence in the interests of justice, but it seems unlikely that the Courts would allow this to drive a horse and cart through the rule.

In circumstances where oral evidence is considered by a party to be desirable or essential, eg where credibility is a vital element of the case: *Richard Saunders & Partners v Eastglen Ltd* [1990] 3 All ER 946, it will generally be advisable to make application at an early stage under R 441A(4) for an order that witness statements not be required.

Recalcitrant witnesses

Briefs of evidence are all very well where a party has the necessary witnesses lined up and ready to speak. There is, however, no procedure to compel a reluctant witness to make a statement which can then be exchanged. The English rule provides for such circumstances by allowing for directions requiring a statement by the party setting out the nature of the evidence to be adduced.

In circumstances where it would be necessary to subpoena a witness to give evidence, the party concerned will generally have to apply to the Court for directions that the normal rules as to exchange of briefs do not apply. Where this is the plaintiff, it will normally be known prior to the filing of the praecipe, and steps can be taken accordingly. Where the defendant's witnesses are uncooperative, there may be additional time pressure, and application will have to be made as soon as the witness's reluctance becomes clear.

It is clear that for both plaintiffs and defendants, the early preparation of briefs is likely to become an important part of litigation practice.

Time for exchange

The English Courts have accepted that briefs should be exchanged simultaneously. In *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 2 All ER 504 (CA), Lord Donaldson MR said, at 511:

> The normal rule should be that the exchange of witnesses' statements should be simultaneous. This is, I think, inherent in the concept of an exchange of witnesses' statements, but in any event flows from the fact that what is involved is a process of discovery and not of pleading and the undesirability of either party being in a position to seek some tactical advantage by delaying service of its witness statements until it has been served with witness statements by the other side.

That practice is now reflected in Order 38 r 2A(4)(c). New Zealand Courts have also regarded simultaneous exchange as the norm: *C-C Bottlers Ltd v Lion Nathan Ltd* (1993) 6 PRNZ 242; *Des Forges v Wright* (1994) 8 PRNZ 235. Rules 441B and 441C provide, however, that exchange is to be sequential.

It is not clear why sequential exchange has been adopted as the appropriate form of exchange, given the theory of exchange propounded by Lord Donaldson. The system seems to operate to the advantage of defendants, and to provide greater possibility for delay.

In most cases, it will probably make little difference whether exchange takes place simultaneously or sequentially. If a plaintiff considers that simultaneous exchange would be of particular advantage in any case, application can be made for directions under R 438 or R 441A(4).

Recent Cases

Costs

Litigants in person

Litigation in person was also the subject of the decision in *Official Assignee of Collier v Registrar of the High Court at Christchurch* unreported, 8 March 1996, CA30/96. Mr Collier had represented himself in the High Court, and claimed costs in respect of two aborted hearings. The High Court refused to award him costs, citing the traditional rule that costs are not awarded to lay litigants. Mr Collier appealed.

Temm J delivered the judgment of the Court of Appeal. He referred to the long standing practice adopted by the English Courts, and espoused by the Court of Appeal in *Lysnar v National Bank of New Zealand Ltd* [1935] NZLR 557 and *Re G J Mannix Ltd* [1984] 1 NZLR 309. Although the position has been altered by statute in the United Kingdom, New Zealand and Australian Courts have continued to follow tradition: *Jagwar Holdings Ltd v Julian* (1992) 6 PRNZ 496; *Cachia v Hanes* (1994) 179 CLR 403 (HCA).

The Court of Appeal noted that the rule is a rule of practice, and may therefore be departed from in an appropriate case. However, given the practical difficulties involved in calculating awards, and questions of policy which would have to be resolved, the Court considered that it was really a matter for the legislature. The case before them was not of such an exceptional nature as to justify any departure from the general rule.

There is no doubt that, like the legally aided party (see the discussion of *Awa v Independent News (Auckland) Ltd* below), a party opposing a litigant in person has a tactical advantage in that there is no liability for costs in respect of unsuccessful proceedings. While it may be convenient to have a blanket rule denying costs to lay litigants, it is hardly fair, and it is of interest to note that there were minority judgments in *Cachia v Hanes* which favoured a more liberal approach to awards of costs in such circumstances. The refusal of the Court of Appeal to embark on a reconsideration of the issue suggests that it is a matter which could receive legislative attention.

Representation

Legal representation of companies

In *Time Ticket International Ltd v Broughton* unreported, Master Venning, 20 March 1996, HC Christchurch CP167/95, a statement of claim was filed by a director of the plaintiff company, who held a practising certificate as a barrister. The defendant applied to strike out the proceedings on the ground that they were defective.

Master Venning referred to a number of cases where the issue of company representation had been discussed, particularly *Penrose Earthworks Ltd v Robert Cunningham Construction Ltd* (1993) 7 PRNZ 35, where it was held that a winding-up application on behalf of a company could only be issued by a solicitor. He considered that the clear intent of RR 40-45 of the High Court Rules was that proceedings can only be issued by a solicitor or a litigant in person. Rule 41 permits the filing of a document on behalf of a corporation only by a principal of a firm, or a solicitor who is the principal legal adviser of the corporation.

The Master held that enrolment as a barrister and solicitor is insufficient to satisfy the rules; the person filing the document must be practising as a solicitor as well as complying with R 41. The proceeding was therefore defective.

What is of some interest is the theory behind the requirement for a solicitor to represent a company. Master Venning pointed out that this enables the Court to exercise disciplinary control over a solicitor on the record, and that the Rules of Professional Conduct prevent a barrister from accepting instructions from a client. In the final analysis, however, neither of these appears to be a particularly convincing reason for depriving a company of the right to conduct litigation in person through an officer.

It is also interesting to note that RR 40-45 are exactly the same as RR 38-44 of the District Courts Rules 1992, yet a company may appear in the District Court through an agent by virtue of s 57 of the District Courts Act 1957. It is all very well to describe this as a statutory exception, but the same reasoning ought to apply to both sets of rules. Unless the word "appearance" is confined to actual conduct in Court, which would seem to defeat the object of the section, there is a conflict between s 57 and RR 38-44. The whole subject of representation of companies in litigation seems to require some clarification.

When it came to solving the problem, Master Venning refused to treat the proceeding as a nullity, but stayed it pending the appointment of a solicitor on the record. This was entirely appropriate in the circumstances, although it appears that there was simply a question of non-compliance with the rules. Rule 5 therefore required the matter to be dealt with as an irregularity, and there was no question of the proceeding being a nullity.

"the legally aided party and the party opposing a litigant in person have a tactical advantage in that there is no liability for costs in respect of unsuccessful proceedings"

Legal aid –

Exceptional circumstances justifying increased contribution by legally aided party

In *Awa v Independent News (Auckland) Ltd* unreported, Hammond J, 11 March 1996, HC Hamilton CP152/92, the plaintiff had brought proceedings for defamation in respect of a report describing him as a "bodysnatcher". The claim was dismissed, in a judgment reported at [1995] 3 NZLR 701.

The judgment was followed by an application by the defendants for an award of costs, which was the subject of the current decision. The defendant's solicitor and client costs totalled some $75,000; scale costs were $5,750, or $21,421.54 if the Court were prepared to certify. As the plaintiff had been legally aided, his contribution towards costs would ordinarily have been limited to the usual $50. It was contended, however, that there were exceptional circumstances justifying a contribution to the defendant 's costs.

The case was governed by s 17(2)(e) of the Legal Aid Act 1969, but it was accepted that the same principles would be applicable under s 86 of the Legal Services Act 1991. Both Acts require the presence of "exceptional circumstances" before an award can be made.

Hammond J started with the proposition that no intrinsic test for exceptional circumstances had been, or could be, devised by the Courts; it is inevitably a fact specific inquiry. He approached the matter in a broad brush way, and considered that the plaintiff emerged in such an unfavourable light that an award of costs was appropriate.

The factors considered relevant by the Court were the nature of the claim itself: defamation claims are "peculiarly personal" and notoriously expensive; legally aided defamation plaintiffs therefore have a powerful bargaining card. Secondly the defendant had made a *Calderbank* offer of $20,000 to try and avoid a trial even though it considered the claim to be without merit. Thirdly the claim was seen by the Court itself as entirely without a prospect of success. Fourthly there was a late application to amend particulars, necessitating a postponement of a fixture. In addition, the Court regarded the trial as unduly prolonged for no good reason.

The plaintiff and his wife had assets which might amount to some $50,000 in a bankruptcy, and he could not be said to be without means. Hammond J decided that justice required an award of the maximum non-certificated scale costs of $5,750.

Hammond J's award is one which smacks of moderation and realism, and His Honour was conscious of not subverting the laudable aims of the legal aid system. In the circumstances, however, the plaintiff might be considered quite fortunate. There is no doubt that a legally aided plaintiff occupies an extremely advantageous position, and is able to put a defendant to enormous expense without any hope of recompense. Ordinary citizens have to weigh the costs of losing a trial very carefully before proceeding with litigation. There should therefore be very careful scrutiny of cases like this before legal aid is granted. Perhaps a greater use of independent legal opinions is indicated.

"Litigation" *will appear every other month, with* "Transactions" *by Brian Keene, Barrister of Auckland, appearing in the alternate months.*

Mr Keene wishes to point out, in respect of last months "Transactions" *that he appeared as counsel for several of the parties in the* MetLife *hearing.*

Judicature Amendment Act 1972, s 9(4A)

Section 9(4A) of the Judicature Amendment Act 1972 provides that where judicial review is sought of the act or omission of a Judge, Registrar, or presiding officer of any Court or tribunal, it is the Court or tribunal which is to be cited as the respondent, and not the presiding officer. The officer may, however, file a statement of defence on behalf of the Court or tribunal.

The section was inserted by the Judicature Amendment Act 1991, with effect from 15 August 1991, and was presumably designed to protect Judges from personalised litigation, or the suggestion that they are personally liable for acts performed in their judicial capacity. The section has apparently been infringed on a number of occasions, eg *Kim v Butterfield* (1994) 7 PRNZ 461 (Disputes Tribunal); *Gordon v Registrar, District Court, Hamilton* (1994) 8 PRNZ 27, but it received its first judicial interpretation in *Tau v Durie* unreported, McGechan J, 16 May 1996, HC Wellington CP215/95.

The case involved a decision of the Waitangi Tribunal. The first respondent, the Chief Judge of the Maori Land Court and presiding officer of the Tribunal, applied to be struck out of the proceeding.

McGechan J pointed out that the section had been aimed principally at protecting District Court Judges, who did not wish to be "immortalised" by being cited personally in judicial review proceedings. He held that the section was intended to apply to one-person tribunals, frequently presided over by District Court Judges, but questioned whether it was designed to include the Waitangi Tribunal. He doubted whether it was intended to include a Judge of the Waitangi Tribunal, but considered that the presiding officer ought to have such protection. The first defendant should therefore not have been cited personally.

Although counsel submitted that the section was mandatory, McGechan J disagreed. He held that the matter was essentially a procedural one and that the Court had a discretion as to the appropriate course of action. As the Tribunal itself was already a party with separate representation, and the first defendant had acquiesced in the proceedings thus far, he held there was nothing to be gained by striking him out. The application was apparently motivated by a desire to avoid interrogatories, and the Court considered that this, too, weighed against the striking out application. The interests of justice required the application to be refused.

The approach taken by McGechan J appears to be sound, although it seems that the section should be interpreted widely rather than narrowly. There does not seem to be any reason why all officers of the Waitangi Tribunal should not be afforded its protection. The final result achieved is also sensible; practical justice required the proceeding to continue in its existing form. It may be asked whether striking out would have released the first defendant from the responsibility of answering interrogatories in any event. It seems doubtful that it would have; any interrogatories put to the Tribunal would have had to be answered by the appropriate officer pursuant to R 286.

Publications on Procedure

Barry Rose Law Publishers in Chichester have produced three slim volumes by L A Sheridan, all relating to various equity procedures, all published in 1994. These are *Injunctions in General*; *Injunctions in Particular Cases* and *Chancery Procedure and Anton Piller Orders*. All three have been issued in soft cover, and have clearly been economically produced, which suggests that they will be available at reasonable prices.

Chancery Procedure and Anton Piller Orders (63 + 20 pages) will be of limited value to New Zealand practitioners. It contains a discussion of the English Court structure, and details of the procedure in those Courts, including a discussion of discovery. The text is expressed simply, and contains useful collections of the decided cases, with some references to journal articles. There is, however, little that would not be found readily in *McGechan on Procedure* or *Sim's Court Practice*. The discussion on Anton Piller orders also suffers from having no treatment of *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840, which is clearly the most important authority for any potential Anton Piller claimant to consult. Given the small number of Anton Piller orders granted in New Zealand, this is not likely to be a high priority.

Probably the most useful of the three books is *Injunctions in General* (105 + xxxviii pages). This contains readily understood explanations of the terminology frequently used in connection with injunctions, and a concise statement of the general principles. It is very much a textbook type discussion, but includes references to a large number of cases and articles. There are also helpful chapters on Mareva injunctions and injunctions to restrain judicial proceedings. Practitioners who do not have ready access to the traditional texts such as Spry on *Equitable Remedies* might find this a convenient reference book to have at hand.

Injunctions in Particular Cases (113 + 38 pages) consists of statements of the principles applied by the Courts in granting injunctions in torts, property cases, family disputes, breach of contract, breach of confidence, associations, and public duties. In most cases, the principles would be equally applicable in New Zealand. One does not normally think of these causes of actions separately from the remedies involved, which makes the book of fairly limited use. It seems puzzling that it was not amalgamated with the general text on injunctions.

Most practitioners will be able to find this material elsewhere without difficulty. The advantage of these books will be in providing a low cost resource, covering basic principles, to keep on the shelf. The index of each volume is rather brief, but it is quite simple to track down material using the contents pages. ❑

"Electronic money" – a legal misnomer?

Frank Quin, Barrister and Solicitor, Auckland

questions whether smart cards are electronic money or electronic cheques

Introduction

Pick up a technology magazine or newspaper liftout these days and chances are there will be another item about "smart cards" and the relentless drive to a so-called cashless society. New Zealand seems to be at the cutting edge of technology which, its proponents would have us believe, will see physical money become as obsolete as the crystal radio. After initial attempts faltered in the late 1980s, electronic payment systems have burgeoned in this country over the last couple of years. EFTPOS systems are now commonplace in supermarkets, service stations and other retail outlets. Now local dairies have gone online and offer cash advances along with the paper and last minute grocery items.

Of course, this technological revolution is not confined to New Zealand. Last year, the media carried stories of the "smart card" pilot launched by National Westminster Bank in the English town of Swindon. The aim is to have 40,000 of the town's 190,000 residents carrying them in due course. These cards are what have become known generically as stored value cards, meaning that they contain a microchip "loaded" with a specified money value. Unlike telephone cards for example, stored value cards can be replenished when that value has been expended.

The media stories quoted a NatWest representative as saying –

> Mondex [the card's brand name] really is money ... just as much as the physical folding stuff.

Similar statements have been made about New Zealand stored value card proposals. But are "smart" or "stored value" cards the same as physical banknotes and coins? Does it matter, so long as they perform the same function, at less cost and greater convenience? What is special about physical money?

What is money?

In legal terms there is a lot that is special about banknotes and coins. They are the only objects which the law recognises as constituting legal tender. What this means is that they are the only objects which someone who is owed money can insist on receiving, and someone who owes money can insist on delivering, in the discharge of that money payment obligation. An interesting case in point was *Libyan Arab Foreign Bank v Bankers Trust* [1989] 1 QB 728. Staughton J upheld the claim of the plaintiff bank under English law to be paid some $US290 million in cash, in circumstances where payment via the CHIPS electronic interbank system had been prevented by a United States freeze on Libyan assets in that country.

When you analyse any means of settling a money payment obligation other than in physical currency, you will find that – in law at any rate – what has occurred is either the creation (or assignment) of debt or a barter transaction, whereby some thing *in specie* is swapped for another. Either way, there is no payment of money.

What is the definition of money? This is something that great minds have debated for centuries. Today, you can get different answers depending on whether you consult a lawyer, an accountant, an economist or an historian. The issue is not the exclusive domain of any one discipline. Even within particular disciplines, there are different schools of thought. An economist brought up on Marxist socialism, for example, will have a very different definition of money from an economist of the capitalist persuasion. A couple of years ago, I presented a paper at an international conference which argued that electronic funds transfer systems, such as CHIPS and Fedwire in the United States, do not in law effect payments of legal tender. I got into a debate with an English lawyer who asserted, amongst other things, that the Ecu – the "European Currency Unit" – is as much money in legal terms as is a pound note, even though the Ecu has no physical form.

In a recent commentary on what were described as "pre-paid cards", Reserve Bank economist Peter Ledingham identified a number of features of physical money, for the purpose of comparison with the use of smart cards. From a legal viewpoint, the most significant is that banknotes (and coins):

> ... [are] valid consideration in all places and circumstances, and (except where forgery is suspected) [their] status cannot be questioned (both legal tender rules and the law more generally imply that, when it comes to the crunch, this is the only type of "money" which really counts).
>
> ("Pre-paid Cards" (1994) 57 *Reserve Bank Bulletin* 346.)

Notwithstanding the huge growth in various paperbased and electronic means of issuing credit, physical money continues to play a significant role in the economy. According to the Reserve Bank, as of June 1995, approximately $1.5 billion was in circulation as physical money. In addition, outstanding Reserve Bank bills, redeemable in law if not in practice for the payment of cash, totalled a further $1.25 billion.

While it may be hard to define money, it is easier to identify what does not constitute money. In particular, cheques are not money. Rather, they are promises to pay money at a future time. That promise is ordinarily discharged on presentment of the cheque at the payer's bank and its exchange for cash or, more likely, for a credit to the payee's bank account. If the cheque is dishonoured of course, there has been no payment. The same

applies as much to bank-issued cheques as to personal cheques although, as illustrated by the much discussed *Yan v Post Office Bank Limited* [1994] 1 NZLR 154, a bank has more limited ability to stop payment on its own cheque. (In *Yan*, the Court of Appeal was careful not to treat the bank cheque as being currency.)

Now, say you are an appliance retailer who has just installed "smart card" transaction hardware and closed your first electronic sale. You have handed over a brand new sound system in exchange for some electronic impulses on an EFTPOS payment system, the end result of which, you expect, will be a credit to your bank account equal to the sale price of the goods sold. Or let us go down a notch or two in value terms. Take the newspaper vendor in Swindon who, according to the media stories, had just become the first retailer in Britain to accept electronic cash, in exchange for a copy of the local newspaper. In either case, has there been a payment, and acceptance, of money?

In legal terms, these so-called "electronic cash" transactions are actually much closer to the use of cheques than they are to the use of banknotes or coins. At the end of each transaction, the buyer has got the goods – the stereo or the newspaper – but what has the retailer got? Clearly not cash – there is nothing in the till to show for the transaction. What the retailer has "received" is the result of those electronic impulses mentioned earlier, a credit entry in a bank account. This is precisely what occurs when a cheque is presented for payment. The end result is an obligation of a bank to pay money, equal to the amount of the credit entry. Conversely, if the retailer's account with its bank happens to be in debit (ie overdrawn), the crediting of the account via the EFTPOS transaction merely reduces the amount of money which the retailer owes its bank. This is settled banking law, established in cases going back over a century. But so-called "bank money", the obligation which a bank has to pay money, is governed by the law relating to credit. It is not legal tender.

So there is a fallacy in describing smart or stored value cards as "electronic" money. What these cards will replace is not physical money but cheques. Of course, in economic and practical terms, the effect will undoubtedly be to displace the use of physical money in many situations where cheques are not used at present, typically because of the small value of the transaction relative to the cost of processing the cheque. But, as a legal matter, the card is replicating the function of a cheque, not the function of cash. In other words, a retailer's acceptance of a stored value smart card in law amounts to acceptance of a promise by the purchaser to pay money, which promise will ordinarily be discharged when the retailer's bank account is credited with the equivalent amount (thus substituting the bank as debtor).

The risk factor

An inescapable feature of any debtor/creditor relationship is risk. This is the risk that, when it falls due, the money payment obligation will not be discharged for some reason. The presence of such risk might seem inconsequential as regards each of the individual EFTPOS transactions going on at any point in time, especially given the apparently instantaneous or "real time" nature of EFTPOS transactions. However, it is an issue which has assumed international significance with wholesale or "large fund" electronic payment systems. Around the world, central banks are seeking out better ways to monitor electronic funds transfer systems, which have permitted an explosion in the amount of debt outstanding amongst banks and other financial institutions. In New Zealand, the Reserve Bank monitors transactions on the electronic interbank settlement system, constantly vigilant for the possibility of an overextended participant defaulting on a settlement obligation. Overseas, the spectacular collapse of Barings Bank is an illustration that such surveillance systems are by no means foolproof.

It is when such failure occurs that the difference between money and credit tends rapidly to come into focus. As earlier noted, the law recognises only one means of discharging a money payment obligation which, universally within a particular country, a debtor or a creditor can insist upon. That is the delivery of physical money of a nominal value equal to the amount of the debt. Some commentators argue that physical money is not the only legal means of discharging a payment obligation. This may be correct in a given case, if the question is directed solely to the specific bargain between the parties. A creditor may agree irrevocably to accept some other mechanism, for example, a transaction on an electronic payment system. But typically, the creditor and the debtor will not be the only people with an interest in the transaction. For example, that creditor may be relying on the payment to enable it to discharge its own payment obligation to a third party. If the agreed mechanism does not involve handing over physical money, it by no means follows that the third party must accept the mechanism as settling its entitlement.

Such a situation will quickly develop if a bank or other participant in an electronic payment system should default. The "knock-on" effects of that default could be rapid and could spread like a cancer to all parts of that system and beyond.

At least in principle, the risk of such a "systemic" failure is not confined to large fund transfer or settlement systems, affecting only banks and financial intermediaries. The same factors will be at play with retail smart card payment systems. Smart card issuers may not themselves be banks. In New Zealand, there is no legal requirement that a registered bank be involved in the issue of smart cards and current initiatives suggest a plethora of non-bank participants in their promotion and circulation.

Imagine, for example, a smart card issuer – which may or may not be a bank – selling 10,000 cards each with a stored value of $50. What this firm has done is not put $500,000 cash into circulation. Rather, it has created a debt of that amount, albeit divided amongst the 10,000 card purchasers.

What happens if, between the time of issuing the cards and their utilisation, the issuer becomes insolvent? If it has hitherto assigned its obligation to give value on the cards, to a bank for example, then the issuer's insolvency may not affect the cardholders at all (although there is an issue as to the validity of an assignment of debt without the consent of the creditor). But if the issuer is carrying the liability, what the cardholders will quickly discover is that their stored value cards are certainly not money and in fact are worthless, since no retailer will accept them. This is because, like a cheque, the stored value card is not legal tender. The electronic data stored on the card will, in the scenario outlined, literally be good for nothing. It is not a thing which the holder can insist on being accepted in discharge of a money payment obligation. As I indi-

cated earlier, there is only one thing which has that characteristic and that is the banknotes (or coins) issued by the state and circulating as currency.

Can smart cards be money?

Thus, the NatWest Bank representative was wrong in describing the bank's Mondex card as "money ... just as much as the physical folding stuff". This raises a question which appears to have received scant attention to date but which will have to be addressed if society is truly to embrace the concept of "electronic money". Is it possible for stored value cards to be accorded the legal status of money in currency, that is, of legal tender?

To give any sensible answer to this question, it is necessary to have a definition of money against which the answer can be tested. The best legal definition I have been able to find is that propounded by the late Dr F A Mann, whose book *The Legal Aspect of Money* was first published in 1938 and who completed the 5th edition shortly before his death in 1991. Dr Mann propounded that the characteristic or quality of "money" can be applied to, and only to:

- all chattels
- issued by the authority of law in a state
- denominated with reference to a unit of account
- wich are intended to serve
- as a universal medium of exchange in that state.

An economist reading this definition might say it is all very interesting but also irrelevant. In economic terms, money is whatever is or will be accepted as an economic medium. But ultimately it is the law, and therefore the legal definition, which will determine the rights and obligations of people caught up in any particular situation in which the definition is at issue.

The importance of currency

Before applying the above definition to stored value cards, it is useful to bear in mind a particular feature of money which is shared by no other thing. It is an absolute legal rule that the ownership of a banknote which is passed in currency vests in the recipient and no other person. This is the point which Leadingham was making above, "when it comes to the crunch, [physical money] is the only type of 'money' which really counts".

This legal rule relating to money was established centuries ago in relation to coinage. As regards banknotes, the rule was established as long ago as 1758, in a judgment of the great English Judge, Lord Mansfield. At that time, and for many years subsequently, banknotes were issued by privately owned banks. The taking by states of the exclusive power to issue paper money is of more recent origin.

"It is an absolute legal rule that the ownership of a banknote which is passed in currency vests in the recipient and no other person. When it comes to the crunch, [physical money] is the only type of 'money' which really counts"

The case in question was *Miller v Race* (1758) 1 Burr 452; 97 ER 398. A bank refused to pay out on a banknote it had issued, or give it back, after the note had been presented for payment by an innkeeper who had accepted it in good faith from a customer, unaware that the customer had stolen the note in a highway robbery. The innkeeper sued in conversion for the bank's wrongful refusal to give him back the note. The bank argued that, because the note had been stolen the thief had gained no ownership interest, or title, and therefore had no title to pass to the innkeeper. Also, for good measure, the bank argued the rule that an action in conversion cannot be sustained in respect of cash, because "money has no earmark".

Lord Mansfield rejected the bank's submissions and, in doing so, explained the legal rule relating to money which remains the law today:

> It has been quaintly said "that the reason why money cannot be followed is, because it has no earmark" but this is not true. The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency. So, in a case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before money has been passed in currency, an action may be brought for the money itself.

Thus, if a present-day bank robber later uses some of the stolen banknotes to buy something from a retailer having no knowledge of the robbery, the bank has no legal right to recover those notes even if it can identify them, by the serial numbers for example. The banknotes have "passed in currency" and the fact that the robber acquired no title is irrelevant.

This might seem strange, possibly outrageous, at first glance but this rule is necessary if banknotes are to serve their purpose as money. Recall the legal definition outlined earlier. Money is such "chattels" which a state issues, or authorises to be issued, which are denominated into units of account (in our case, dollars) and which are intended to serve as a universal medium of exchange in that country.

The rule as to the ownership of money passed in currency is inextricably linked to this legal definition. There could not be "universal" acceptance of banknotes as a constant medium of exchange if people had to concern themselves with the ownership of particular notes in circulation within the country. Common expressions such as "cash in the hand", "cash on the nail", "cash is king" and so on reflect that physical money passed in currency becomes the property of the recipient regardless of the circumstances by which the payer came into possession of the money.

As a legal matter, it can be said that there is no other thing which might serve as a medium of exchange and about which there is the same absolute certainty of ownership. There are of course other instruments which are used as if they were money, such as cheques, bonds or other "paper". Sometimes, other physical things are used amongst certain people, or traders in a particular industry, as a medium of exchange. (This can happen in times of high inflation, for example.) But these things are not money, because there is not, within the country of issue, universal recognition of their use as a medium of exchange.

Applying Dr Mann's definition

So, could "electronic money" qualify for the legal status of money in currency? If so, stored value card transactions would indeed become payments of cash, with no questions asked, or allowed to be asked, as to the right of the cardholder to make the electronic payment or as to the worth of the "stored value" in the card. Both in law and in fact, the electronic impulses

generated by the card would function in the same way as the physical delivery of banknotes or coins. Let us look at the key elements in Dr Mann's definition of money, set out above, and see if this might be possible.

Money is a "chattel". In its historical meaning, a chattel was anything you could get your hands on. A chattel was either "personal" (you could tote it round with you) or "real" (it didn't go anywhere, as in "real estate"). Banknotes and coins obviously qualify as chattels personal. But more modern jurisprudence has blurred the distinction between chattels and other things which the law recognises as capable of ownership. In particular, it is no longer necessary for a thing to have physical form to be recognised as a chattel. Thus, a share in a company is a chattel, as are a number of other things "in action" (as distinct from "in possession"). I suggest that there is no fundamental obstacle to according the character of "chattel" to electronic impulses within an EFT system or stored value card, should this be required as part of the definition of money.

Only a state can issue money. There should be no theoretical problem with this part of the definition of money. It is not the uniqueness of banknotes or coins which explains why states reserve to themselves the right to issue, or authorise the issue of, money. Of course, states go to extraordinary steps to prevent unauthorised replication (counterfeiting) but this is to prevent debasement of money as a medium of exchange. Nowadays, individual notes and coins have no intrinsic value. It is not difficult to conceive an analogous process in respect of transactions on EFT systems. The obvious issues are economic (control of the money supply), evidential (inherent in the very notion of "paperless") and technical (unauthorised manipulation of data), rather than legal in nature.

Denomination into units of account. At first sight, this is a tricky one. How do you denominate electronic impulses into units of account? Is it conceivable that electronic data in an EFT system can be made to constitute a "dollar" – or a multiple or fraction of a dollar – as if it were a dollar coin in your pocket? Actually, I suggest this is not as difficult an idea as might at first appear. What are computers good for if not counting things? The importance of denomination is, again I suggest, related to the extrinsic worth of the money supply, rather than the intrinsic value of individual pieces of money.

Universal acceptance as a medium of exchange. This is the challenging aspect of the definition of money. As explained above, it is the universal acceptance of state-issued currency as a medium of exchange – at least within that state – which makes the notes and coins legal tender. The proposition here is that anything less than universal acceptance simply will not do. The wide acceptability which may exist amongst banks, as regards transactions on electronic interbank settlement systems, does not of itself make such transactions payments of legal tender. Manifestly, no one else can participate in such transactions. A payment effected by an EFT system is not, as the law stands, a payment of money. In law, the electronic transaction is no more than the creation and acceptance of an obligation to pay money, that is, to incur (or accept) debt. This is so whether the debtor (obligor) is a commercial firm, a trading bank or the central bank (in our case, the Reserve Bank).

But surely, it might be asked, a Reserve Bank-issued bond is as good as money? And if so, should not the same be said for a Reserve Bank-generated transaction on an electronic interbank settlement system? In economic terms, the answer is undoubtedly "yes" – a country will be in deep trouble if its central bank, which alone has the right to issue money, is not good for a promise to pay money. But, a Reserve Bank acknowledgement of debt is not a payment of money, unless and until it takes the form of legal tender. That is why every banknote has written on it that "This note is legal tender for" a nominal amount of money.

What then of the prospects of universal acceptance being accorded to "smart card" transactions as payments of money in currency? I have suggested that it should be technically feasible to accord the other attributes of money to electronic transactions. But for such transactions to really constitute payments of money, every economic unit in the country, from the largest company to the smallest sole trader to the householder conducting a garage sale, would have to accept electronic transactions as a medium of exchange. This would necessitate portability between "wholesale" and "retail" electronic money – the same mechanism which settles a multi-million dollar money market transaction would also pay your grocery bill. And we would all have to carry round little smart card processing devices!

The issue for the state

The implications of such a scenario are far-reaching. Quite apart from the privacy issues raised by the multi-faceted use of smart cards, the very idea of "electronic money" challenges a law of money developed over centuries and which, even today, remains tied to the creation by the state, and possession by people, of physical tokens used universally as circulating instruments of exchange. Historically, the control of the issue of currency has been a key means by which states exercise governance and maintain sovereignty. The prospect, for example, of the Internet becoming a global cross-border shopping mall (or casino) challenges the power of the state to control the money supply within its jurisdiction.

As noted above, throughout history states have usurped the initiatives of the private sector in the creation of economic exchange media. Today, all developed states reserve to themselves, or control, the printing and minting of physical money. But who will control the money supply in a world where computer and communications firms develop and control the technology by which the "cashless society" comes into being?

One proposition can be confidently stated. Stored value cards, or other electronic payment systems, cannot be accorded the status of money in currency without an act of state sovereignty, that is, an act of law. Historically however, the law has lagged well behind the play in recognising commercial innovations. For example, companies were conceived and functioning de facto well before the first legislation recognising their separate legal existence. And, as noted above, paper money was in circulation long before the assumption of state control of the process. But globally, the history of money has featured ultimate state intervention and control. Thus, the framework is in place for the mother of all power plays between the state and the private sector. The creation of legal status for "electronic money" carries implications for the future which are at present difficult to assess but definitely interesting ❑

Enforcement of foreign judgments

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considers Bolton v Marine Services Ltd *and the enforceability of foreign contempt sanctions*

Can a foreign judgment be enforced in New Zealand where the Courts of the country in which it was delivered have acknowledged its irregularity, but have refused to set it aside solely because the judgment debtor was in contempt of Court? In *Bolton v Marine Services Ltd* unreported, Court of Appeal, CA 251/93, 5 February 1996, the Court of Appeal recently answered this question in the affirmative.

Facts and prior proceedings

The facts in *Bolton* were briefly these: a yacht owned by Bolton was arrested by the High Court of the Solomon Islands following the institution of admiralty proceedings in rem by Marine Services Ltd, who had salved Bolton's yacht but remained unpaid. Bolton managed to get access to his arrested yacht, and sailed it to New Zealand. Marine Services Ltd continued to prosecute its claim against Bolton before the High Court of the Solomon Islands, ultimately obtaining a default judgment for the full amount claimed. It subsequently transpired that that judgment was irregular, as the salvage award had been assessed on incorrect principles and was potentially excessive.

As Bolton had left no assets against which execution could be levied in the Solomon Islands, Marine Services Ltd sought to have the Solomon Islands High Court default judgment enforced in New Zealand, using the registration provisions of the Reciprocal Enforcement of Judgments Act 1934 (hereafter, "the Act"). (See D Goddard Conflict of Laws – The International Element in Commerce and Litigation NZLS Seminar, 1991, p 35.) The New Zealand High Court became aware of the risk of irregularity, and ruled that enforcement could not proceed until Bolton had had sufficient opportunity to apply to the Solomon Islands High Court for a rehearing as to quantum. Bolton accordingly applied to the Courts of the Solomon Islands to have the original default judgment set aside. Both the High Court and the Court of Appeal of the Solomon Islands declined his application, but for different reasons. The Solomon Islands Court of Appeal held that the default judgment against Bolton should in principle be set aside, as it was irregular. It nevertheless refused to make an order to this effect, on the ground that Bolton had placed himself in contempt of Court by removing his arrested yacht from the jurisdiction of the Solomon Island Courts in defiance of a Court order that the vessel not leave the jurisdiction; that a contemner will not be heard in at least those cases where the contempt has the effect of impeding the course of justice; and that Bolton's removal of the yacht from the jurisdiction had impeded the course of justice by making it difficult or impossible for the Solomon Island Courts to enforce a judgment in rem. The Court accordingly directed that the irregular default judgment should stand as a final judgment, and be enforceable as such, until Bolton returned his yacht. (See *The Owner of the Ship "Classique" v Marine Services Ltd* unreported, Court of Appeal of Solomon Islands, CA 8/1992, 30 June 1993.)

It was obvious that Bolton had no intention of complying with the condition imposed by the Solomon Islands Court of Appeal. Marine Services Ltd accordingly applied to the New Zealand High Court for an order that the original default judgment of the High Court of the Solomon Islands be finally enforced in New Zealand. Counsel for Bolton argued that this order should not issue, as: (i) it would be contrary to public policy to enforce a foreign judgment in New Zealand when the Courts of the country in which it was issued have acknowledged that it had been irregularly obtained; and (ii) s 6(1)(e) of the Act requires the registration of a foreign judgment to be set aside if its enforcement would be contrary to public policy in New Zealand. Barker ACJ rejected these arguments. His Honour took the view that public policy leaned in favour of recognising the judgments of the Courts of reciprocating countries, even where there was some concern about the basis of their judgments: the guiding principle in the Act was that of reciprocity, and a New Zealand Court had to express judicial comity with the Courts of those countries to which the Act applied. Furthermore, the attitude of the Court of Appeal of the Solomon Islands to a judgment debtor who acted in contempt of its orders was one with which a New Zealand Court could sympathise. Thus, considerations of judicial comity warranted supporting the Solomon Island Courts by visiting the consequences of Bolton's contempt on him in New Zealand. (See *Marine Services Ltd v Bolton (No 3)* (1993) 7 PRNZ 333.)

Court of Appeal

On appeal, Bolton's counsel essentially reiterated his submissions to the High Court, arguing that the registration of the Solomon Islands judgment had to be set aside under s 6(1)(e) of the Act so as to effect justice between the parties and avoid a breach of New Zealand public policy. Thomas J, delivering the judgment of the Court, rejected this argument, for three reasons.

First, it would undermine the principle of reciprocity informing the Act if a New Zealand Court were to re-examine the merits of the decision of the Solomon Islands Court of Appeal: reciprocity required its full recognition.

Secondly, the registration of the Solomon Islands judgment was not

contrary to public policy and would not cause injustice between the parties, as:

(i) a New Zealand Court would have done precisely as the Solomon Islands Court of Appeal had done, had the positions been reversed;

(ii) while the enforcement of an irregular judgment might appear repugnant to justice, all relevant considerations had to be taken into account, including that the judgment debtor had the option of taking steps abroad to remedy his position, considerations of judicial comity, and the need not to endanger existing reciprocity arrangements; and

(iii) Bolton's blatant contempt and his act of depriving Marine Services Ltd of its security negatived any injustice in enforcing an irregular judgment in the latter's favour, at least failing any genuine attempt by Bolton to purge his contempt.

Thirdly, the Court considered that enforcement of the Solomon Islands judgment would, on the contrary, actively promote justice between the parties: it was fair to let an irregular judgment stand against a contemner who had deprived the plaintiff of its security, whether in New Zealand or abroad. The Court accordingly rejected Bolton's appeal, ruling that the Solomon Islands judgment was finally enforceable in New Zealand.

Comment

It is submitted that the Court of Appeal rightly rejected Bolton's argument that the enforcement of the relevant Solomon Islands judgment would breach New Zealand public policy. A New Zealand Court would similarly have refused to allow Bolton to be heard, had the relevant events occurred in New Zealand. A result that would be arrived at under New Zealand law cannot possibly be contrary to New Zealand domestic public policy; and if the enforcement of a judgment of this nature would not even offend against New Zealand domestic public policy, it is impossible to argue that it would offend against the fundamental public policy of New Zealand, as required before the public policy exception may be invoked in conflicts litigation (see generally L Collins (ed), *Dicey & Morris on the Conflict of Laws* 12 ed, 1993, London, Sweet & Maxwell, 88 ff, 511 ff).

However, one may express some reservations about the Court of Appeal's approach to resolving the public policy plea. First, it is submitted that the Court erred in its view that comity and the need to safeguard existing reciprocity arrangements are factors which may be taken into account in assessing the applicability of the public policy exclusionary rule. That view is inconsistent with the approach which has always been adopted in this area, in terms of which the sole consideration is whether the relevant foreign law or judgment, or the result under it, would violate "some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal" (*Loucks v Standard Oil Co* (1918) 120 NE 198 at 202 adopted in *Dicey & Morris* at 88). It is also illogical. The public policy exclusionary rule provides for an exception to the general approach in favour of the recognition and enforcement of foreign laws and judgments. It is intended to govern a range of circumstances in which a foreign law or judgment should not be accorded local effect despite the general desirability of international cooperation, because of other, overriding considerations; it relates to circumstances where the significance of the arguments in favour of such cooperation are dismissed ex ante. It is therefore not possible to regard the desirability of international cooperation as a relevant factor. The desirability of such cooperation dictates that the concept "public policy" should be narrowly interpreted for conflicts purposes, and should be confined to the fundamental public policy of the New Zealand Courts; but it cannot be used to determine whether a foreign law or judgment, or the result under it, offends against basic principles of justice, decency, or public order and national security. The latter question must be resolved on its own terms. Secondly, it is submitted that the Court erred in assuming that a New Zealand Court's failure to enforce this Solomon Islands judgment would in fact undermine reciprocity between New Zealand and the Solomon Islands: if the positions were reversed, a Solomon Islands Court would have refused to enforce a New Zealand judgment in similar terms, on the grounds that it belonged to a category of judgments which can never be enforced extra-territorially.

"Contumacious civil contempt is committed when the contemnor wilfully defies the authority of the Court, thereby offending against the public interest in the effective functioning of the judicial system"

This brings me to the point that a more comprehensive analysis of the issues should have led the Court of Appeal to prohibit the enforcement of the relevant Solomon Islands judgment in New Zealand.

It is an elementary and firmly established common law principle that the Courts of one country will not enforce another country's penal laws or penal judgments, whether directly or indirectly (*Dicey & Morris* 97-101, 461-463). This exclusionary rule is expressly recognised in the 1934 Act; s 3(3)(b) provides that the Act and its enforcement provisions will apply to a judgment only if "there is payable thereunder a sum of money, not being a sum payable in respect of a fine or other penalty". Here, "penalty" must be interpreted as any monetary sanction for the breach of a penal law, as defined at common law.

"Penal law" is a broader concept than "criminal law". It may be described as any law which has as its object the prevention or punishment of an offence against the state or the public interest; or, put differently, any law enacted in the interests of, and for the benefit of the state or the community at large, a breach of which is punishable at the instance of the state, an authorised official, or a member of the public in the character of a common informer (*Huntington v Attrill* [1893] AC 150, 156 – 158). It is submitted that the rule of Solomon Islands law prohibiting the deliberate and contumacious defiance of a Court order, as engaged in by Bolton, fell within this description. First, that prohibition is aimed at preventing an offence against the public interest in maintaining the rule of law and the authority of the Courts; and secondly, its breach is punishable by penalties such as the imposition of a fine, sequestration, or imprisonment. It is irrelevant that any proceedings will be instigated by a private plaintiff: in this context, the plaintiff's conduct will constitute a denunciation of the contemnor to the Courts to vindicate the public interest, and the plaintiff will therefore bear the

character of a common informer. This characterisation of the Solomon Islands rule must follow from the general common law view on the nature of contumacious civil contempt.

There are two categories of civil contempt. Inadvertent civil contempt is viewed as a purely private matter, and the sanctions for it as serving a coercive rather than a punitive purpose. Contumacious civil contempt, and the sanctions for it bear a different character. It is committed when the contemnor wilfully defies the authority of the Court, thereby offending against the public interest in the effective functioning of the judicial system. This category of civil contempt bears a two-fold character. As between the parties to the proceedings it merely creates a right to exercise and a liability to submit to compliance measures in the judgment creditor's private interest; but, as between the defiant party and the state, there is a penal or disciplinary jurisdiction to be exercised by the Court in the public interest. (*In Re Grantham Wholesale Fruit Vegetable and Potato Merchants Ltd* [1972] 1 WLR 559, 565; *Laws NZ*, Contempt of Court, para 56.) Contumacious civil contempt therefore bears a quasi-criminal aspect; it is analogous to, and merges with, criminal contempt (see *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67, 73).

The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it (*Dicey & Morris*, 101). If the Solomon Islands prohibition constituted a penal law, a judgment founded on its breach constituted a penal judgment, and any sanction imposed constituted a penalty. It is irrelevant whether that sanction would financially benefit a private plaintiff rather than the Solomon Islands state: a "penalty" normally means a sum payable to the state, rather than a private plaintiff, but this is not essential (see *Dicey & Morris*, 463.) It follows that Bolton's exposure to the risk of having to pay an excessive sum of money to Marine Services Ltd represented the imposition of a monetary penalty, rendering the Solomon Islands judgment unenforceable under s 3(3)(b) of the Act.

It cannot be argued that the judgment debt which Marine Services Ltd sought to execute in New Zealand simply constituted a salvage award. The salvage award was, as the Solomon Islands Court of Appeal acknowledged, a nullity (at 13). Once it was established that the relevant default judgment was irregular, the award could no longer be founded on the Solomon Islands law of salvage. Its sole foundation was the Solomon Islands law of contempt. In form it remained a salvage award; but in substance it became an executionary measure and, importantly, a penalty. It is unfortunate that counsel and the Court focused on the form rather than the true nature of the judgment debt, and thus failed to identify the real issues at stake.

"contumacious civil contempt is simultaneously a private and a public matter, and the sanctions imposed for it are simultaneously coercive and punitive measures"

It might be argued that the sanction visited on Bolton bore not only a penal but also a civil character; that foreign measures should be characterised as non-penal wherever possible and where the need to promote international cooperation demands this; and that s 3(3)(b) was thus not necessarily applicable. This objection would be based on *A-G for the U K v Wellington Newspapers Ltd* [1988] 1 NZLR 166, 173-174 (CA). That case involved a claim by the British Government for breach of a duty of confidence owed by a former secret agent of the British Crown and reinforced by a British public law, the Official Secrets Act 1920 (UK). There, the Court acknowledged both the existence and (in effect) the absolute nature of the rule that a local Court will not enforce a foreign penal or other public law. It went on to hold that the characterisation of the British Government's claim raised a novel question, as the agent's duty of confidence originated in the special relationship between him and the British Crown and thus subsisted apart from the relevant statute; that it was possible to characterise a secret agent's duty of confidence as founded either on the private law as to confidentiality or on the public law of the relevant foreign sovereign; that the former classification was to be preferred, so that New Zealand Courts could assist friendly foreign sovereigns in safeguarding their security; and that the exclusionary rule therefore did not apply. However, it is submitted that the process of recharacterisation and circumvention engaged in in *Wellington Newspapers* is not available where contumacious civil contempt of a foreign Court is at issue. Such contempt is simultaneously a private and a public matter, and the sanctions imposed for it are simultaneously coercive and punitive measures. This is not a case where the private aspect of the claim can be said to subsist independently from its public aspect. The pervasive penal aspect of the prohibition against contumacious civil contempt as well as any sanctions imposed for its breach render them completely unenforceable.

Larkins v NUM [1985] IR 671 (accepted in *Dicey & Morris*, 101) supports the submission that sanctions for contumacious civil contempt constitute penalties for the purposes of the foreign penal law/judgment exclusionary rule, as well as the submission that the partly private nature of such contempt does not remove it from the scope of that rule. There, the High Court of Ireland held that contumacious civil contempt had a quasi-criminal character; that the sequestration of a union's assets ordered by the English High Court following its deliberate defiance of that Court's orders thus bore a penal aspect; and that an Irish Court would accordingly not assist a receiver appointed by the English High Court to obtain any of the union's Irish assets, unless there were independent grounds for the receivership.

If the foregoing submissions are correct, a question arises as to what precedent force *Bolton* should enjoy. It is submitted that it should only be authority for the point which it expressly decided, ie for the view that the enforcement of a foreign contempt sanction is not contrary to New Zealand public policy in at least those circumstances where a New Zealand Court would act in a similar way. *Bolton* should not be seen as offering any support for the view that a foreign sanction for contumacious civil contempt is enforceable under the Reciprocal Enforcement of Judgments Act 1934. A sanction for contumacious contempt has a pervasive penal aspect and must always constitute a penalty; and the direct or indirect enforcement of any foreign judgment imposing a penalty is absolutely precluded by s 3(3) of the Act – cadit quaestio. ❑

Partnerships in Australasia

Duncan Webb, Victoria University of Wellington

reviews Higgins and Fletcher Partnership Law in Australia and New Zealand *7th ed, LBC, 383 pages.*

Keith Fletcher, the author of *The Law of Partnership in Australia and New Zealand* is soon to assume the Chair in Business Law at Massey University. The book is in its seventh edition and, unsurprisingly, is well structured and clearly presented. Whilst it is not formatted in the now familiar style of numbered paragraphs, one has little difficulty navigating the material.

It may also be due to the fact that the book is in its seventh edition that it seems to lack a degree of vibrancy in its approach to the material. The preface notes that

> Partnership, as a relatively mature body of law, does not spring many surprises. Since the last edition there have been no landmark decisions,...

The author then proceeds to present a muted apology for the writing of the present edition. It may be fair to say that partnership is not in the state of flux of some other areas of the law, but it is, I think, unfair to present it as mundane.

The book gives an excellent framework of the law of partnership and discusses the foundational cases well. It also refers the reader to the more exhaustive works in the area, both ancient and modern, such as *Pollock*, *Lindley* and *Underhill*.

Writing a cross-jurisdictional work is undoubtedly a difficult task. Either one must avoid the detail and focus on universally applicable principles and cases, or considerable effort needs to be spent on providing explanations of the law of each jurisdiction where differences exist. This book takes the latter approach. In some parts of the text this causes difficulties. For example, in chapter eight, on special partnerships, it has been necessary to state the law separately for each of the jurisdictions as there are numerous differences in detail. There are therefore significant areas of the text which are

"The new section on joint venture arrangements is a welcome addition to the text. The section focuses on when those arrangements commonly known as joint ventures will also be partnerships"

of little relevance to New Zealand, or where the relevant material has to be sifted from the rules of the various Australian jurisdictions.

The inclusion of New Zealand law in a primarily Australian text also poses difficulties where issues being discussed are significantly different in New Zealand. Thus of the eight pages devoted to the effect of illegality on partnership only half a page is devoted to the Illegal Contracts Act 1970. I also note that the author has not dealt with the question of partnership assets as matrimonial property. Perhaps this omission is because of the significant variations of substance between the jurisdictions in this area of the law.

The new section on joint venture arrangements is a welcome addition to the text. The section focuses on when those arrangements commonly known as joint ventures will also be partnerships and the participants will therefore incur the onerous duties owed between partners, and the risks of joint liability. It is surprising that there is no discussion of, or reference to, *Auag Resources Ltd v Waihi Mines Ltd* [1994] 3 NZLR 571. Further discussion of the situations where rights and liabilities between joint venturers arise would also (I think) have been useful. I note the case of *Dickie v Torbay Pharmacy* [1995] 3 NZLR 429 which explores these issues in the context of a joint venture arrangement between a medical practice and a pharmacy. It is clear that fiduciary duties will be imposed on parties to certain arrangements even though they fall short of a partnership.

The book devotes a short chapter to the question of fiduciary duties between partners. The discussion of the duration of these duties is of particular interest. This is an especially useful area of the work, and one where the law does not significantly differ between the various jurisdictions. There is a useful discussion of the several classes of duties which have been recognised as being an incident of the partnership relationship; to render accounts, not to compete, and to account for use of assets. It is however clear that the fiduciary duties of partners extend well beyond these classes. In reading this chapter it needs to be kept in mind that the concept of a fiduciary duty is a wide one. It will be necessary to look beyond the authorities discussed (which concern primarily partnership arrangements) to determine whether any particular act is in breach of such a duty.

The inclusion of precedent documents in the appendix as well as a checklist for the fundamental requirements in a partnership agreement is a useful feature which demonstrates that this book is aimed at the practitioner.

Overall the book is a useful one. It gives a concise and accurate account of the principles of partnership law. Although there is discussion of the peculiarly New Zealand aspects of partnership law, I do not think it does justice to partnership law in New Zealand. For a thorough discussion of the New Zealand position I think one will have to look further. However, in light of the ever growing trans-Tasman trade it is useful to have a concise and accurate guide to the various laws of the Australian jurisdictions. ❑

The state of New Zealand juries

Stephen Dunstan formerly research adviser, Ministry of Justice

This article describes a research project undertaken into the jury system. The report gave special emphasis as to whether Maori were under-represented on jury panels. The author concludes that changes are needed in the way juries are currently being selected. The alleged under-representation on a jury panel referred particularly to Maori men, those aged between 20 and 39 years, elementary workers (as the article describes them), and professional and managerial occupational groups.

The jury system allows some defendants the opportunity of being judged by a panel of their peers. For most New Zealanders, being a juror is the only contact they will have with the inner workings of the criminal justice system. The community is seen as standing in judgment over its own members. In fact, the notion of being tried by a jury of one's peers has become a cornerstone of our criminal justice system. However, recent research on the composition of juries suggests that the ideal of selecting juries that are fully representative of our communities is not being achieved.

Gurney observes that a jury is important " ... because it interposes the common sense of the community between the government and the accused, thereby protecting the defendant from unwarranted punishment". (Gurney, B. "The Case for Abolishing Peremptory Challenges in Criminal Trials". (1986) 21 Harv. Civil Rights – Civil Liberties LR 227.) To achieve an impartial jury that reflects this "common sense of the community", it is necessary first to have a selection process that randomly selects jury members from all sections of the community. Secondly, it is necessary to ensure that challenges to a person's participation on a jury are used in a manner that does not bias a jury towards, or away from, any particular group in the community.

The research project, which culminated in the report *Trial by Peers? Composition of New Zealand Juries* (1995, Wellington: Department of Justice, by S Dunstan, J Paulin, K Atkinson) was designed to answer whether juries were broadly representative of the populations from which they were drawn. There was a special emphasis on whether Maori were under-represented on jury panels. In the second half of 1993, a survey was conducted which gathered information on the potential jurors' ethnic group, gender, age, occupational group, and employment status. This information was compared with the relevant populations from the jury districts. The survey also gathered data on the use of the peremptory challenge by counsel for the prosecution and defence. The survey was completed by all jurors and potential jurors in either the High or District Court for the four week period, 13 September to 8 October 1993. Interviews were conducted to gather information from Judges, prosecution and defence counsel, and Court staff.

"many trial lawyers subscribe to the view that the composition of a particular jury is likely to have an important bearing on the verdict"

Many of the concerns raised by this research sit within an ongoing international debate. This debate centres around the need to ensure the jury selection process does not distort the representation of any particular group, or undermine public confidence in a jury's deliberation of a criminal case. I will first examine some aspects of this literature, then present the current research findings.

The selection of the pool of potential jurors

A pool of potential jurors will be broadly representative of the community if the selection process is conducted in a random manner. However, unless a form of stratified sampling is used to select potential jurors, *individual* juries can be "all male, all conservative, all white". (Darbyshire, P. "The Lamp that Shows that Freedom Lives: is it Worth the Candle?" [1991] Crim LR 740.) It is only when an average is taken across a number of juries that all groups in the community will be seen to participate. Thus we cannot always expect individual juries to reflect the expected distribution of groups in the community. There is also no guarantee that areas with a minority ethnic concentration will be sampled and therefore the jury list may not accurately reflect the ethnic composition of the jury district. (Fukurai, H., Butler, E. and Krooth, R. "Cross-sectional Jury Representation or Systematic Jury Representation: Simple Random and Cluster Sampling Strategies in Jury Selection." (1991) 19 Jo Crim J 31.)

The random selection of a pool of potential jurors can be biased by the Registrar's power to excuse summonsed jurors. This form of bias can be exacerbated by the "self-deselection" of unwilling jurors from the panel. (Darbyshire, above.) Self-deselection in this context refers to summonsed jurors who either do not turn up for jury service, or who apply to be excused only because of their unwillingness to serve on a jury. Overall, exclusions from jury service through exemptions, ineligibility, or disqualification, will reduce the representativeness of a jury panel.

The peremptory challenge

The peremptory challenge was initially instituted to ensure the jury was not biased in favour of either party. Baldwin and McConville assert that many trial lawyers subscribe to the view that the composition of a particular jury is likely to have an important bearing on the verdict. (*Jury Trials*, (1979), Oxford: Clarendon Press.) This means lawyers challenge potential jurors they assume to be unsympathetic to the prosecution or defence. Gurney maintains this has now led

some counsel to search for a favourable jury, a tactic used by both the defence and prosecution. (Gurney, above.)

In the United States, the prosecution has used peremptory challenges to exclude minorities from a jury where the defendant is a member of the same minority group. These challenges remove jurors considered to be sympathetic to the defendant, thereby increasing the likelihood of a conviction. The peremptory challenge has more effect the smaller the size of the unwanted group. For example, it would be easier to obtain a jury with no Maori than a jury with no women. A 1984 Chicago study showed when the defendant was black, prosecutors challenged blacks at more than double the rate they challenged whites, despite jurors having similar backgrounds. (cited in Gurney, above, p 232.) Such actions can produce a jury that represents a select section of the community, and a verdict that acts to undermine a minority's confidence in the justice system. (See A. Alschuler "The all-white American jury", (1995) 145 NLJ 1005. Moana Jackson (1988) [*The Maori and the Criminal Justice System. A New Perspective: He Whaipaango Hou*. Wellington: Department of Justice] indicated that a majority of Maori lacked confidence in aspects of the New Zealand criminal justice system.

Courts have attempted to prevent misuse of the peremptory challenge. In 1978 the California Supreme Court held that the use of peremptory challenges to remove potential black jurors because of their ethnicity violated "the right to trial by a jury drawn from a cross-section of the community". (*People v Wheeler* (1978) 583 P 2d 748.) As such, the Court attempted to distinguish between challenges made on a "group bias" and those made on a "specific bias" with the former being prohibited.

Group bias is defined as challenges made on a member of an identifiable group, i.e. on "racial, religious, ethnic, or other similar grounds". Specific bias is defined as, "a bias relating to the particular case on trial or the parties or witnesses thereto" (Gurney, p 243).

In 1986 the Supreme Court of the United States (in *Batson v Kentucky* (1986) 90 L Ed 2d 69) concluded that the exclusion of blacks from a jury was discriminatory in nature. The Court found that excluding blacks solely on the basis of race, or on the assumption that blacks as a distinguishable group would not perform impartially as jurors, violated the equal protection rights of that race and the defendant's right to an impartial jury. This decision was later extended to gender based peremptory challenges. In *J E B v Alabama* (1994) 128 L Ed 2d 89 the Supreme Court held "that gender, like race, is an unconstitutional proxy for juror competence and impartiality".

"peremptory challenges were mostly based on 'some sort of instant character analysis known only to members of the legal profession'"

The New South Wales Law Reform Commission (NSWLRC) in the report *The Jury in a Criminal Trial* (1986) considered that the peremptory challenge could cut across the principle of representativeness. They noted the circumstances where it is proper for the Crown to exercise its right of peremptory challenge, and recommended that guidelines for its exercise be formulated and published by the Attorney-General to prevent any "improper" use. The NSWLRC considered that the guidelines should prohibit challenges solely on the basis of race, age or gender. The Commission also recommended reducing the number of challenges from the current eight (twenty when the offence is murder) to three, for both the Crown and defence. It was thought that this would allow the opportunity to remove bias without enabling either side to select the jury of their choice.

Concern about the abuse of the peremptory challenge has led some overseas jurisdictions to reduce or remove the right of challenge. For example, in England the defence had the right to the peremptory challenge of three jurors. This right was removed by the Criminal Justice Act 1988, which also circumscribed the right of the Crown to "stand-by". The use of the stand-by is in effect a peremptory challenge as there is no requirement to give cause, and the potential juror is unlikely to be called again.

Restrictions on the use of the peremptory challenge are not universally applauded. For example, in the United Kingdom, Blake argued for the retention of the peremptory challenge. He cited the Bristol riot trial where the Judge guided the prosecution to use their right to stand-by, and the defence to use their peremptory challenge, in order to ensure a racially balanced jury. (Blake, (1988). "The Case for the Jury" in Findlay and Duff (eds) *The Jury Under Attack*. London: Butterworths.) This was to assure the predominantly West Indian community, where the defendants came from, that they could have confidence the defendants were being tried by their peers. Vennard and Riley assert that the absence of a voir dire system along the lines of the American system, means the peremptory challenge is the only way of removing jurors whose impartiality is in doubt (where there is no evidence to justify a challenge for cause). Vennard, J. and Riley, D. (1988). "The Use of Peremptory Challenge and Stand-by of Jurors and their Relationship to Trial Outcome." [1988] Crim LR 731.

In New Zealand, anecdotal evidence suggests that use of the peremptory challenge by counsel is based, at least in some cases, on nothing more substantial than the appearance of the potential juror. For example, O'Donovan commented that peremptory challenges were mostly based on "some sort of instant character analysis known only to members of the legal profession". (O'Donovan, J. (1989). *Courtroom Procedure in New Zealand: A Practitioner's Survival Kit*. Auckland: CCH NZ Ltd.)

In Wellington, some defence counsel make use of a psychologist who offers a service advising lawyers whom to challenge. Richard Goode commented that he, " ... takes mental notes of the types of cars jurors drive, their shoes, their hands, physical characteristics and body language" (*City Voice*, 16 September, 1993). This information is used to help select a jury that is favourable to the defendant.

The controversy surrounding jury selection means it is important to understand how the New Zealand jury is currently assembled, and the implications this has for our justice system. The following research examined whether any groups were under-represented on juries, and if so, how this under-representation came about.

The research

The selection of New Zealand juries can be broken down into two steps. First, the process of assembling the

pool of potential jurors; and second, the process of selecting the jury. The first step occurs prior to the day of the trial, while the second occurs in the Courtroom as the potential jurors are balloted for a jury. The research showed that both steps involve selection processes which lead to some groups being under-represented in the pool of potential jurors, and on juries, when compared with their proportions in the jury district populations.

Assembling the pool of potential jurors

Potential jurors are drawn from a designated jury district, generally 30 kilometres radius from the Court. This radius excluded some Maori as a comparatively higher proportion of Maori lived outside the main urban areas. In the 1991 census, 61 per cent of the Maori population were counted as living in main urban areas compared with 70 per cent of the non-Maori population. However, research using census data showed that extending jury district boundaries out to 60 kilometres would not appreciably increase the proportion of Maori in the jury district populations.

The Chief Registrar of Electors annually draws up jury lists from both the General and Maori Electoral Rolls. At the time of the survey it was estimated that about 27 per cent of people with Maori ancestry were not enrolled on the Electoral Roll compared with about 17 per cent of persons not of Maori ancestry. This finding means that the names of proportionately fewer persons of Maori ancestry appeared on the jury lists. The latest Maori enrolment period (2 February 1994 to 14 April 1994) resulted in a considerable increase in the number of people with Maori ancestry who are enrolled on to the Electoral Roll. It was estimated that Maori non-enrolment declined to 18 per cent.

Sections 7 and 8 of the Juries Act 1981 disqualify certain people from serving on a jury. Those disqualified include some people sentenced to imprisonment, people in some way associated with the criminal justice system, and some people with a disability. In addition, on application to the Registrar a person can be excused from jury service if attending would cause too much hardship or inconvenience to themselves, another person, or the general public, because of the nature of their occupation or business, their state of health, family commitments, or other personal circumstances. Other reasons for being excused are if the person is a practising member of a religious sect whose beliefs are opposed to them serving as a juror, or they have been excused from being a juror or have served in the previous two years.

Under-representation in the pool of potential jurors

The result of the above process for assembling the pool of potential jurors was that only one quarter of those who were initially summonsed attended Court for jury service. Of the 12,112 people summonsed, 56 per cent were excused by the Registrar from attending jury service, while a further 18 per cent failed to show up at the Court.

“Of the 12,112 people summonsed, 56 per cent were excused by the Registrar from attending jury service, while a further 18 per cent failed to show up at the Court”

While people from a wide range of ethnic groups made up the jury pool, those describing themselves as New Zealand European made up the majority (79 per cent). New Zealand Maori were the other significantly large group (10 per cent).

We found that the pool of potential jurors was not representative of the jury district populations.

- Although ten per cent of people in the pool of potential jurors identified themselves as Maori, there was some under-representation of Maori, on a jury district by jury district basis. Maori women accounted for most of this under-representation;
- Women in general were under-represented in the jury pool;
- There were one quarter fewer potential jurors in the 20-39 age group than expected from their proportions in the jury districts;
- For five occupational groups the proportions in the pool were lower than their proportions in the jury district populations. The difference was most striking for the “legislators, administrators and managers”, “professionals”, and “elementary” occupational groups.

It was from this jury pool that potential jurors were randomly balloted. The balloting procedure led to the potential jurors either being challenged, or sitting on a jury. Counsel may challenge a potential juror from the time his or her name is read out until the potential juror is seated in the jury box.

Selecting the jury

Jury selection in New Zealand is a complex process. In single defendant trials counsel can issue six challenges without needing to give a cause. In multi-defendant trials prosecution counsel have a maximum of twelve challenges while the defence have six for each defendant. When deciding who to challenge, counsel rely on any background checks they might have made on the potential jurors, and on any assumptions they might have about the suitability of certain potential jurors to sit on particular juries.

The prosecution counsel interviewed for this research saw their role during jury selection as obtaining an unbiased, impartial, and representative jury. Some prosecution counsel would try to obtain a jury that would be favourably inclined towards their case. Defence counsel saw their role as obtaining a jury that contained no bias against their client. They also believed they should try to obtain a jury that was favourably inclined to their client, and one that would be best suited to the argument they intended to make.

Use of jury vetting

The interviews revealed that in all areas except one major city, the police routinely provide the prosecution with information on the potential jurors' previous conviction, using the Wanganui computer. At times the officer in charge of the case would look through the prosecution's jury list to see if there was anybody he or she did not want on the jury. The prosecution used this information when deciding whether to challenge a potential juror.

Prosecution counsel claimed that often people would not be challenged if their convictions were minor or happened a long time ago. Relating the previous convictions to the offence being tried was a common strategy which usually resulted in the exclusion of some potential jurors. Counsel reported using the list of previous convictions to *include* people with previous convictions, when it was considered expedient to their case. For

example, one counsel commented that he actually liked to have someone with a simple cannabis conviction on a possession for supply drug case.

> Well, a person who is using cannabis himself, and has a previous conviction, is not going to accept that a person who has got ten pounds of cannabis, that it's all for his own use. So that's an advantage to me I think.

In comparison, defence counsel stated they did very little jury vetting. They would go through the jury list with their client to see if any person should be excluded. The jury list would often be discussed with people not involved with the case being tried to try to acquire some personal information on the potential jurors. Defence counsel were particularly concerned to find out if a potential juror was in some way associated with the police. In smaller cities it was possible to obtain information that could inform their use of challenges.

> Well, you've got to get some people off, I mean, in a place like [small city] someone might say to me, that person on the jury list, their father's a policeman, he's up in the police canteen, always mixing with policemen. You've got to get them off don't you? Or that man had a bad experience ten years ago, his daughter was raped, So you've got to get him off on the rape trial I suppose.

Assumptions of suitability

While counsel for the defence and prosecution had different types of jury composition in mind, the interviews indicated that they would generally take into account a number of similar factors. In particular, counsel used the following information about the potential juror when deciding whether to issue a challenge:

- information from the jury list, primarily address and occupation;
- ethnicity;
- general appearance and demeanour; and
- the reputation that various occupational groups brought with them to jury duty.

These, and other matters, were considered in relation to the issues counsel thought relevant to the trial. These included:

- the need to have a balance of jurors (particularly in regard to gender);
- the type of offence;
- characteristics of the victim and defendant;
- the desire to empanel a jury that fitted their argument; and
- whether counsel thought that they could relate to the potential juror.

As an example, the following assumptions were made by counsel about the address of the potential juror. Most defence counsel considered the potential juror's address was an indicator of the range of attitudes held by that individual. There was an assumption that people from middle class suburbs would be unduly biased against certain types of offending, such as burglary, because they themselves felt vulnerable to this offence. One counsel commented that people from wealthy neighbourhoods could be totally out of touch with the subject matter. Another counsel stated:

> you get into a conversation with them, they want to hang the people and there's a crime wave in the country and the cops aren't tough enough and the Judges are too soft on people and if we had a chance we'd straighten the show out, you know, that sort of thing.

Prosecution counsel often used both address and occupation to get a feel for where the potential juror fitted within the socio-economic pattern of the city. One counsel commented that if he had a potential juror from particular areas he would invariably challenge. This was because:

> ... people in those areas have sympathies with the accused or the groups that the accused may be from.

Maori potential jurors

In regard to Maori potential jurors, some counsel gave the following reasons for challenging Maori:

- a higher proportion of Maori men have previous criminal convictions than non-Maori men;
- Maori jurors may be sympathetic towards a Maori defendant, particularly a defendant who was from the same age and gender group as the potential juror;
- a kinship relationship with a Maori defendant may exist (especially in small communities);
- some Maori may be biased against the police; and
- comparatively more Maori are from the lower socio-economic groups (which the prosecution tend the challenge).

An example of the assumptions made about Maori potential jurors was the tendency for some counsel to assume Maori would sympathise with a Maori accused. This was especially so if the potential juror was from the same age group as the accused. One prosecution counsel commented:

> ... if you've got a [male] Maori accused aged 25, ... and you get male Maori men of the same age coming into your jury and then you think they're likely to empathise with the position that he's in, so therefore challenge them with or without convictions.

Challenges

The jury vetting and the assumptions of suitability act to guide prosecution and defence counsels' use of the peremptory challenge. The above process meant that, during the survey period, prosecution counsel challenged one tenth of balloted potential jurors while defence counsel challenged just over one quarter. Overall, one third of all those balloted were challenged.

Counsel for the prosecution and defence had very different patterns of challenge. Multivariate analysis was used to examine how various personal characteristics influenced the likelihood of being challenged by prosecution and defence counsel respectively. The following characteristics each contribute independently to the likelihood of being challenged and are presented in descending order of significance. (All the personal characteristics shown are statistically significant at the $p<0.05$ level.)

Prosecution counsel were more likely to challenge:

In the High Court: unemployed; men; manual workers.

In the District Court: men; Maori; manual workers; 20-29 year olds; unemployed.

Defence counsel were more likely to challenge:

In the High Court: 50+ years; non-Maori.

In the District Court: 40+ years; women; professionals, clerical and service workers.

continued on p 240

Do Judges need to know any economics?

Professor Richard Epstein, of the University of Chicago

asked this question in a speech in Auckland last year and gave some surprising answers. This is an abridged version of Professor Epstein's speech.

This paper investigates the use of economics by common law Judges. I shall begin by propounding a gentle paradox. Great progress has undeniably been made over the last two generations, both in the science of economics and, more specifically, in the law and economics movement. Today we can analyse, in a more sophisticated fashion than formerly, a range of economic processes that are relevant to legal issues. We know something of the impact that legal rules have on social behaviour, and something of how economic theory can assist in choosing the efficient legal rule. Given these academic advances, we might have imagined that this new knowledge would slowly diffuse itself throughout the legal profession and the Courts. We could hope therefore to see the development of a judicial body of knowledge reflecting many of these academic advances. Yet the opposite is largely true. A little learning – or even a great deal of learning – can sometimes be a dangerous thing.

The perils of discretion

In some instances the source of our uneasiness lies in the direct way that legal rules are said to incorporate economic considerations. Too often we are told, for instance, that the Courts should consider a wide range of costs, and then seek to minimise their sum across disparate domains, or to undertake similar technical feats. To that challenge we react with confusion, wondering how on earth to take all these variables into account, to acquire all the relevant information, and to put the data together in a coherent manner so as to come out with the correct answer. In many cases modesty is the superior virtue. Application of so precisely an articulated theory is so fraught with difficulty that Judges are well advised to abandon the effort. Instead, they should follow some usimple rule of thumb, in order to avoid these complicated economic calculations. The equal division of damages under the older admiralty rules may well be superior to the constant struggles to develop more refined approaches to the apportionment question.

My contention is that greater judicial sophistication has not brought forth higher quality judgments, but rather the reverse. Nineteenth century Judges, who thought in less sophisticated economic terms than their counterparts today, often delivered judgments that better reflected sound economic principles. No one would deny that we have greater economic wisdom today and more sophisticated tools of analysis. But where should we go from here, now that the economic genie is well and truly out of the bottle? Our challenge is to domesticate that new knowledge within the judicial setting.

Judges are not economists. We do not expect to see in Judges' opinions precise economic demonstrations of the kind found in a standard textbook. Judges do not derive a demand curve or a long-run supply curve. That does not in itself concern me. The legal profession is better off taking economics more as a set of heuristic principles for understanding fundamental social relationships than as a set of formal equations or precise quantitative knowledge.

A further constraint is that Judges themselves are limited by institutional barriers. Frequently they must interpret statutes and regulations. Unfortunately, a sound rendition of a bad statute should yield a bad result. Judicial construction should not be able to cure the flaws in bad legislation: consequently one cannot criticise Judges for faithful construction. Conversely, a good statute, correctly construed, should lead to a congenial result because now an accurate translation should preserve the basic statutory principles. The task of Judges is not to make the law but to apply it in a sensible fashion; they have delegated authority only. When the statute they are applying contains economic wisdom, that wisdom should be reflected in their judgments. When the statute does not contain wisdom, it is not the role of Judges to attempt to improve the law under the guise of construction. Thus we cannot look simply at judicial output and automatically criticise Judges for decisions with bad consequences. We need to look deeper, and decide whether it is Judges who have mangled a fine statute or whether it is the statute itself that is doing the damage.

But we cannot push this point too far, for within the set of statutory constraints, Judges retain considerable capacity to use the economic tools at their command for good or for ill. There are three aspects to this judicial discretion. First, even today a large number of judicial decisions are at common law, whose first principles are rightly understood as falling in the province of Judge-made law. Thus Judges retain a degree of freedom – without any legislative guidance – to make decisions, for good or for ill, regarding which of our earlier doctrines should be preserved and which should be changed. In these circumstances no Judge can "pass the buck". Each Judge must rationally defend his or her decision with reference to the principles appropriate to the decided cases. If those principles include justice and efficiency, then the sound Judge needs rationally to address both.

Second, a large number of statutes themselves contain a reasonable degree of openness and fluidity. For instance, the Sherman Antitrust Act – one of our leading statutes – opens by prohibiting in general terms contracts

and combinations that operate in restraint of trade. It is largely left to Judges to determine how its grand principles will apply to concrete situations. Legislation that gives Judges that degree of running room should be read in a different light from more tightly specified statutes. A statute such as the Sherman Act should not be thought of as a series of chains binding Judges to certain inevitable outcomes, but rather as an authorisation for Judges to tread in areas they might not otherwise have thought appropriate to enter. When Judges are given this degree of discretion, we are entitled to expect them to do the right thing, and to be critical of them if they fail. Using that statute to attack vertical and conglomerate mergers should be condemned as an overaggressive judicial invalidation of transactions that hold out no real economic danger.

The virtues of restraint

There is clear scope, then, for Judges to exercise their discretion either well or badly. Here I want to draw a broad contrast between the 19th and 20th century Judges. The 19th century could not, in fairness, be called an age of economic illiteracy. Adam Smith was an 18th century figure, David Ricardo a figure of the early 19th century. As we move through that century we encounter the works of other great economists. Nonetheless, as late as 1875 the state of economic knowledge was still strictly limited: many important developments lay in the future. The analysis of marginal cost was developed by Alfred Marshall only in the 1880s. Also in the future lay all the most insightful measures of social welfare, such as Pareto optimality – developed around turn of the century – or its English version, the Kaldor-Hicks standard, dating from the late 1930s. Moreover, serious analysis of topics such as information costs and transactions costs – to many of us the heart and soul of modern economics – dates only from the late 1950s and early 1960s.

Thus 19th century Judges, when dealing with transactional issues, necessarily proceeded without a knowledge of modern theories of law and economics. Indeed, the decisions of these Judges do not appear to have been based on any of the calculations one typically hears mentioned today; they were not maximising or minimising anything, at least explicitly. They were trying, in a rather simple fashion, to come up with an appropriate resolution to the cases in front of them. Yet for all these limitations, their modest approach generally served them well.

A number of reasons account for their success. First, most 19th century Judges were aware of their own limitations: of what they knew, and what they did not know. By contrast, modern law and economics can encourage the dangerous feeling in Judges that, with the grand theoretical principles now elaborated, they can know a great deal about specific transactions. In other words, knowledge of economics is treated as a licence for intervention. If Judges think they understand all the details of transactions, they are tempted to believe themselves justified in imposing a command and control system, with them in the role of commanders and controllers. But the 19th century Judge, who was aware of how much he did not know, tended to think: "I should be sceptical about intervening, and fairly cautious about what I am prepared to do". In many cases this translated into Judges thinking: "I don't know what is right and wrong under these circumstances. Perhaps the best thing is to let people decide for themselves what they want to agree to." One important consequence of this sceptical attitude was a firm belief in the doctrine of freedom to contract – even by Judges who had never heard of the proposition that voluntary exchanges between two or more parties will shift resources to a higher-valued use.

A second feature of the wisdom of 19th century Judges was a realistic assessment of human nature, of how people interact. An easy mistake for a modern Judge to make is to assume that the tools he possesses are capable of being put to good ends, and that he can tell which of the parties in a given case are the "good guys" and which are the "bad guys". On those assumptions, it follows that he should tilt the scales of justice in favour of the more "deserving" individuals. The 19th century Judges were more cautious about attempting such feats than their 20th century counterparts. They realised that one should have a fair measure of scepticism about the motives of everyone who comes to Court, and that Judges should not pick sides on the basis of the status or roles of the various parties. This recognition of self-interest reinforced their scepticism, and put them on their guard not to be hoodwinked by either party.

The third element of wisdom frequently found in 19th century jurisprudence started with the presumption that litigation is a drastic step to take. Litigation is a form of aggression. It may be aggression that is licensed, sanctioned and organised by the state, but an individual should still have a powerful reason for invoking state powers against other individuals. Law suits should not be lightly or transiently pursued, but rather should require a breach of major proportions by the other party. Disputes below that level should generally be settled outside the Courts.

Finally, and following on from the previous point, 19th century Judges had a clear sense of their own limitations in selecting the legal sanctions to impose on individuals. Given their limited knowledge of both parties and circumstances, they recognised a simple and uncomplicated remedial structure: no elaborate decrees of specific performance of service arrangements, and no structural injunctions to reform prisons, hospitals and schools.

These four elements generated a strong tendency amongst 19th century Judges to defer to their inherent limitations, and to be cautious about how much they attempted to do. I will give several examples of that attitude, and in each case I will also look at how that attitude changed in the 20th century.

The insurance cases

The English developed a law of marine insurance, and its content was shaped by the 19th century judicial presumption of distrust. The party to an insurance contract about which the Courts were most sceptical was not the rich and powerful insurance company, but rather the insured party. It is not difficult to see why. The insured was in possession of the property, and had the lion's share of the information about the nature of the risks that were being run. Only the insured party could claim that a ship was safe and sound when it was not seaworthy. After offering a favourable premium, the insurance company would then discover that the ship was a worthless tub that had sunk in the ocean, leaving the company with a large bill. The insurer did not possess similar weapons to brandish against the insured. Based on this simple but powerful insight about the opportunities and motives of the parties, the early legal doctrines placed strong obligations of disclosure upon the insured. Contracts were con-

strued in light of their ordinary meaning. The 19th century Judges entertained no assumption that writers of insurance contracts had superior bargaining power, or were wicked and greedy capitalists. They rightly refused therefore to shift covertly the balance of advantage in favour of the insured.

Twentieth century Judges, in contrast, have often taken a different view of an insurance contract. It is a view which leads to incredible complications, which can create grave international repercussions from local disputes, as in the asbestos cases. No longer do American Judges regard both parties to an insurance contract with the scepticism of former times. Despite the fact that insurance companies operate in a competitive market, the Courts tend to impute to those companies a high degree of market power. This view arises, in part, merely because the insurance companies enter into standard form contracts with insureds. The Courts imagine that standardisation carries with it an element of coercive force that no contract should contain. So they take upon themselves the unwise task of neutralising that power. They wield counterbalancing power by construing the provisions in an insurance contract in the fashion least favourable to the interests of the insurer. If a contract is unclear, the scales are always tilted in favour of one party – the insured. Now that this rule has been left in place for so long , hardly any insurance contract will ever be clear.

The asbestos coverage dispute in the United States provides a good example of the process at work. Back in the early 1940s, people became aware that accidents and injuries came in two broad categories. One type was the standard traumatic injury where somebody would fall off a bus and strike her head on the sidewalk, and an insurance company would answer for that particular loss. That situation posed few problems. The second category of accident was much more problematical. It concerned people who were exposed to dangerous or injurious conditions for a long period – perhaps for decades. Suppose the party responsible for those conditions had purchased liability cover in different periods by different insurance companies with different contracts. Which of these various companies should honour the policy in question? There is no obvious answer to this question. In 1943, the insurance industry in the United States did the only honourable thing – it punted. It said: "We've managed to live with a very informal response to this particular problem for about 20 or 30 years. We can't agree amongst ourselves as to how it should be definitively solved. We will all go our separate ways."

That was the situation before the asbestos litigation rose in all its unanticipated fury. After asbestos, instead of needing to worry about one law suit every couple of years, there were now several hundred thousand cumulative trauma cases whose cover was provided under standard insurance contracts crying out for interpretation. These contracts were undeniably ambiguous.

Then in 1981 a case called *Keene v INA* laid down an astonishing rule. On the assumption that sophisticated economics tells us that one party to an insurance contract is the dependent party and the other party is independent, *Keene* adopted the rule that ambiguous contracts should be construed so as to maximise the degree of coverage to the weaker party. This was done by allowing the insured, after the race had effectively been run, to pick any insurance contract in effect during the entire period of exposure as the source of cover for the particular case. Clearly this approach is tantamount to rigging the race: it allows the insured party to place its bets on a particular horse after the race is over. It can always collect handsomely after the event. Yet the sheer oddity of the *Keene* judgment has been lost on many sophisticated Judges who still assert that the object of an insurance policy is to maximise the coverage to the insured, rather than to promote the mutual benefit of the parties, as seen by them, at the time the contract is made.

The consequences of allowing the insured to pick a preferred insurance policy can be bizarre. Imagine an insurer who had written an insurance policy for one week. It may have written a policy for $100 million, and attracted a premium commensurate with the period of coverage – say $5,000. If the new rule is applied, everybody exposed to asbestos during that one week (by which I mean everyone with asbestos in the lungs during that week) who subsequently becomes ill will be covered by that one policy. This is no mere theoretical case: there were many instances in the United States where policies that had involved trivial premiums for insurers ended up generating huge liabilities, simply from this ability to select at will the operative insurance policy. The havoc created in American markets by this approach to insurance contracts ended up being exported to the London markets. One result has been the near bankruptcy of Lloyd's.

By around 1993 or 1994, some American Judges had realised that the *Keene* rule was unworkable. They had gone back to the older view, which recognised that insureds are not angels, any more than insurers, and that it is necessary to look sceptically at the motivations of both sides. But these days Judges seem unable to let themselves do anything simple. They seem driven to use their economic sophistication to find other complicated rules. I prepared some expert testimony in a recent New Jersey case, *Owens-Illinois v United Insurance Co*, that turned on the correct interpretation of excess insurance policies in an asbestos coverage dispute. Predictably enough, the New Jersey Supreme Court would not accept the simple solution of pro-rating the coverage amongst policies based upon the duration of their respective periods of coverage. They wanted to find an elaborate economic formula which would allow them to calculate the amount that should be assigned to each period. They ended up creating a sophisticated model with so many constraints that it failed to yield any solution at all, even though it generated an enormous flurry of economic testimony. It was a classic illustration of a Court having a high degree of economic literacy, of being aware of all the imperfections associated with ordinary commercial transactions, of having good intentions –and making a complete hash of the entire project. That sophistication is not what we want from a Court. The older approach, in which people recognised the limitations of their economic knowledge, but could follow a rule of pro-rating when necessary, was simple and just. It was also economically efficient. If our knowledge of the case is very limited, a simple pro-rating rule will at least eliminate the various forms of strategic behaviour – the gaming of the system – that litigants will be tempted to indulge to exploit the fluidity that Judges have introduced into the system.

The lesson to take from insurance contracts is that if we do not know what we are doing, we should simply

make straightforward assumptions about human behaviour. We should not play favourites. If we followed the lead of the older Judges, we would paradoxically come up with the most economical of solutions. Our new and elaborate theories do not imply that the results achieved a century ago were unsound. It simply means that we have more sophisticated explanations as to why the simpler results of last century actually make sense.

Tort and cost-benefit analysis

The problems that have bedevilled contract law often carry over to other common law areas. Modern tort cases, for example, bring us to another economic tool that is too often misused by the Courts – cost-benefit analysis. Cost-benefit analysis can be extremely useful for explaining the world in abstract terms, and closer to home, in organising our daily lives. And modern economic theory allows us to analyse costs and benefits in a much more sophisticated fashion than formerly. We understand, for instance, that relative prices depend on marginal benefits and marginal costs. We understand the maximisation process that takes place. But the fact that cost-benefit analysis may be important for rational decisions does not mean that Judges themselves should be employing it to decide concrete cases. To explain why, I will look at some 19th century examples and their 20th century parallels.

One of my favourite 19th century Judges is Baron Bramwell. He was a flinty old fellow, and probably the most consistent and powerful libertarian intellect who served on the English Courts last century. His attitude to cost-benefit analysis was most instructive. His attitude is well illustrated with the following case – one which modern economic theory has considered in great detail.

In *Powell v Fall* (1880) 5 QBD 597, a traction engine operated on the highway, emitted sparks that set on fire the fields of a farmer who owned the land nearby. Should the operator be held responsible for the damage that occurs? Bramwell LJ (as he had become) broke this case down into the analysis of two scenarios. In the first scenario, assume the activity was sufficiently profitable to enable the operator to compensate the farmer for the loss of his crops. Under those circumstances the operator should pay the farmer. The operator will be internalising all the benefits from running the engine; it should pay all the costs as well. In other words, a cost-benefit analysis will tell us that if it is rational for one party to undertake such an activity, then that party should pay.

Next Bramwell LJ considered the second scenario in which the engine also damaged the crops, but its operator could not afford to purchase the insurance necessary to cover the loss. Under this scenario, we should still make the operator pay because it will then think very seriously about its actions. Having been forced to bear the

“a flinty old fellow, and probably the most consistent and powerful libertarian intellect who served on the English Courts last century”

cost of the damaged crops, it will recognise that it is no longer worthwhile to run the engine. So cost-benefit analysis again yields the result that the operator should pay.

Having established that principle, no Judge actually needs to do a cost-benefit analysis in Court. It is of no moment to a Judge whether the cost-benefit analysis says that the train should run because the operator can afford to pay, or whether it says that the engine should not run because the railroad cannot afford to pay. All that Judges need to do is enforce the rule that the company pays for the damage. If it is rational to continue running the engine, the operator will pay up and continue, while if it is irrational the activity will stop. The legal rule sets up the necessary boundary conditions. The cost-benefit analysis is taken out of the public sphere and placed in the private sphere where individuals can understand which costs they will be held accountable for, and can make rational calculations on that basis. Thus the legal rule – the boundary condition – induces a private cost-benefit analysis, but it does not turn Judges into charter members of a planning commission with a licence to decide which activities will be undertaken for what benefits, and why.

The modern view on this issue is in many ways the complete opposite. It received its most vivid formulation when Judge Learned Hand used cost-benefit formula as a test for negligence, and it was taken up and championed by Richard Posner. Posner believed that the operator should be held responsible only in the second scenario, where it was not cost-justified for the engine to run. Superficially, this rule appears highly sophisticated. It incorporates an explicit economic judgment based on the social welfare of certain activities. But the rule turns out to be a mistake. If, as Bramwell had it, the company will be held responsible whatever happens, there is no need to calculate where the line should be drawn. But once we determine that the company is not responsible for cost-justified activities, but is responsible for activities that are not cost-justified, Courts will need to decide where to draw that line. Having set themselves this task, they typically discover they lack the necessary information to discharge it in an intelligent fashion.

How, for instance, do Courts decide the marginal cost of additional measures to prevent losses? What factors should they vary? Should they examine the speed of the train, the type of engine, the nature of the spark, the crews that are used, the cutting of the grass along the tracks? Courts become de facto central planners using, *ex post*, formulae appropriate for private decision making but inappropriate for dealing with the public sphere. One of the major insights of modern economics is that costs are to a large degree subjective. They are opportunity costs: they represent the loss of opportunities that we would otherwise have had. Their subjective nature makes it extremely difficult to identify and measure these costs in a public forum. In these circumstances, the entire cost-benefit process involves a judicial second-guessing of how industries should be structured and operated – speculations that Posner, for example, is all too eager to make. But even gifted Judges lack the competence or the skill to do this successfully. Once again the 19th century Judges were, paradoxically, more modern. Their scepticism was more consistent with modern analysis of subjective value. By contrast, the efforts of today's Judges to quantify costs is inconsistent with the best modern theory.

The fallacies of activism

The activist view assumes that a Court, after the fact, can decide whether the bargain made by other people was rational. The Court assesses rationality in terms that *it* understands, but which the parties themselves may not have entertained. If the Court approves of the parties' actions, it can ratify them. If the Court does not, it feels free

effectively to override them. Much of the activism of American Judges has, I suspect, sprung from their own confidence on economic issues. They have been exposed to the problems of imperfect information and "inequality of bargaining power". They know that positive transaction and administrative costs may block some transactions. But it is one thing to grasp these propositions in the abstract, it is quite another to apply them correctly in concrete situations. Mastering the abstract theory does not give a Judge, or an academic, licence to second-guess the preferences of other people; for what economics truly teaches is that people generally have a better knowledge of their own preferences than do others. The role of the Courts is to understand what the parties meant, what they said and how they construed it – not to superimpose their own judgment as to the wisdom of their behaviour.

I am not denying that there is any room whatsoever for judicial intervention. Nor am I insisting that we should adopt a legal regime of absolutely pure contract with no constraints, where any agreement between two parties is automatically upheld by the Courts. Many of the 19th century Judges possessed a better instinct on such matters than the 20th century Judges. In any contract between two parties, the key elements for a Court to consider are the gains from trade between the parties and the consequences that contract has for third parties. If a contract between two individuals has positive effects on third parties, that is all the greater reason for enforcing it. Most contracts – for selling goods, hiring labour and so on – are of this type. These contracts have positive externalities because they enhance the wealth of the two parties to the transaction, and wealthier and more commercially sophisticated people provide greater opportunities for contracting to third parties. Thus, paradoxically perhaps, anything we do to make ourselves better off helps other individuals in the long run by creating the opportunities for further commercial transactions.

Certain contracts, however, do not have this effect, such as the contracts in restraint of trade alluded to above. Two parties may agree to restrict output or to divide markets. In both cases they are attempting to reduce the number of possibilities available to third parties. Standard economic analysis tells us that when we allow these monopoly practices to flourish welfare losses ensue. The 19th century Judges struck a good balance in dealing with this problem. Their attitude was simply not to enforce these arrangements, and to rely on the ordinary incentives on one party or the other to cheat on the cartel, leading to disintegration so that a competitive equilibrium could then reemerge.

Today we understand the dynamics of this process, but we fail to appreciate the simplicity of the common law remedy. Instead, we have elaborate antitrust laws, various public tribunals and private rights of action, all of which creates an enormous incentive for people to sue other parties, for huge sums of money, over ostensible misbehaviour. At least in America, the consequence has been to confuse the good with the bad, at enormous public cost. We now allow private rights of action against forms of contract that are in fact not contracts in restraint of trade. The attempt to provide direct legal enforcement of various remedies amounts to a less effective mechanism for countering restraint of trade than was used by the common law Judges. As happens so often, the modern approach takes a good instinct one step too far. By attempting to eliminate every single evil, it creates bigger imperfections elsewhere. So in this area, as in others, we have much to learn from the 19th century approach of offering cheap and simple legal remedies. Non-enforcement of restraint of trade arrangements may not be perfect. But it is better than establishing an elaborate set of government agencies and tribunals, which usually will slow down ordinary commercial transactions and do more harm than good.

The case for simple rules

To summarise: today we know a huge amount about the way a legal system works. We know more than in past eras about the interactions between various parties to contracts. We understand concepts such as information asymmetries, transactions costs, and the dynamics associated with bargaining power. But we fall to appreciate how difficult it is to use what we know. Our knowledge tells us how individuals can beat the system if given the chance. It does not tell use how to fine tune the rule by building ever more complicated models. The best way to handle the complexity of analysis is usually to reduce it to a form that yields some simple rules of thumb – simple rules for a complex world. These rules allow us to get results which are 95 per cent correct without working through, on a case by case basis, the tortuous analysis of all the factors regarded as relevant under general economic theory. The rules I have recommended can all be justified in terms of the most sophisticated modern economics, but their operational content is manageable within a legal setting.

The first of these rules is that, in a contract between two parties where we believe the parties know what they are doing, we should construe that contract in its ordinary meaning. We should not attempt to tilt the balance in one direction or another. We should not have friends or foes. We should not think that employers are good or that insurers are bad, or that landlords are terrible and tenants virtuous, or vice versa. We should ignore the roles associated with the parties and simply treat the contract as though it were created amongst anonymous equals, the "As" and "Bs" of countless hypotheticals, even if it were not. This stripped down approach will bring far superior outcomes than if we are constantly aiming to rig the scales and complicate the analysis.

In tort law the rules should be simple too. If we run into a stranger's house or car, we should pay damages for the harm caused. In other situations where people voluntarily come together – such as premise liability and employer liability – we should hold people responsible when they create hidden traps for other individuals. But we should not hold them responsible when the dangers to which those other individuals are exposed are open and obvious. Moreover, in assessing the standard of liability in a medical malpractice case, or a case involving some other unsafe service or product, we should find out the standards of that profession and slavishly follow them. We should do this even if we do not understand the rationale for the standards, on the grounds that the people professionally involved in these activities are likely to have a better grasp of what goes on than we do.

A common mistake made by Judges is to reason from the infrequent cases that come before them to the routine cases their rules will govern. In a thousand situations where there is a physician/patient relationship, the case that gets to the Court of appeal is the case where something has gone

terribly wrong. Thus the peculiar method of selecting cases for appellate litigation generates a sample of cases radically different from those that somebody involved in business would see on daily basis. In that sense, most of the cases that a Judge sees are aberrations. Yet it is a great mistake for a Judge to assume that the rules a Court creates only apply to the aberrational cases. The legal rules will also govern the mundane cases that remain within the system, to be resolved without litigation. The Judge needs to fear that laying down an ideal rule for this one case in a thousand may unglue the system that works well for the other 999 cases.

I remember teaching tort law about 25 years ago, and outlining to my class the rules of thumb that I thought should apply in automobile cases. For example, if you go through a red light and hit a car which is proceeding on a green light, you should be liable. If you rear-end somebody parked at a stop sign, you should be liable. I went through all these rules. One of my students went into the practice of insurance claims adjustment. He later said to me: "Professor Epstein, it's remarkable. I discovered that 99.9 per cent of our cases are litigated by your rules, which are not the official rules of tort liability today. And the only cases that are litigated by the judge-made rules are those that go up on appeal." The insight is that we will get a long way with simple rules of thumb for traffic accidents – not a no-fault system as you have in New Zealand, but simply a rule which says that whoever violates the rules of the road will have to pay somebody who does not violate the rules for the damages incurred.

If we understand how this system works in the routine cases, we will avoid excessive mischief in the sophisticated and idiosyncratic cases that end up before a Judge. By aiming for subtlety and economic refinement, we risk falling flat on our faces by making the errors that simpler techniques could have avoided. The most sophisticated economic theory leads us back, in fact, to simple and powerful rules. If we understood that, it would probably make judging a more boring profession. But in the end, society, lawyers and even we academics would be better off for having more boring Courts. ❑

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continued from p 234

It is apparent from these analyses that the prosecution were more likely to challenge potential jurors who share similar characteristics to the defendant. Defendants are more likely to be male, young, unemployed, or manual workers if employed. The defendant will also be Maori more frequently than one would expect given the proportion of Maori in the population. In the District Court, the prosecution challenged close to every second balloted Maori male. In contrast, the defence were more likely to challenge potential jurors with dissimilar characteristics to those of the defendant.

Under-representation

When the challenges were added to the under-representation already evident in the pool of potential jurors, the following groups were under-represented on juries when compared with the jury district populations:

- Maori men;
- those aged 20-39 years;
- elementary workers; and
- the "professionals", and "legislators, administrators and managers" occupational groups.

An interesting finding was that more women served on juries than men. This was because of the higher number of challenges on men. The principal findings in regard to Maori representation were: first, the lower than expected number of Maori women in the jury pool; and second, the lower than expected number of Maori men on juries. The factors that caused this under-representation occurred at different stages of the selection process.

Changes to the peremptory challenge

Those interviewed were asked for their views on the desirability of making changes to the peremptory challenge. While there was a diverse range of opinion on whether the challenge system should be changed, some clear trends emerged. The strengths of the current system identified in the interviews were, that the peremptory challenge allowed possible bias to be removed from the jury, and that the defendant could have an opinion on who would sit on his or her jury. The weakness was that challenges were often based upon weakly-based assumptions and could result in a skewed jury. A number of interviewees considered that challenges should be reduced or removed as they believed the use of challenges resulted in a non-representative jury. Despite these weaknesses, the majority of interviewees thought that the status quo should remain.

Overall, challenging potential jurors was acknowledged to be a very imprecise art. Although challenging was viewed as being based upon assumptions, challenges were still considered to fulfil a useful function. Part of this function was symbolic, allowing defendants to feel that they had some control over who would sit on their jury. This needs to be balanced against the perception that particular groups of potential jurors, such as Maori, appear to be targeted in challenging. There was some evidence that these groups may lose confidence in the jury system as a result. Another part of the function of peremptory challenges was a practical one of removing people who were perceived to be biased against either party.

Conclusion

If trial by a jury of one's peers is considered the ideal, changes are needed to the way juries are currently being selected. Unless changes are made to the way juries are selected, the way in which a large number of people are being excused from jury service, and the way challenges are issued, juries will continue to be unrepresentative of the populations from which they are drawn.

Before we can begin to address the problems highlighted by this research, we need to answer the question, "What does the term 'trial by one's peers' mean in the New Zealand context?" Only when this question is answered, and we decide what is an acceptable jury composition, can we move on to examine possible changes to the way we select our juries. ❑

Further references

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