THE NEW ZEALAND
LAW
JOURNAL
PUBLISHED BY BUTTERWORTHS FEBRUARY 1999

MONOPOLY MONEY

One of the fundamentals of the rule of law is that no one should be made to suffer in body or goods except for a distinct breach of the pre-existing law.

During the twentieth century lawyers have allowed themselves to become so bemused by policy wonkism that they have surrendered this principle in exchange for the supposed benefits of macro-economic control by government.

One instrument of macro-economic adjustment is the currency. Until this century adherence to the gold standard meant that the currency was simply not a political issue. Then the gold standard was abandoned and governments suddenly acquired the power to alter the value of money by fiat. This they could do either by regulating the exchange rate or by regulating interest rates.

Since one cannot vote oneself rich, it stands to reason that no net benefit automatically flows from a government mandated change in interest rates, the exchange rate or the rate of inflation. What does happen is that wealth is transferred from some people and groups to others. In the case of inflation, obviously, wealth is transferred from those on fixed income and dependent upon interest (often the elderly amongst others) to wage and salary earners; from investors and the prudent to borrowers and the profligate.

Nothing should be clearer than that such transfers of wealth from one class to another should only take place, if at all, as a result of legally authorised and transparent procedures. The money in an individual's pocket represents that individual's property and governments have no business secretly deciding to depreciate individuals' property in pursuit of social benefits. But, until the Reserve Bank Act 1989 there was no legal regulation of the currency at all, Ministers made inflationary decisions at whim, while telling lies to Parliament and the people about their real intentions.

The Reserve Bank Act attempts to get to grips with this problem by enacting that the sole goal of monetary policy will be stability in the general level of prices. Detailed policy targets are set out and the bank is required to explain its actions publicly.

But we have political parties that have no respect for this fundamental principle of the rule of law and which wish to restore the power of governments unpredictably to alter the value of individuals' property. They do this under the rubric of "broadening the Reserve Bank's goals to include employment and growth". But if the Reserve Bank has multiple goals we are just back to where we were before. We have no idea at any particular time what the acceptable level of inflation is.

So, as long as the NZ government has monopoly control over the currency, the potential for future breaches of the rule of law and the protection of private property remains. The currency needs to be placed permanently beyond the reach of the political process.

The introduction of the single currency in Europe has naturally prompted discussion of the prospect of a single currency for Australia and New Zealand. The technical conditions for the introduction of a single currency in Australasia appear more propitious than in Europe. There is real, as opposed to merely legal, free movement of labour and inflation and growth are not widely divergent.

These considerations are counterbalanced by a drawback New Zealand suffers from in its relations with Australia when compared to the United Kingdom in its relations with Europe. The adoption of a single Australasian currency would amount to the adoption of the Australian currency by New Zealand. Whatever structure were created for the supervision of the currency, it would be bound to be dominated by Australia.

During the transition period especially New Zealand would be beholden to Australian monetary policy. A transition period is required to arrange the printing of the new cash and the training of all who need professionally to handle money. The success (or otherwise) of the transitional period in Europe depends upon the maintenance of confidence that the national central banks (and the Bundesbank in particular) will purchase each others currencies in potentially unlimited quantities at a guaranteed exchange rate. There is no question of New Zealand making a similar undertaking in respect of the Australian currency.

Subordinating New Zealand monetary policy to Australian control would not obviously be a good thing. At best we would have swapped one monopoly for another. But the situation would not be at best. Australia is a much more recent convert to control of inflation. The Reserve Bank of Australia Act still has not been altered to reflect a single goal for monetary policy. There is no reason why New Zealanders should have any more confidence in a monetary system dominated by the Australian government than they should have in the New Zealand Dollar.

Besides these considerations, the supposed practical arguments in favour of a single currency are pretty feeble. The two most commonly put up are the elimination of exchange rate risk and transparent cross-border pricing.

The idea that the elimination of exchange rate volatility will remove a source of uncertainty for business is superficially attractive. But businesses are concerned with future prices. Future prices, especially of products purchased from abroad, are uncertain. One of the factors that affects assessment of future prices of foreign goods is exchange rate volatility. But exchange rates do not move in a vacuum. They move in response to, and counterbalance, other changes such as inflation and the level of government spending. A loss of productivity in country A for example may be counterbalanced by a consequent fall in the A's exchange rate with the result that the price of its goods in terms of currency B remains exactly the same. Any price change is the net outcome of numerous pressures which push in different directions. The removal of one element from this complex matrix will not necessarily stabilise the system, indeed it could well have the opposite effect.

The concept that transparent pricing will lead to benefits to consumers seems equally doubtful. One does not have to walk far in any New Zealand city to find different shops perfectly transparently charging different prices for the same goods. And if there were genuine price differentials from one place to another, arbitrageurs would have taken advantage of them. Where there is no possibility of arbitrage, there is no reason for prices to move merely because people recognise them as being different from elsewhere.

So what are the alternatives? First, and most obviously, there is private money. In a private money system individual banks produce their own currencies and then have to compete to maintain their value. Seeing that nearly all New Zealand banks are overseas owned, such private currencies very likely would be Australasia-wide. Perhaps, however, the political system is not ready for private money yet. Certainly most people would currently regard the production of currency as a natural role of government, but then it is not long ago that most people thought the same about owning and operating railways, airlines and so forth.

The second might be simply to abolish the New Zealand dollar and allow New Zealanders to use whatever currency they wished. It is perfectly predictable which currencies would come into common use. This would combine the chief benefit of private money, that individuals could desert a currency which went soft, with the chief benefit of government money, that failure of an issuer was unlikely.

Under both these systems the New Zealand Government would have to retain some unit of account of its own as long as it charged an income tax, but if the only tax were GST even this need would disappear.

Finally, there is what is in practical terms the easiest of all options, and certainly easier than introducing a single currency in Australasia. That is that both the Australian and New Zealand dollars should circulate freely in both countries. Now we have the best of all worlds. Neither currency would be likely to fail and the two governments would have to compete to maintain the value of their currencies.

Having two competing currencies may seem strange. But the people of Russia and large parts of Eastern Europe have become accustomed to dealing in $US, DM and their own largely worthless scrip. In South China the use of Hong Kong dollars is commonplace. But, more appositely, the people of Britain are soon going to become used to having both Euros and sterling in circulation. Already British banks offer a full range of Euro services. By the time their referendum comes round, the political decision will seem an irrelevance.

As a first step the prohibition on the importation of foreign specie for the purpose of circulation should be repealed. If having several currencies in circulation at once is a bad idea, no one will want to do it and the section is unnecessary. If it is a good idea, the section is a bad provision. The decision what currency to use in a transaction should be made not by politicians, but by the individuals whose interests are at stake. ❑

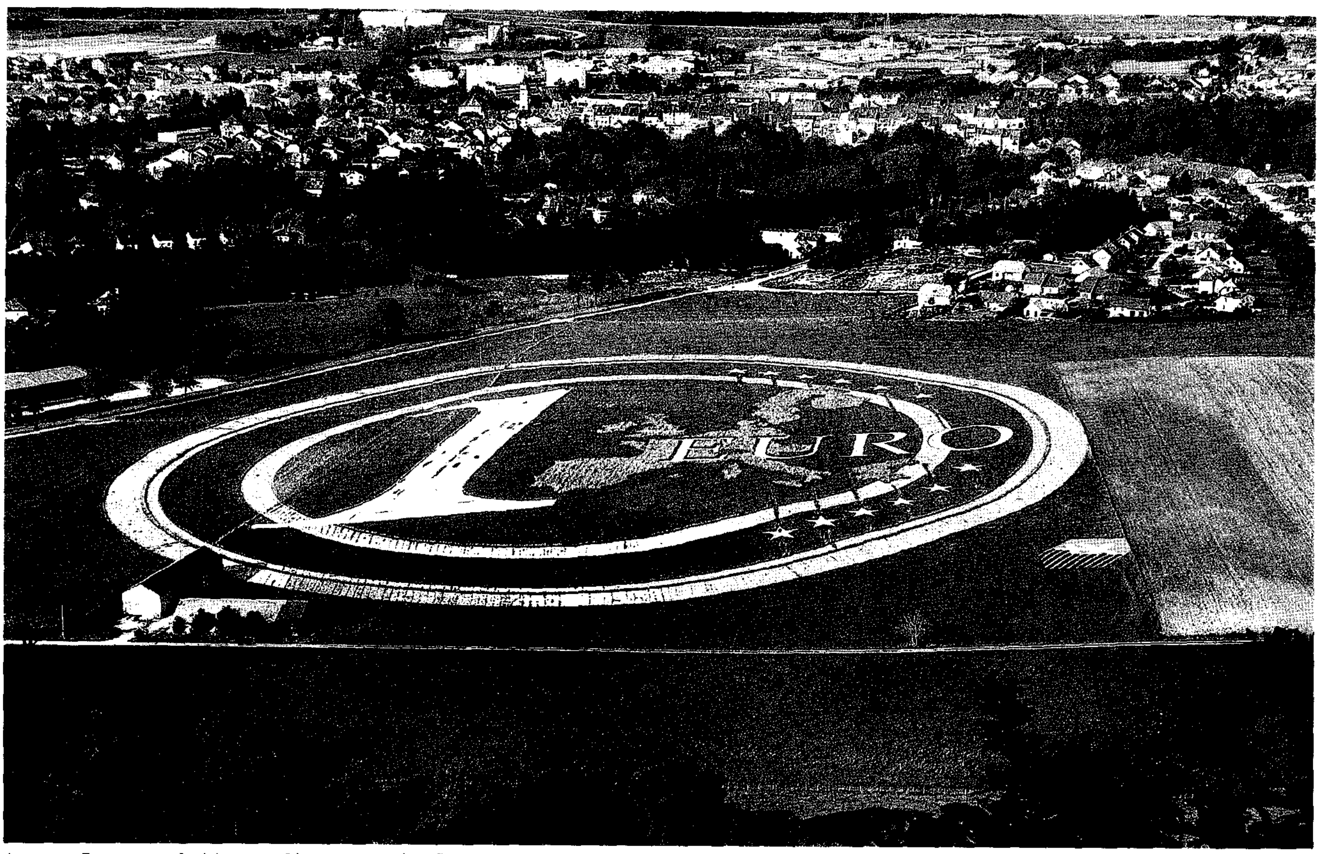

Photo: K Horn

A giant Euro in a field near Champagnole, France

THE ESCB STATUTE

Dr Karen Horn, economics editor of Frankfurter Allgemeine Zeitung

reviews the latest statute aimed at ensuring a stable currency

On 1 January 1999, Europe stepped into a new era, and with it the financial community around the globe. The Euro has come into being, the single currency for the eleven member states of the European Monetary Union (EMU). Germany, France, Italy, Spain, Portugal, Austria, Belgium, the Netherlands, Luxemburg, Ireland and Finland have handed over their monetary policy to the European System of Central Banks (ESCB) as agreed upon in the Maastricht Treaty signed in February 1992. The remaining four member states of the European Union (EU), especially the UK, are supposed to join the system later. For the time being, they are bound together in the European Monetary System II (EMS II), a fixed exchange rate regime within given boundaries. In the EMU member states, the Euro will coexist with the traditional national currencies as legal tender for another three years. These are however scheduled to disappear between 1 January 2002, when Euro coins and bills will finally be issued and 1 July 2002. EMU (or Euroland, as some call it in anticipation of the political union that might be waiting at the end of this road) is an economic area of considerable importance and weight in international trade. The eleven member states together have a population slightly larger than the United States, but economic output is lower: GDP per capita is one third higher in the United States than in "Euroland".

THE TREATIES

The legal framework for EMU is laid down in the Treaty on the Creation of the European Community (EC), the amendments of which were signed in Maastricht (Netherlands) on 7 February 1992 under the official name of "Treaty on the European Union (EU)". This treaty, subsequently to be known as the "Maastricht Treaty", formulates a vast series of amendments to the Treaties of Rome concluded in 1957; it was the result of a whole year of intense negotiations on economic, monetary and political union between the governments of the (then) twelve EU member states (Belgium, Germany, Denmark, France, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Great Britain). The negotiations of the European Council were finally concluded in December 1991. The Maastricht Treaty is divided into six sections and 17 protocols.

The European Community is therefore now based on three main pillars: the EC Treaty comprising the provisions on Economic and Monetary Union (sections I-IV of the Maastricht Treaty), the rules for common action in foreign and security policies (section V of the Maastricht Treaty), and the agreement on cooperation in legal and interior policies (section VI of the Maastricht Treaty). The result is a revised Treaty on the Creation of the European Community in its version of 7 February 1992, in which the major rules concerning monetary policy are to be found in s VI, chapters 2-4, arts 105-109, while the ESCB and the European Central Bank (ECB) are created by s I, art 4a.

The statutes of the ESCB and the ECB are finally specified in a protocol comprising nine chapters and 53 articles. These articles concern:

- the creation of the ESCB and ECB (art 1);
- their tasks (arts 2 and 3);
- informational duties (art 4);
- statistical tasks (art 5);
- international cooperation (art 6);
- independence (art 7);
- internal bodies and organisation (arts 8 to 14);
- links to the European Commission (art 15);
- the issuing of bank notes (art 16);
- monetary instruments (arts 17 to 20);
- business with public entities (art 21);
- international clearing systems (art 22);
- third party business (arts 23 and 24);
- prudential supervision (art 25);
- accounting rules (arts 26 and 27);
- the ECB capital (arts 28 and 29);
- reserves (arts 30 and 31), the distribution of profit and seignorage (art 32 and 33); and
- legal power (arts 34 and 35).

The other articles concern minor amendments and provisions. The protocol provides a solid legal basis in itself, as most of its provisions are anchored in the Treaty (in identical wording) and can therefore only be changed through an amendment of the EC Treaty itself, which requires the consent of all member states.

THE EUROPEAN SYSTEM OF CENTRAL BANKS

According to art 1.2 in the first chapter of the protocol on the statutes of ESCB and ECB, the ESCB is composed of the ECB and the EU's national central banks, including those from countries that do not yet participate in EMU.

The ESCB and the ECB are built very much according to the German model: former Bundesbank president Karl Otto Pöhl actually dominated the conception and formulation of the legal statutes. Following the Bundesbank model, "Euroland's" central bank is focused on price stability; independent; and decentralised.

But while the functioning of the Bundesbank was only defined in the Bundesbank law ("Bundesbankgesetz"), a simple law that could easily have been amended by a non-qualified parliamentary majority but never was (due to some implicit, historically anchored agreement between all political parties), the rules governing the ESCB are laid down in a complicated treaty according to international law which therefore attains constitutional status. So, although the institutional setting concerning ESCB and ECB has been conceived in such a way as to reproduce the efficiency of German monetary policy, the Maastricht rules are much stronger and more binding than their German predecessors.

Price stability

In art 105 of the EC Treaty (as amended in February 1992) and in art 2 of the protocol, it is laid down that:

> The primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community.

This clarifies the priority of price stability over any other economic objectives. The law on the German Bundesbank has never been quite as explicit by formulating that the Bundesbank was supposed "to secure the currency". The actual balance between the three goals of the so-called "Magic Triangle" (price stability, growth and trade equilibrium) of fiscal and monetary policy was thus being left to the actual decision-makers. Article 105 goes on:

> The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources.

As opposed to this very clear commitment, the German Constitution, the so-called Basic Law ("Grundgesetz"), does not support any concrete economic order but leaves a lot of room for interpretation. It only lays down basic constitutional principles that may, but do not necessarily, lead to a market economy (individual liberty, private property, free trade, free contracting, etc).

Article 105,2 of the Treaty and art 3 of the protocol then determine the major activities of the ESCB:

> The basic tasks to be carried out through the ESCB shall be: to define and implement the monetary policy of the Community; to conduct foreign exchange operations ...; to hold and manage the official foreign reserves of the member states; to promote the smooth operation of payment systems.

The means by which this is to be done are specified in art 109; they include open market operations, standing facilities and minimum reserves. In order to fulfil these tasks, the ECB has a legislative function. It has the power to make regulations, take decisions, and make recommendations. The creation of a minimum reserve obligation (credit institutions have to hold part of their assets as deposits with the central bank) was subject of controversy, their disadvantage being that the commercial banks' leeway in extending credit is being restricted artificially, their advantage being – according to the German Bundesbank, one of the very few central banks to operate minimum reserves – a more immediate reaction to changes in the money supply. While minimum reserves were interest-free in Germany (an additional burden to the banks, as interest income is forgone on part of their assets), they are interest-bearing in EMU. In addition:

> 5. The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

Independence

The independence of the ESCB is guaranteed by art 107 of the Treaty and Chapter 3, art 7 of the protocol:

> When exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of their decision making bodies shall seek or take instructions from Community institutions or bodies, from any government of a member state or from any other body. The Community institutions and bodies and the governments of the member states undertake to respect this principle and not to seek to influence the members of the decision making bodies of the ECB or of the national central banks in the performance of their tasks.

Again, these provisions were less clear in the case of the Bundesbank, which – according to para 12 of the law on the Bundesbank – was supposed to cooperate with the government and to "support" general economic policy. The president of the Bundesbank used to be nominated according to political affiliation; in spite of that, the independent spirit of that institution was so strong and self-enforcing that the Bundesbank never gave in to any government pressure towards printing money beyond potential GDP growth.

Article 104 of the Treaty and art 21.1 of the protocol also strengthen the ECB's independence by strictly prohibiting that short term cash credit be given by the ECB or any of the ESCB national banks, to national governments, the European Community, regional or local entities or any other institution governed by public law. Again, this rule is more restrictive than the law on the Bundesbank which does not prohibit cash credits to the government. Instead, para 20 of the Bundesbankgesetz fixes upper limits for cash credits to the different public entities.

However and more generally, ECB and former Bundesbank Chief Economist Otmar Issing points out that even if one claims independence for the central bank, one cannot deny that money will always be a political issue, and the power of the central bank will always be derived from the elected governments. The ECB, like all other central banks, has no political mandate of its own.

Governing structure

According to Arts 9 to 14 of the protocol, the ESCB is governed by the decision-making bodies of the ECB:

- the Executive Board:
- the Governing Council: and
- the General Council.

The governors of the national central banks and the members of the ECB Executive Board have guaranteed tenure. The latter are appointed for a non-renewable term of eight years. The Executive Board implements monetary policy according to the decisions of the Governing Council. While the General Council mainly directed the transition of ECB from its predecessor, the European Monetary Institute (EMI), the Executive Board and the Governing Council are the operating bodies of the ECB.

The Executive Board consists of the President, the Vice-President and four other members appointed politically by common agreement by the governments, on a recommendation from the European Council after having consulted the European Parliament and the ECB Governing Council. The first President of the ECB is Willem Duisenberg from the Netherlands, well known for his hard-line commitment to careful and restrictive monetary policy.

The Governing Council has 17 members. It is formed by all the members of the Executive Board and the governors of the national central banks of those countries which have accepted the Euro. The Governing Council actually formulates the monetary policy of the Community.

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THE BANK OF ENGLAND ACT 1998

Adam Mikkelsen, Russell McVeagh, Auckland

asks whether the UK is following New Zealand or preparing for the Euro

The recent passage of the Bank of England Act 1998 has fundamentally changed the relationship of the Bank of England to the government of the United Kingdom. The Act reflects, to a large measure, the trend towards central bank independence and accountability reflected in the Reserve Bank of New Zealand Act 1989.

PRIOR RELATIONSHIP

The predecessor of the 1998 Act was the Bank of England Act 1946. Typical of its time, the 1946 Act empowered the Chancellor of the Exchequer (the equivalent of the Minister of Finance) to give, through the Treasury, undefined and secret "directions" to the bank on any aspect of its operations. In practice, since these directions were not made public, it was impossible to know what monetary policy the government might be pursuing through the bank, or how the monetary performance of the government or the bank might be measured. Indeed, one of the constitutional problems of this structure was that it permitted the government to make a public commitment to fight inflation while simultaneously taking inflationary action.

Because no monetary policy was set under the Act, and the Act imposed no accountability for monetary decisions, the bank effectively acted as the financier of government, printing money which could not be secured through imposing taxation. The Act thus allowed for the unconstitutional imposition of extra-parliamentary taxation.

CHANGES IN MARKETS

Changes in international capital markets have also changed the extent to which governments can make unaccountable monetary decisions, and have to a large extent provided the impetus for the changes .

Twenty years ago relatively small amounts of capital flowed worldwide on a daily basis, and governments could maintain fixed rates of exchange and high inflation without the consequences of those policies being immediately apparent. In today's world however, investors can transfer billions of dollars of assets in and out of different currencies at will. Consequently, the value of a currency to a large extent reflects the assessment of investors of the political risk that the currency will be devalued by inflation. In this environment, governments which maintain high levels of debt, and attempt to pay this debt through printing money and generating inflation will be swiftly punished by the markets through a devaluation in currency.

It is therefore in governments' interests to have a monetary policy which is transparent, and which enables the performance of governments in meeting monetary policy to be measured by the market.

REPORT ON THE BANK

In 1993, the Treasury and Civil Service Select Committee reported on the role of the Bank of England and the suitability of the 1946 Act. The report stressed the need for clear lines of accountability and answerability for monetary policy to Parliament, concluding that – "the present system for determining monetary policy does not, in practice, allow for clear parliamentary accountability". Following the release of the committee's report, a private member's Bill was introduced in 1994 pursuing the thrust the changes suggested by the committee, although differing in detail. (See Robertson "The Currency and the Constitution: Lessons from 'A Rather Small Place'" (1996) OJLS 1.) Although the Bill was subsequently defeated, the manifesto of the then opposition Labour Party contained a commitment to ensure that "decision making on monetary policy is more effective, open, accountable and free from short term political manipulation". (This wording is from the Open Letter from the Chancellor of the Exchequer to the Governor of the Bank of England regarding "The New Monetary Policy Framework", May 1997.) Following Labour's election in 1996, the structure of the bank was changed informally and the Act was eventually passed in June 1998.

Bank to control monetary policy

Section 10 of the 1998 Act provides that the Treasury may continue to give directions, "except in relation to monetary policy". In other words, the responsibility for implementing monetary policy is shifted to the bank.

However, the responsibility for determining the goals and objectives of monetary policy still rests with the government. Section 11 of the Act consequently provides:

> 11. In relation to monetary policy, the objectives of the Bank of England shall be:
>
> (a) to maintain price stability, and
>
> (b) subject to that, to support the economic policy of Her Majesty's Government, including its objectives for growth and employment.

Under this section, the bank effectively has the sole objective of maintaining "price stability", as the other objectives of supporting the government's other economic policies are expressly subject to the price stability goal. This section substantially mirrors the New Zealand Act, which provides that the "primary function" of the Reserve Bank of New Zealand is to "formulate and implement monetary policy directed to achieving and maintaining stability in the general level of prices".

The New Zealand Act provides for the fixing of price stability "policy targets" between the Minister of Finance and the Governor. Similar to this, s 12 of the Bank of England Act provides that the Treasury may by notice to the bank specify for the purposes of the Act what "price stability" is to be taken to consist of. The subsection further provides that such notice must be given before the Act comes into force, and following that at no more than 12 monthly periods. "Price stability" has since been defined by the Chancellor as inflation of 2.5 per cent, measured against the UK Retail Price Index (RPI). As with the New Zealand policy target of between 0-3 per cent inflation, price stability is not defined as 0 per cent for the reason that consumer price indexes, including the RPI, are considered to overstate inflation by between one and three per cent.

Monetary policy committee

One of the significant features of the Act is the formation, under s 13, of a "Monetary Policy Committee" ("The committee"), which has the statutory responsibility for formulating and implementing monetary policy. The committee must meet at least once per month, for the purposes of setting interest rates in order that the bank meets its stated price stability goal.

The committee consists of eight members, being:

(a) The Governor and Deputy Governor of the bank;

(b) Two members appointed by the Governor of the bank after consultation with the Chancellor of the Exchequer;

(c) Four members appointed by the Chancellor of the Exchequer.

With two important differences, the committee essentially performs, as a group, the same function as the Governor of the Reserve Bank of New Zealand, in that it is responsible for making the decisions regarding monetary conditions which will allow the bank to meet its inflation target.

The first difference is that the committee meets relatively infrequently. Unlike the daily assessment of the Governor of the Reserve Bank regarding whether current monetary and interest rate conditions are at a level which will allow it to meet its inflation target, the committee formally makes these decisions only 12 times per year. From a practical perspective, it is questionable whether this allows the committee to respond in a timely manner to developments in the economy which could impact upon the level of inflation. The meeting must also take place on a certain day, and this could lead to decisions being made hastily in the course of the three or four hours allotted for the monthly meeting.

The second major difference is that accountability for the performance of the bank in meeting its target rests with the group of persons comprising the committee as opposed to an individual Governor. The Governor of the Reserve Bank is explicitly accountable for its performance. The Private Member's Bill introduced in 1994 would have placed responsibility on the Governor, as per the Reserve Bank of New Zealand Act 1989. Interestingly, however, the Select Committee in its report had recommended a Monetary Policy Committee, for reasons which Robertson (supra) suggests were confused. As will be discussed below, not only is accountability diffused and ultimately weakened under the Bank of England Act through the committee structure, but there is no explicit mechanism for holding the committee to account for a failure to meet the inflation target.

DISCUSSION

The basic framework created under the Act reflects constitutional principles in a number of ways. There is only one goal to be achieved, it is made public, and the boundaries of the bank's discretion under the Act are sufficiently tight to make monetary policy predictable. There is also no direct scope for the government to announce it is pursuing price stability whilst simultaneously undermining this by giving inflationary directions to the bank. However, certain features of it are of constitutional concern.

Unlike the New Zealand legislation, there is no formal accountability mechanism imposed upon the committee should the bank fail to meet its inflation target. Although the committee performs the same formal role as the New Zealand Governor, in that it is responsible for determining and implementing monetary policy, it is not accountable to the same degree. Under the New Zealand legislation, it is clear who is responsible and accountable for decisions regarding monetary policy, and the consequences of non-performance. Under the Bank of England Act, the consequences of non-performance not clearly spelt out. There is no formal procedure whereby the committee can be held to account for a persistent failure to achieve the price stability objective.

The Chancellor has adopted an informal process of requiring the bank to publish an open letter if inflation is more than one percentage point higher or lower than 2.5 per cent. The letter must set out:

- why inflation has deviated from the target;
- what action the bank intends to take to get it back to the target;
- when inflation will return to the target; and
- how this meets the bank's remit.

It is unclear what action the Chancellor would take if the letter was unsatisfactory, or if no letter was published by the bank as requested. As this accountability mechanism is not a feature of the Act, neither the bank not the committee are statutorily required (save in exceptional circumstances provided for under the "emergency" provisions of the Act) to comply with any direction given by the Chancellor in relation to monetary policy.

The Treasury provides little guidance as to the accountability of the bank under this "letter" regime:

> Whether and how the Chancellor responded to any letters would depend on the merits of the case at the time. The Chancellor would be mindful of considerations such as [demand or supply side shocks]. But there is nothing automatic in the process. His response would depend on the prevailing economic circumstances. (*Inflation Target and Remit for the Monetary Policy Committee – Background Notes*, HM Treasury, 13 June 1998.)

This is a major area in which the Act provides a dead end in terms of accountability. There is no sanction provided for in the Act, or in the accountability mechanisms outside the Act, if the bank fails to meet its inflation target. In this respect, the Act needs to clearly set out the consequences of non-performance, and the persons to whom these will apply.

The committee is also comprised of a number of individuals. As decisions are taken by majority vote, no one person can be said to be responsible for the performance of the bank. Under the New Zealand legislation, it is clear that the Governor is responsible, and the Act provides for the Governor to be dismissed for non-performance. The very nature of a large committee also means that although one or more members could be dismissed, it is unlikely that the whole committee would be replaced (as this would also entail replacing the Governor and Deputy Governor). However, if only a handful of members were dismissed in the event of the failure of the bank to meet its targets, how could Parliament be certain that it was only those members who were accountable for the failure? The Act would be further improved if, as with the New Zealand legislation, only one person was accountable for the performance of the bank. The committee appears to be a mechanism to ensure that no one person is responsible for any decision taken by the bank.

ADOPTING THE EURO?

An analysis of the current position of the Bank of England would be incomplete without mentioning its position in relation to the newly constituted European System of Central Banks ("ESCB"). Indeed, one of the motivations for the 1998 Act was that if Britain is adopt the Euro, it must have a statutorily independent central bank.

Although the Euro has been launched to much acclaim, legitimate concerns remain. The ESCB is independent of the national governments in the Euro zone, yet it remains to be seen whether it resists political pressures, and maintains a tight monetary policy, in the face of high unemployment and low growth in Europe. From a legal and constitutional perspective, concerns also remain about the accountability of the ESCB itself. Unlike the RBNZ and the Bank of England, the ESCB is empowered under its governing legislation to set its own inflation target. Like the Bank of England, but unlike the RBNZ, the ESCB has no specific prospectively determined let-outs. Instead the ESCB talks about attaining price stability over the medium term and ignoring one off shocks. The ESCB in this sense sits in its own judgment and is not accountable to anyone for its performance.

Undoubtedly the better solution for Europe would have been a monetary system whereby each of the European currencies would be accepted in each country in Europe and could compete freely against each other. Consumers would accordingly tend to use the strongest and most stable of the competing currencies (in Europe, undoubtedly the D-Mark) but would be free to switch if they so chose. Ultimately, this system would have been preferable, because although the ESCB is committed at present to price stability, government monetary monopolies have historically generated inflation on a scale which far outweighs any countervailing efficiency gains and "Euroland" will in all likelihood be no exception.

In this respect, the better option at present for Britain is to buck the trend towards greater monopolisation and centralisation of monetary policy, and retain its own transparent regime of accountability, unburdened by the bureaucratic and centralist instincts of Europe which will ultimately hamper the success of the Euro. ❑

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The General Council now has a reduced role, but is responsible for planning the accession of new member currencies and for formulating the employment conditions of employees of the ECB.

One of the first activities of the Governing Council was to determine the operational target for its monetary policy, which was subject to vigorous controversy. The German Bundesbank, due to its extremely positive experience, recommended not to fix a direct inflation target but rather to focus on indirect goals such as money supply according to "M 3 harmonised" (harmonised statistical measurement for all EMU member states). The disadvantage of a monetary target is that the empirical correlation between money demand and growth seems to become more and more unstable, so that steering the price level via money supply becomes an increasingly difficult task. Inflation targets, on the contrary, suffer from their impact on anticipations. ECB Governing Council finally decided vaguely to fix a monetary "reference" (4.5 per cent growth in M 3 harmonised), but to consider inflation indicators as well. It is commonly held that in the long run, the ECB will follow a similar strategy as the Fed, focusing on a variety of general economic indicators.

Decentralisation

The ESCB is a decentralised system modelled on the German "Landeszentralbank" structure, a network of regional branches headed by the Bundesbank. According to art 14 of the protocol, the role of the national central banks is restricted to the implementation of the guidelines set up by the ESCB/ECB; they promote the operation of payment systems and supervise private banks. While the ECB will have the exclusive right to permit or refuse the issuance of Euro bills by any of the national central banks according to art 105a, art 1 of the Treaty and art 16 of the protocol, the national central banks will still be entitled to issue coins (art 105a, 2 of the Treaty). There has been some controversy on this federal structure, critics arguing that the ECB has too little power and staff as opposed to the national central banks. The ECB now counts 500 staff, as opposed to the Bundesbank with 16,000 and the entire ESCB with 60,000.

Seignorage

There was another controversy on the distribution of seignorage amongst the EMU member states, mainly due to the rule of distribution which disadvantages Germany. According to art 32 of the protocol, all seignorage flows into a common fund and is then redistributed according to the ECB capital share of each member state, which in turn depends on population and national GDP according to art 29 of the protocol. The contribution to common seignorage, however, in fact depends on minimal reserve requirements and circulating cash. Due to the fact that many Eastern European Countries use the D-Mark as legal tender, the sum of German cash highly exceeds the amount that would correspond to GDP. In the fall of 1998, the EMU member states agreed not to consider circulating cash for a transitional period of three years. The ECB capital amounts to five billion ECU as on 1 January 1999 according to art 28 of the protocol.

CONCLUSION

The D-Mark has been a highly successful currency in terms of confidence and stability. In part this has been due to the success of the German real economy, and to a popular culture of aversion to inflation. The Bundesbankgesetz has also been an anchor for confidence. The Statute of the ESCB is based on the law relating to and the experience of the Bundesbank. From an institutional point of view there is no reason why the ECB should not be equally successful in engendering confidence in the Euro. ❑

EMU – AUSTRALIAN OR EUROPEAN?

Geoff Harley, Russell McVeagh McKenzie Bartleet and Co, Wellington

tells us what every practitioner needs to know about the Euro

According to *The Economist* of 28 November 1998, a Ford Mondeo car costs almost 50 per cent more in Germany than in Spain. The article refers to research which indicates that, of more than 50 homogeneous goods sold in Europe (petrol, Coke, Big Macs, Levi jeans etc), the price differences in the various countries differed by 24 per cent from the mean – over double the size of such price gaps in the United States. Why is there such a difference? How easy is it to see and to exploit?

The United States adopted a common currency in 1792. The "greenback" has emerged as the world's reserve currency or store of value; the US economy is now the largest and most powerful in the world. Until EMU (no, not the Australian bird), no other currency has looked like being a serious rival this century.

Of the European Union's 15 member nations, 11 committed themselves to the single "Euro" currency at the commencement of 1999 (the United Kingdom is the major "opt out") in terms of the Maastricht Treaty. The heavyweight members are Germany, France and Italy. These are joined by the Netherlands, Spain, Belgium, Austria, Finland, Ireland, Portugal and Luxembourg. The combination of these Euro 11 has created a single market larger than the United States, in terms of people, and about 75 per cent in size in terms of GDP.

The likely longer term economic effects of EMU may be profound, but it is important to note that EMU was the result of highly contentious political decision making, which barely commanded a democratic majority. The main purpose was not economic. Rather, EMU is an important step in a long political process of European integration. Its purpose is highly political and, at least to outside observers, the economic consequences which are likely to follow seem almost perceived as incidental by-products. Quite possibly, the union will be seriously tested when those economic by-products themselves emerge, and become intensely political issues. It is one thing for what was West Germany to transfer a huge portion of its wealth annually to the former East (a historical re-unification, between a population with a common language, culture, and wide-spread personal/family relationships). It is another if Germany is asked to make such a contribution to, say, Italy if it were to disintegrate economically and financially.

France's late President Mitterand and Germany's now retired Chancellor Kohl have been the leaders of monetary union. So much so that the other EU members in effect were asked whether or not each wished to join. In reality the only country strong enough to challenge whether the "single currency is a good idea" has been the United Kingdom – the result of that challenge being that successive Conservative led governments, first of Mrs Thatcher with the demise of her Chancellor of the Exchequer Nigel Lawson over ERM, second of Mr Major and the demise of his Chancellor Norman Lamont, became hopelessly split. In no small way, Mr Blair's Labour administration is the result.

EMU certainly raises fundamental political and economic questions, especially about an individual government's ability to manage its own fiscal policy independently. At once, monetary union saw the abandonment of any sovereign independence concerning monetary policy. That is put into the hands of the European System of Central Banks ("ESCB"), with a single (Treaty governed) mission: price stability, and in rigorous form.

Sound familiar? The way in which the ECB is constituted is different in a major way from New Zealand's Reserve Bank Act, and not simply because of the 11 nation/single currency constituency. Under our regime, it is true that "price stability" is the central tenet. But its translation depends on a written agreement from time to time between the Governor of the bank and the Minister of Finance. This Policy Targets Agreement can be changed, not only by agreement from time to time, but also it can be completely overridden for 12 months by the government. In short, the independence of the Governor of the Reserve Bank rests solely on how the agreed objective is to be met. If the government alters the terms of its agreement, that must be immediately made public. Our government can override its current agreement, and set an inflation target of, say, six per cent if it wants to. Immediately, the whole world will know and, those interested or affected will react immediately and accordingly.

The Maastricht Treaty does not allow either the flexibility or the direct transparency/accountability between the Central Bank on the one hand, and member nations and their electorates on the other. A considerable body of political economy writing is now directed at the potential seriousness of this. If, for example, Italy suffers a major recession, while Germany and France struggle to contain strong growth and inflation, the issue is how does each economy manage its own destiny? Self-evidently, the Italian government cannot lower interest rates through its own central bank, and neither Germany nor France can influence higher rates through the ECB – for instance they only have four of 17 votes of the ECB governing council. Yet Germany alone accounts for about 50 per cent of the total Euro 11 GDP. Effectively, this leaves fiscal policy as the only "real" weapon of an independent government (and which is itself effectively set within a prescribed band).

The ECB is more "independent" than our model, which does not make it right or wrong. It is worth noting that Dr Brash is required to report at least six monthly to Parliament. He is routinely examined by the Finance and Expenditure Select Committee. Importantly, he is a regular speech-maker, before financial markets, farmers, manufacturers and even lawyers (and notwithstanding the ill-judged criticism of him from politicians which such speeches have provoked recently). The ECB is not formally accountable to member nations in this way (cf Mr Alan Greenspan, chairman of the United States Federal Reserve, a regular before the Congress, and in America's commercial life) although it is required to report to the European Parliament. For those inclined quickly to endorse monetary union with, say, Australia, some rather careful thinking needs to be completed first (see for example, Hugh Templeton's article in Wellington's *The Dominion* 14 January 1999 and the Auckland *Herald*'s article concerning the views of Australia's Deputy Prime Minister Tim Fischer 9 January 1999).

For investors, the Euro represents a major change and opportunity. The changes within the Euro 11 are profound and they may come about quite rapidly

WHAT IS IN THE EMU FOR NEW ZEALAND?

Probably not a lot will be the answer, directly, except for New Zealand businesses which trade with Euro 11 suppliers or purchasers, and for those with an interest in a substantial change in the world's financial markets. For investors, the Euro represents a major change and opportunity. The changes within the Euro 11 are profound and they may come about quite rapidly.

The Ford Mondeo example is instructive. If the price difference is so great (and 50 per cent is quite a margin), the first observation to a German Ford car trader or purchaser is that the price difference is immediately obvious. It is on the "shop window" as it were. Absent explanations such as taxes or freight, the price arbitrage is clear. Rational buyers and sellers will seek to exploit it.

Financial institutions are also likely to lose margins on translation business. Traders within Germany, buying and selling between France and Italy, do not have three way currency positions any longer. Even if they were unhedged, either maintaining foreign bank accounts or converting back to home currencies, such transactions have substantial deadweight costs for those traders (banks take margins). Cash management across accounts and borders takes time, uses precious resources and costs money. Estimates vary about the size of such markets – and the apparent costs of their operation. *The Economist* refers to estimates that foreign exchange revenues for EU banks will reduce by 70 per cent (7 Nov, p 91): this is predicted to be worth some US$40 billion per year (Oct 24); *Fortune* Magazine put it at some US$65 billion (21 Dec, p 81).

Under the rules, each of the currencies of the Euro 11 will continue physically to survive for another three years (vast quantities of new notes and coins are being produced to smooth the transition; and a truly grand version of the "the 10th of July next year" – being 1967, for those of us old enough to remember the change to decimal currency, emerges in Euroland in 2002). The conversion occurred on 31 December 1998. The Euro will move from its current virtual existence over the period – traders can receive constituent currencies and translate to the Euro in circumstances where the convertibility is both fixed and now free.

Firms' legal obligations on contracts are also in effect currency fixed at this point. Regulations of the EU are meant to ensure that there is contractual continuity and, once the transition expires in 2002, "national currency Y" means Euro, at least in terms of EU law. International law equally will apply lex monetae.

Thus New Zealand firms trading as buyers and sellers with their purchasers and suppliers in the Euro 11 are more likely than not to be at least marginal beneficiaries. The Euro itself is expected to be a much more liquid and powerful medium of exchange, even beyond the mighty Deutschmark (and if only because it is effectively twice the size, across a range of more broadly diversified economies). If the value stability is in fact realised, an element of historical volatility across the currencies will no longer be quite so apparent.

Just as a German wanting to buy a Ford Mondeo will easily be able to use transparent price differences to buy at the best price (tax, transport, convenience etc to the side), so also will New Zealand traders. Relatively homogeneous goods and services from different Euro 11 sources will have much more clearly discernible price differences. New Zealand firms can and will make their choices, particularly for supplies, accordingly (and New Zealand exporters competing in these different markets will of course be similarly vulnerable to Euro price transparency).

Price transparency is one undoubted effect. Probably more important is the effect in the EMU financial market. The mobility of capital and of wealth will have a greater effect and is likely to determine whether EMU "will work" or will provoke what will become very serious political issues. The contributors of investment capital to, say, Italy can far more easily vote with their "Euro money" out of Italy, if its economy fails relatively, in comparison to, say, France. As with price transparency, it is so much easier to measure economic performance and investment returns comparatively, given a common measurement base. Shareholder returns from individual firms immediately are both transparent and exposed to competition.

The differences between the United States (single) capital markets and those of Euroland are striking. Euro firms borrow from banks at a rate 3:1 in comparison – the balance coming from the bond market. The US is the reverse. While a lot of this is caused by different commercial approaches, much of it is attributable to fragmented, small, currency blocs. They are now gone.

> In short, a lot [is] riding on the effect of the euro on the capital markets
>
> *The Economist* p 83, 21 November 1998

Also of importance is the size of the Euro, and its potential emergence as a second currency of world reserve status. This is a significant matter for New Zealand households and savers. If a person were to come from Mars, to our universe, that person would be unlikely to select New Zealand as the physical location for a significant portion of his or her assets (indeed, any!). *The Economist*'s economic indicator pages do not even mention us, a mark of "national esteem" and as the editors observed (2 Jan 1999, p 17):

> Disgruntled government officials and businessmen often demand to know why their country is left out. The answer is simple. New Zealand's economic policies have been more exciting (and commendable) than Belgium's, but (given our space constraint) the criterion for inclusion ... is size: Belgium may be uneventful but its GDP is almost four times that of New Zealand's.

To expect the Euro immediately to undermine the hegemony of the US dollar in world markets is at least brave. Apart from the absence of the United Kingdom and sterling (formerly the second largest "world currency"), the United States is very different. It not only is much wealthier in GDP terms, but also it enjoys an almost 200 year advantage of union, common language and overwhelmingly one physical continent. As *Fortune* observes, referring to the current American Ambassador to France, Mr Felix Rohatyn – a giant in US investment banking circles – the US has one capital market, and a Federal government and system of laws, including the vital interstate commerce clause of its Constitution. All of these have been at work for over 200 years, based on English language and in a single and undivided geographic area (ignoring Hawaii). Notable though the achievements are, the Treaty of Rome and its successors have yet to approach that standard close, and have had nowhere near the time or the common language base to do so.

For some, the very idea of monetary union with Australia will be as bad as the Wallabies beating the All Blacks again this year. Could anything be worse?

Moreover, world trade is dominated by the US dollar, and way beyond its relative weight as a country in such trade. It is the world's main currency. It dominates world trade pricing and, *The Economist* has it, some 87 per cent of the FX transactions have the US dollar on one side. Some 50 per cent of the commercial notes and bonds are currently US dollar denominated, as are foreign held bank deposits. These features were probably reasonably obvious by the beginning of World War II; undoubtedly they were hugely expanded not just by that event itself but also the subsequent reconstruction of Europe through the Marshall Plan, and also Japan.

The almost instant creation of a "second" world currency, made up in half by the security of the long-standing policy sustained now over 50 years of the German Bundesbank, and a religion of immutable "price stability" (0-2 per cent), is important. One would expect investors around the world to back the Euro, simply because it is both "second" and so big – in the order of 30 per cent of the world's economic weight. Confidence is infectious and the early weeks of transition no doubt are encouraging, especially for those concerned about being overweight in $US. The growth of volume should compound, because with it should go an increase in the depth of liquidity and increasing stability. The rate of change should be relatively rapid. Whereas the United States in the late 1790s had huge information/geographic barriers (no steam trains, post, telegraphs), Europe has the benefit of e-commerce and all that goes with almost instant access to information transfers, as well as of money itself.

For the New Zealand household saver the issue is about portfolio diversification. The "prudent person" test we are familiar with under the Trustee Act is orthodoxy, and it applies beyond New Zealand asset classes. Of course it is true that a New Zealand household saver is not just likely to live here but also likely to consume some of his or her savings domestically. Such an approach does not per se imply a 100 per cent allocation to New Zealand dollar assets. Such a saver will be consuming, for example, cars or TV sets or computers, none of which has any pricing relationship with New Zealand outputs or inputs. We import so much of what we consume, or use in our tradable sector, that it is common sense to seek asset and risk diversity, by way of country exposure.

AUSTRALASIAN EMU?

Australia is our most important trading partner, taking nearly a quarter of our exports (and it even rates on some of *The Economist*'s "Economic Indicators"). While the Euro has caused the Trade Weighted Index to be reconstituted (now represented by both trade volume and respective GDP size), Australia makes up 18 per cent (down from 38 per cent on the previous definition).

Simply on a proportional basis, the Euro is also attractive, as a currency, making up 23 per cent of the TWI. Relative to Australia, it should be even more attractive for a New Zealand household, because Australia is so much smaller, and its currency is more prone to both liquidity and systemic risk. Given the geographic proximity, and trade relationship post – CER, if EMU truly does make economic (as well as political) sense, the question we should ask is whether monetary union with Australia is an attractive proposition.

Before commencing the preparation of this article, the writer confesses to have been in the British "Euro-sceptic" mould. And it may prove that the Euro-sceptics will be right; one or more of the member European governments could be forced to leave the Euro because of its doubled fisted grip over monetary policy (0-2 per cent and nothing else; immutable) and also its clear direction to orthodox fiscal rectitude (budget surpluses over the long-run of the business cycle).

However that may prove to be, there is a compelling theoretical case for New Zealand carefully and positively to examine a monetary union with Australia. This is not the case for political union – they are different. There are some aspects to the case for Australian monetary union which appear to be self-evident. Size, for one – Australia will dominate because it is in the order of six times bigger in GDP, population and it is relatively wealthier per person.

Most of our financial institutions are Australian owned. It is a practical certainty that, just as the Deutschmark and the Bundesbank have provided the core for Euro policy, so would the Australian dollar in union (and if Australia's Deputy Prime Minister really did seriously refer to the "Zac" as the name for a single currency, we can think again!). While Australia currently has an admirable policy position concerning price stability, the institutional framework for its Reserve Bank is different from our own.

For some, the very idea of monetary union with Australia will be as bad as the Wallabies beating the All Blacks again this year. Could anything be worse?

It is contended that the idea is worthy of close examination because of its economic benefits. If we adopted a common currency, with our largest trading partner, whose financial institutes dominate our own, some substantial economic effects would be soon felt.

Substantial layers of transaction costs would be removed and so would the causative risks. New Zealand exports to Australia would be paid in the same currency as their inputs would be measured. There is no need to hedge prices, and there is no currency conversion. The exporters can measure costs – rent, wages, electricity, telephones etc in the Australian dollar equivalent value. Such traders could not eliminate other foreign currency input risks (recall that about half of world trade is priced in US dollars), but the intra-country trade volume would imply significant benefit, particularly because of the dominant position of Australian owned banks in our market.

At this basic level, what we need to look at is the cost of money, and transactions. Everywhere money moves from country A to B, and between traders and their banks in either of A and B, there is actual or opportunity cost. Someone is paying for all this in the prices of goods or services they consume. Long run traders successfully pass on those costs to consumers. Risk is being shifted, both consciously and unconsciously, between buyers, sellers, financial intermediaries onto consumers, over time and through prices. There is a substantial dead weight cost to both economies, and hence to the national wealth of the people in both countries. This cost is probably able to be measured, because it is reasonably observable, at least comparatively.

Other cost related effects are observable, but their true economic effects are almost subliminal and probably impossible to prove quantitatively. Recall the Ford Mondeo example. When New Zealand firms set prices for goods and services in this country, and in New Zealand dollars, their margins are only really capable of measurement accurately with New Zealand competitors with homogeneous or substitutable products or services, and operating in similar sized markets, near enough. When it comes to another country, and almost always another currency, the ability to measure/compare prices and margins becomes very hard work. Taxes are one distortion, and so also are transport costs.

For consumers, it is not easy to measure accurately the difference in prices between Australia and New Zealand for the same goods or services. If the exchange value is common, however, the consumer needs neither a Hewlett-Packard calculator nor a Reuters screen to match up. As in the "Euro 11 land", the prices are commonly expressed, in the shop-windows. For the buyer of the Ford Mondeo in Germany, the power of this price comparison is obvious – and it is likely to be very influential in making a decision about where to get value for money. At this simple level, trading power through transparent price competition is enhanced.

It is ridiculous to go too far with this. Even if a "Big Mac" cost half of the New Zealand dollar comparable price, there is something of a problem for New Zealand consumers who wish to consume through the Hunter Street, Sydney branch of McDonalds. But even this example is superficial, without a real response to what is the underlying question. Why is there such a difference? There are real answers to some questions – population size, distribution costs and efficiency, distortionary effects of taxes and duties are some. The labour market is also profoundly influential. The point is not to develop a theory which provides a rational explanation of pricing differences; rather if expressed in a common unit of measurement, immediately the question, why? is expressed. Intuitively, a trader able to use and measure his or her firm's buying power in a common currency across national boundaries is likely to compete down otherwise hidden margins, because such margins are immediately made obvious.

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Forecasting longer term macro economic effects is notoriously hazardous. For a person unskilled in economics, it is likely to be dangerous. Notwithstanding, hazards recognised, a currency union between New Zealand and Australia should produce clearer margin pressure on prices of mostly homogeneous products, apart from removing the dead-weight costs on all types of currency flows and in the banking sector. Consumers and savers should both benefit.

Beyond that, it is necessary to go back to the politics of such a monetary union. First, an explicit treaty based on a common central bank, charged with maintaining price stability, has to be a given. Second, and just as automatic, the Treaty would need to prescribe in detail both the mechanisms open to each country to manage its economic cycles, and also the mechanisms as to how the unified central bank would maintain price stability. These are neither simple economic nor political questions. If both countries were persuaded to proceed with monetary union, there has to be a common position about "price stability", how it is to be maintained, and about accountability. We would no more accept the ability of Australia's government to alter the agreement, or suspend it, that we would expect Australia to accept it from us. The ECB is governed by a representative 17 person council; members are appointed for a single eight year term (ie not renewable). It is highly unlikely that Australia would see us as having an equal right, although both Germany and France have set a precedent for an extraordinary level of restraint, concerning their own size. Accountability to the respective Parliaments would be critically important, even if conducted on a joint basis. It is obviously desirable that the voting populations in each fully support the change. While CER has been an act of the executive –as is any Treaty agreement under our systems of government – monetary union should command something more, including an Act of Parliament.

It seems likely that an explicit inflation target has an important influence on both the level of expectation, and on actual forecasting. So long as the financial markets believe that the target is credible, and that the institution will strive to deliver, it would be surprising if people then acted irrationally. In that regard, we can observe our own markets reacting with interest rate adjustments quite frequently, and commonly before the Reserve Bank has said a word. There is a strong sense of "ownership" of the Reserve Bank's policy in the financial markets, because of the transparent single goal of price stability.

The New Zealand Reserve Bank has historically placed a strong emphasis on the exchange rate, and tried to influence monetary conditions according to its view of the rate of change of pricing in the domestic market. A lot of criticism was directed at this, some of it in the mistaken belief that the Reserve Bank "knew" what the appropriate exchange rate "target" was. Properly understood, it seems clear that the Reserve Bank was trying to measure inflationary pressures, and use interest rates to move our exchange up, to reduce import price pressure (or vice versa). The real focus was on price levels.

More recently, the Reserve Bank has altered this approach. It seems almost conventional wisdom now that the earlier focus was misplaced, and that the exchange rate appreciated too far and too rapidly and without appropriate interest rate focus. The bank now uses a monetary conditions model, focusing on an 18 month or 2 year horizon and which seems closely to resemble "the Taylor Rule" (which proposes that interest rates should depend on the inflation rate relative to its target and the level of output relative to trend ie full/over capacity). This approach is tricky territory for a very small country with a large exposure to international trade. Whereas "the Fed" can alter US rates by 25 bp, at the end of a quarter, our market can and does alter much more, even in a day. Unlike the US, we are very exposed to international trade and so our exchange rate has a much more profound effect on our domestic price levels. Interest rate adjustments have been much larger and made more quickly, than is common experience in the United States.

the true "test" for the stability of EMU will come when the German and French economies start sharply to part company in terms of economic performance

Exactly how a unified central bank operates is a vital issue. If New Zealand were in recession, and Australia struggling with an inflationary boom, a unified currency means common interest rates. The very instrument currently in use by the Reserve Bank is not nearly as easily employed, and of course our government could not unilaterally instruct a unified central bank to put the target to one side. Under the Maastricht Treaty, the ECB is prohibited from taking instructions from the governments.

While these are issues, they are capable of organised resolution through negotiation. There is a lot to be gained for both New Zealand and Australia if a monetary union can be agreed within an acceptable policy framework.

CONCLUSION

EMU is an accomplished fact now, at least institutionally. The public of the Euro 11 will in due course move beyond dual pricing, and have a hat full of new notes and coins by 2002. In that sense, the jury is now out in terms of whether one of the smaller constituents can weather a recessionary storm while Germany and France are going strong, along with the rest. In real life, Ireland's current boom conditions (predicted eight per cent growth) do not reflect the same requirements as Germany, as it continues to digest the huge cost of re-unification and high unemployment. If the Euro continues to bear relatively high interest rates, and is relatively strong against other currencies, the recessionary country has very limited choices left. Its government would need to do better than just pray that it had a very strong fiscal position (in order to be able to cut taxes) and a strongly competitive economy and productive, mobile, well educated work force. Ireland's present position is out of step and inflationary. It does not have the traditional methodology to influence that, leaving fiscal policy as its main and cruder weapon.

Given their size, probably the true "test" for the stability of EMU will come when the German and French economies start sharply to part company in terms of economic performance. Neither can independently use interest rates, and each would need a broad consensus because of the construction of the central bank's governing body and its membership. Without that flexibility, in those circumstances, other macro economic policies provide some alternatives. But it is not easy to understand that German voters would be happy to support a massive transfer of their wealth, on the scale necessary for East German reconstruction, to the French in economic crisis or vice versa.

It is hardly surprising that a significant body of economic writing is now looking at Euro 11 labour market flexibility. By our standards, inflexibility is a better description. Because of the different languages, the mobility of labour is not nearly as easy to see in Europe. Putting language to one side, one suspects that the populations do not themselves have a shared view of the desirability of being flexible about where one lives and works. In addition, highly structured social welfare supports clearly act as a disincentive to such mobility in any event.

We should also clearly understand the implications for traders and for those in the labour markets. It is relatively easy to see the good sense in, and economic benefits from, a wider capital market (with common stock and bond market rules). The longer term effects on the tradable sector and on labour markets are more intuitive. Whether the United Kingdom's "opt out" decision is inspired insight is unknowable. It has the luxury of being a giant capital market and from which it can observe, for a period.

If we were to pursue a monetary union with Australia, because of the likely significant benefits in the tradable sectors, the structure of a central bank is a vital pre-condition It would be nice if Dr Brash were to run it for, notwithstanding the ill-judged and inaccurately based criticism of him, because he does understand:

> Monetary policy works best if firms, households and financial markets understand exactly what a central bank is doing. A mixture of discretion and secrecy makes for a dangerous cocktail.
>
> *The Economist*, 31 October 1998, p 96 ❑

Acknowledgeents

This article draws heavily on a series of eight "briefs on the Euro" in successive weeks of *The Economist*, commencing 17 October 1998; "*Brave New Europe*" by Henry Muller and "*The Euro: Be Careful What You Wish For – You May Get It*" by Prof Paul Krugman, 21 December 1998's edition of *Fortune* magazine; and Merrill Lynch & Co's *3rd EMU Debate* chaired by Prof. C Bean of the London School of Economics, 26 November 1998. For a comprehensive analysis of the European Central Bank, see Credit Suisse First Boston's "*ECB-Watch*", December 1998.

THE LAW OF FRANCE AND THE LAW OF NEW ZEALAND

Justice W D Baragwanath

addressed the Alliance Française in Wellington on 21 September 1998

There have been at least seven waves of French influence upon our law. The last and greatest is increasing in its effect.

Only towards the end of the three decades for which I have been involved in the subject would it have occurred to a New Zealander to speak of the influence of French law on that of England and New Zealand. Rather the civil law of France and our common law have been seen as antithetical. Article 5 of the *Code Napoléon* of 1804 provided that:

> Il est défendu aux juges de prononcer, par voie de disposition général et réglementaire, sur les causes qui leur sont soumises.

While "jurisprudence" is an inevitable result of the existence of appellate Courts, that remains the law of France as part of the Code Civil. The common law, by contrast, is entirely Judge made, even if nowadays it is coming to be recognised that it must be developed consistently with the policies of Parliament.

The complementary notion of codification of the law is another distinguishing feature, Napoléon having drawn together all the important laws in the written form of the Codes. In theory and to a significant extent in practice the technique of codification remains alien to the common lawyer.

The very process of legal analysis appears strikingly different, especially as expressed in the formal phrasing of the civil law judgment of the Court, contrasted with the individualistic and idiosyncratic judgments, including dissenting judgments, of the common law Judges.

In fact French influence has occurred in quite major respects in the development of our law and the process is currently accelerating. Yet most common lawyers are largely unaware of it. What has been the influence and why have we been oblivious to it?

THE FIRST WAVE

The great English legal historian Maitland described the Norman Conquest as:

> a catastrophe which determines the whole future of English law. We can make but the vaguest guesses as to the kind of law that would have prevailed in the England of the thirteenth century or of the nineteenth had Harold repelled the invader ... [I]t is slowly that the consequences of the great event unfold themselves ...
>
> Among the most momentous and permanent effects of that great event was its effect on the language of English lawyers, for language is no mere instrument which we can control at will; it controls us. Pollock and Maitland *The History of English Law* Vol 1 Chapter IV.

Maitland observed that:

> If we must choose one moment in time as fatal, we ought to choose 1166 rather than 1066, the year of the assize of novel disseisin rather than the year of Hastings. Then it was that the decree went forth which gave to every man dispossessed of his freehold a remedy to be sought in a royal Court, a French-speaking Court. Thenceforward the ultimate triumph of French law terms was secure. In all matters the French element, the royal element, was the modern, the enlightened, the improving element.

The language itself was important. While Latin was the language for laws and ordinances until the middle of the 13th century, it was succeeded by French which dominated for the next two centuries and left a permanent legacy. The significance of the point in New Zealand as we enter the 21st century is illustrated by the concept of sovereignty – the Norman-French term that remains crucial to the identity of the state at international law, the jurisdiction of state Courts over foreigners, and – critically, as the term mistranslated into Maori as *kawanatanga* instead of *mana* or *rangatiratanga* – the relationship between Maori and the Crown under the Treaty of Waitangi.

But perhaps of even greater moment was the effect of the Norman presence upon how the law was systematised. The French genius for bringing system into the law was present from the beginning. The Domesday Book of William is only the best known of the measures to impose law and order. The *Leges Henrici*, the Laws of Henry I, were an attempt to state the existing law in a comprehensive and even a philosophical form. It may be called an initial attempt to codify the law of England: a task with which the English Law Commission continues to wrestle. The process included the importation of the Frankish inquest, which evolved into what that English claim as their institution: trial by jury.

Above all was the custom of the King's Courts, described in the Latin of the *Leges Henricus* as:

> - the tremendous empire of kingly majesty
> - applying a jurisprudence developed by a Court composed of Frenchmen to meet cases in which Frenchmen were concerned; the language in which men spoke it was French; and in the end, so far as it dealt with purely private rights, it would closely resemble a French *coutume*.
> - [While undeveloped in Norman times t]he future was to make the jurisprudence of the king's Court by far the most important element in the law of England ....

Finally in 1215 came the Great Charter, imposed on John by the great barons in vindication of the feudal rights introduced by the Normans, bringing the King himself under the rule of law. It remains our fundamental constitutional protection, reproduced in Volume 33 of our Reprinted Statutes of New Zealand.

THE SECOND WAVE: THE ENLIGHTENMENT

As a rule English law has never placed much weight on abstract principle. With certain notable exceptions the development of the common law of England was, as it has remained, incremental from case to case.

In *Dr Bonham's Case* Sir Edward Coke, the Chief Justice of the Common Pleas, revived the medieval notion of the supremacy of the law over even the wishes of the King. Removed from that office against his wishes to the less influential office of Chief Justice of the King's Bench he re-entered Parliament and was author of the Petition of Right protesting against prerogative rule, to which Charles I reluctantly consented. Cromwell's execution of Charles I was the watershed, in England, between Royal and democratic government. But the English temperament seemed to lack the philosophical bent required to express the principle.

It was left to a Frenchman, Montesquieu, to do so. In *De l'Esprit des Lois* Livre XI Chapitre V (Ed GF-Flammarion p 294) he observed:

> *De la Constitution d'Angleterre*
>
> Il y a, dans chaque Etat, trois sortes de pouvoirs; la puissance législative, la puissance exécutrice de choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil.

The ensuing account of the consequences of confusing them is so lucid and intellectually convincing as to be retained in the current edition of *Halsbury's Laws of England* as the definitive statement of our basic constitutional precept. What is more, his rejection of absolutism and acceptance of the relativity of law is a profound insight, as topical today as in 1748. His account may, at least in the eye of a common lawyer, be seen as the Enlightenment's gift to modern New Zealand constitutional theory. Implicit in it is, as Oliver Wendell Holmes popularised, that law is not a brooding omnipresence in the sky but a practical reaction to real needs. It provides the philosophical basis for understanding the roles of law: for order, so one can know on which side of the road to drive, to facilitate transactions, as by making wills and contracts, to regulate conduct, as by laws prohibiting abuse of market position, and for a criminal law. It is now increasingly realised, not only that we can both learn much from one another – something of the very greatest importance to anyone with responsibility for law reform, but that the distinctions are overstated. It is being realised that to the extent that fundamental public values and social problems tend to be similar in France, England and New Zealand, so it is likely that the need for response of the law will also tend to be similar. Montesquieu's 20 year labour is a continuing and major contribution to New Zealand jurisprudence.

THE THIRD WAVE: THE RIGHTS OF MAN

The English reaction to the event in France of 1789 was ambivalent; as seen in Burke's initial euphoria and subsequent change of mind. But the *Déclaration des droits de l'homme et du citoyen* of August 1789 has had pervasive effect, not only in the Amendments to the US Constitution but as expressing the fundamental values of a civilised state.

Lord Goff has recently observed, that while common lawyers tend to proceed as I have observed incrementally, moving gradually from case to case as the doctrine of precedent requires nevertheless –

> nowadays we cannot always be true to our inherited culture. There is a whole new area of jurisprudence in which we find ourselves acting more like civil lawyers than common lawyers. I speak of the enforcement of fundamental human rights which are recognised under the Constitutions of many common law countries .... *The Future of the Common Law* (1997) 46 ICLQ 745, 753.

New Zealand was a major proponent of the Universal Declaration of Human Rights and both the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights. The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 are expressed in the general language of the French Code which was its model. So contrary to the common lawyer's technique that –

> we tend to avoid large, abstract, generalisations, preferring limited, temporary, formulations .... We tend to reason *upwards* from the facts of the cases before us, whereas our continental colleagues tend to reason *downwards* from abstract principles embodied in a Code. We must [now] seek to work down from principles. (Lord Goff ibid.)

My own first exposure to this process was as counsel in *Coburn v Human Rights Commission* [1994] 3 NZLR 323 where the broad language of the human rights legislation encountered the practical problem of dealing with persons having vested rights in superannuation schemes. The remedy was found in adopting, for the first time in English or New Zealand legal history, the process of making a purely prospective judgment, following in this regard the European Court of Human Rights applying the French approach seen in *Neath v Hugh Steeper Ltd* [1994] 1 All ER 929. The result made practical sense and was adopted by Parliament, after a modification that only it could make.

The most recent example raises the issue in Art 11 of the Déclaration of 1789 –

> La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi.

Earlier this month the Law Commission issued its report *Defaming Politicians: A Response to Lange v Atkinson*, following a judgment of the Court of Appeal of New Zealand with which the Court of England has expressed disagreement. The issues are difficult but critical.

THE FOURTH WAVE: CONSTITUTIONAL AND ADMINISTRATIVE LAW

Since its publication in 1885 the influence of Alfred Venn Dicey's *An Introduction to the Study of the Law of the Constitution* has led the profession to accept as a datum that French law's recognition of the need for a distinct *droit administratif* was somehow evidence of a deficiency compared with the common law which did not. Dicey's thesis was that the application to the executive in the ordinary Courts of the ordinary law of the land was to be preferred to the establishment of special Courts to perform the function of applying the rule of law to the government.

For over a century Dicey's influence on British public opinion has led generations of lawyers to see the civil law of France and the common law of England as scarcely on speaking terms. The towering genius of Napoléon as both general and law maker seems to have led to a backlash similar to that against Maori rights which followed the Land Wars, from which we are still recovering.

Inevitably someone like me who has practised administrative law in NZ for a generation sees some advantages in the common law single Court system. That is less so in Australia, where the Administrative Appeals Tribunal has established a formidable reputation for competence.

Most recently, in enacting the New Zealand Bill of Rights Act 1990 s 3(1), our Parliament has both adopted Montesquieu and distinguished sharply between public and non-public functions –

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

We have after 90 years reached the position stated in 1908 by the Conseil d'Etat in *Feutry* where the Commissionaire du Gouvernment concluded:

> Il semble *a priori* qu'on ne puisse même pas concevoir la possibilité d'une différence entre la situation des départements ou des communes et celle de l'État. *La puissance publique est une*, le caractère de ses actes ou de ses opérations ne change pas suivant l'importance territoriale de l'administration qui agit. Les actes accomplis par les représentants ou les agents de l'administration ont la même nature, quelle que soit l'étendue de la circonscription où exercent ces agents.

See Allison "Theoretical and Institutional Underpinnings of a Separate Administrative Law" in Taggart (ed) *The Province of Administrative Law* Hart 1997 at 73.

See also *Electoral Commission v Cameron* [1997] 2 NZLR 421 in which the Court of Appeal held that the Electoral Commission was entitled to judicial review of the unincorporated Advertising Standards Complaints Board because, although acting in accordance with powers conferred by a private organisation, it was exercising public power by creating the Advertising Codes of Practice 1995 and so was reviewable on common public law principles.

In truth we are still wrestling with the tension between problems of justiciability, or competence, and independence. I have recently attempted in *Ports of Auckland Ltd v Auckland City Council* CP 306/98 High Court Auckland, 18 September 1998 to identify two points on the spectrum between judicial deference to executive competence and the hard look approach that can be appropriate in areas with which the Court is familiar. I recorded in that judgment the value of the specialist experience of the Environment Court Judges and Commissioners in Resource Management Act litigation. We have retreated a long distance from Diceyan chauvinism and the attitude of "one Court fits all". I do not doubt that we can continue to learn much from the French experience.

Indeed in the Law Commission's recent Report 37 *Crown Liability and Judicial Immunity: A response to Baigent's Case* and *Harvey v Derrick* we expressed at p 6 the principle of equality and went on to examine the relevant French law in detail.

In a recent essay by Van Hoeke and Warrington *Legal Cultures and Legal Paradigms: Towards a New Model for Comparative Law* (1998) 47 ICLQ 495 at 515 it is said that (as in New Zealand and England):

> ... in [France] administrative law is hardly ever codified or even governed by statute, and unwritten "general principles of law" are more often used.

I suspect in this sphere we will benefit still further from close examination of the French experience.

THE FIFTH WAVE: LEGAL ANTHROPOLOGY

In 1994 I had the privilege of taking part in a colloque in Nouvelle Calédonie under the auspices of the Université française du Pacifique à Nouméa. The topic was *Coutume autochtone et évolution du droit dans le Pacifique Sud.* I had for some seven years been representing Maori in a variety of claims before the Courts and the Waitangi Tribunal, reacting to the Crown's claims to corporatise and to privatise a wide range of assets. There had arisen in very direct manner just how the competing claims of Maori, under distinct norms and values, could be accommodated under New Zealand law. It was illuminating to meet among a number of distinguished scholars, lawyers and Judges Professor Norbert Rouland, Professeur d'anthropologie juridique Université d'Aix Marseille III. His address commenced with a lovely antithesis between two propositions, one of Bodin dating from 1577 and the other of Condorcet from 1780.

The first read:

> L'un des plus grands et peut-être le principal fondement des Républiques est d'accommoder l'Etat au naturel des citoyens, et les édits et ordonnances à la nature des lieux, des personnes et du temps [...] qui fait aussi qu'on doit diversifier l'Etat de la République à la diversité des lieux, à l'exemple du bon architecte qui accommode son bâtiment à la matière qu'il trouve sur place.

The second stated:

> [...] on ne voit pas pourquoi toutes les provinces d'un Etat, ou même tous les Etats, n'auraient pas les même lois criminelles, les même lois civiles, les même lois de commerce, etc. Une bonne loi doit être bonne pour tous les hommes, comme une proposition vraie est vraie pour tous.

Rouland's thesis is expressed in the English translation of his text *Anthropologie Juridique* (*Legal Anthropology* Athlone Press 1994) p 221:

> as Carbonnier has rightly pointed out:
>
> > What further distances [contemporary thinking] from reality, is the kind of Pharisaism whereby we ask no more than "What is ownership?" without the corollary "But who is the owner?" Blinded by art 544 [of the French Civil Code], we have been satisfied that the attributes of property were alone worthy of our attention, and we have neglected the means of appropriation, which founders in technicalities in another part of the Civil Code (art 711 *et seq*), without realizing the terrible social reality they

> depict. ... Yet for whomever wishes to understand the institution in all its aspects the distribution of property is as important as its organisation.
>
> In other words, we cannot study ownership without studying those who have rights of ownership.

That thesis, expressed by the doyen in France of the discipline, is to similar effect to that expressed by the Court of Appeal of New Zealand in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20.

With the benefit of Professor Rouland's analysis and that of Sébastien Grammond of McGill *La protection constitutionelle des droits ancestraux des peuples autochons et l'arrêt* Sparrow (1991) 36 McGill LJ 1382 it was possible to deduce the result that the New Zealand constitution is duadic. As well as the predominant Pakeha legal constructs by the Judges of the common law and by Parliament of legislation, there is a residual set of Maori norms to which it is the duty of the Courts to give legal effect in so far as they have not been ousted by the Treaty of Waitangi's cession or by statute. Except where the original cession and subsequent statutes provide a bar, the Courts will give effect to Maori aboriginal rights. Baragwanath *The Treaty of Waitangi and the Constitution in New Zealand* Law Society Seminar *Treaty of Waitangi Issues – the Last Decade and the Next Century* April 1997 p 11.

THE SIXTH WAVE: THE EU AND THE ECHR

New Zealand's final Court of Appeal of course remains the Judicial Committee of the Privy Council. The Judges of that body are the Lords of Appeal who in another capacity sit as members of the Appellate Committee of the House of Lords as the final tier of appeal for United Kingdom cases. The accession by the United Kingdom to the European Court of Human Rights and its joining the European union has resulted in an infusion of French concepts, via European law, into the minds of the Law Lords and, inevitably, into our own jurisprudence. The present Lord Chancellor Lord Irvine of Lairg, has introduced into the UK Parliament the Human Rights Bill which will incorporate into the domestic law of the United Kingdom the rights and liberties guaranteed by the European Convention on Human Rights. In a recent address *The Development of Human Rights in Britain* 1998 PL 221 at 224 he contrasts the approach of the Convention (and the remark is applicable to those to which New Zealand is subject) with the traditional common law approach to the protection of individual liberties. He stated:

> The common law treats liberty only as a "negative" right. As explained by Lord Donaldson MR in [*A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109] this negative approach means that "the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law or by Statute". The liberty of the subject is therefore the "negative" right of what is left over when all the prohibitions have limited the area of lawful conduct.
>
> Dicey saw merit in this negative approach. He believes that the absence of writing lent the common law a flexibility to develop to meet changing conditions. But the approach has disadvantages which are greater ... for the negative approach offers little protection against a creeping erosion of freedom by a legislature willing to countenance infringement of liberty or simply blind to the effect of an otherwise well intentioned piece of law .... The traditional freedom of the individual under an unwritten constitution to do himself that which is not prohibited by law gives no protection from misuse of power by the state, nor any protection from acts or omissions by public bodies which harm individuals in a way that is incompatible with their human rights under the Convention .... The view that because we have liberty we have no need of human rights must be rejected.

I rather think that the 1789 Déclaration has outlived Dicey.

THE SEVENTH WAVE: INTERNATIONALISM

The seventh wave is always said to be the biggest; I do not doubt that this will prove the case. The shrinking of the nation state is borne out by statistics obtained for the Law Commission's forthcoming Report 50 *Electronic Commerce Part I*. See p 3 –

> Business-to-business commerce over the Internet ... reached an estimated $US 8 billion in 1997, ten times the 1996 total. Erwin estimated in a 1997 paper "Sizing Inter Company Commerce" that business-to-business commerce over the Internet would grow to $327 billion by the year 2002.

A report produced for the French Ministrie d'Économie de Finances et de L'industrie *Electronic Commerce: A New Factor for Consumers, Companies, Citizens and government* (1998) is one of the key documents for planning for the future of communication in cyberspace. To achieve a lex mercatoria it is imperative that the common law countries should continue to learn from France and the other civilian states how we can modify our procedures in a way that will provide a single seamless whole for the world-wide enforcement of business transactions.

IX. CONCLUSION

The common law has been an inveterate borrower of ideas from other jurisdictions just as the English language has always done with foreign words. While my focus has been on public law, Pothier's influence upon our law of contract is one example. Another is the adoption of *travaux préparatoires* in aid of statutory construction which occurred in England as recently as 1992, following its occurrence in New Zealand rather earlier. A third is the Warsaw Convention: in a recent judgment I was required, in order to determine liability for the injury to a horse being freighted from Sydney to Auckland, to assess the meaning of the French language text.

Certainly significant differences remain. In the important sphere of determining whether to exercise jurisdiction the common law Judge exercises a discretion as to *forum conveniens* unknown to the French Courts, which expect to be guided by rules. See essay by Helene Gaudmet-Tallon, Professeur à l'Université Paris II, in Fawcett ed *Declining Jurisdiction of Private International Law Clarendon* Press 1995 Chapter 8 pp 175-187 *France*.

But a leading authority on English and French law, Professor Bell, who has performed a close study of both systems, has called a recent paper *English and French Law: Not So Different?* [1995] Current Legal Problems 63. I do not doubt that, with ever improving communications, the differences will continue to recede. The way forward, I suggest, is to ride the seventh wave with even more vigour than its predecessors. ❑

CONFLICT OF INTEREST

TRANSACTIONS

with

Brian Keene

Russell McVeagh McKenzie Bartleet and Co v Tower Corporation [1998] 3 NZLR 641 (CA); *Bolkiah v KPMG* (House of Lords, 18 December 1998). Not only were the approaches of these two judicial bodies to potential conflicts of interest significantly different but the House of Lords considered and rejected the New Zealand Court of Appeal's approach. In New Zealand, the firm of solicitors was entitled to continue to act as on balance the risk of divulging confidential information was too slight. In contrast, the House of Lords granted an injunction and restrained KPMG from acting further. The public policy issues balance the need for the commercial community to have access to a range of advisers who in turn must inevitably run conflict of interest risks to maintain their work bases, against the right of an individual client to have an absolute assurance that confidential information will be protected.

Although not explicit in *KPMG*, it is also evident that the international chartered accountancy practices in extending their range of services to forensic and para-legal advice will have to accept a corresponding heightening in their duties to clients.

First, the factual similarities in the two cases: in both cases, the issues centred on a former client restraining his/its previous adviser from acting for an interest potentially or actually adverse concerning that client's confidential information relevant to the second brief; both cases were decided upon the basis of a solicitor's obligation to preserve confidential information. Whilst it was true that KPMG performed accounting work, nonetheless it was in the nature of litigation support services. The House of Lords took the view that the Court should exercise the same jurisdiction in the respect of that accounting work as it would have had the work been legal and performed by solicitors. The basis was that the same principles applied to all forms of relationships between the client and adviser where the business involves the protection of confidential information.

In both cases, the advisers placed considerable weight upon information barriers in the firm ("Chinese Walls"). One of the principle reasons for the different outcome was the lesser weight attached to this technique by the House of Lords compared to the New Zealand Court of Appeal and the different burden imposed upon advisers by the House of Lords.

KPMG

KPMG were standing auditors for the Brunei Investment Agency. Whilst holding that role, it was approached by the appellant, Bolkiah, a brother of the Sultan of Brunei (who then enjoyed a close working relationship with him). In a significant retainer between 1996 and 1998, KPMG was retained by both Bolkiah and his associated companies in connection with major litigation with third parties. KPMG undertook the tasks usually performed by solicitors. The job was given a code name – Project Lucy – and significant particular security arrangements involving separating personnel, premises and computer access were put in place by KPMG. The litigation was eventually settled and all KPMG's papers handed over to solicitors.

Following the cessation of that brief, the government of Brunei asked KPMG to investigate substantial capital transfers known as "the special transfers". This work was able to be completed from audit records. From this grew a second and more controversial (from Bolkiah's point of view) proposal codenamed – Project Jemma. Its task was to discover the ultimate destination of the special transfer and it was clearly – in part at least – actually or potentially adverse to the interests to the interest of Bolkiah. He objected.

KPMG adduced evidence that all staff working on Project Jemma had been screened to avoid any possibility of those with material adverse information from Project Lucy becoming involved in Project Jemma. Nonetheless, of the 51 persons employed on Project Jemma, 11 had been employed on Project Lucy albeit – so KPMG argued – on a low administrative level.

Bolkiah sought an injunction in the High Court in England and it was granted. This decision was reversed on appeal to the Court of Appeal and Bolkiah appealed to the House of Lords. The judgment of Lord Millett was adopted by all the Law Lords with Lord Hope of Craighead adding some short supplementary conclusions.

Both the New Zealand Court of Appeal and the House of Lords accept that where there were not simultaneous conflicting briefs, the Court's jurisdiction to intervene lay in the protection of confidential information. This, therefore, was a common approach.

The first crucial difference between the two judgments lies in the approach taken to the protection of confidential information. The New Zealand Court of Appeal accepted a less stringent test for protection of confidential information. It held that provided the firm had taken all reasonable steps to protect the former client's confidential information, that would be proof against granting the injunction. In contrast, the KPMG judgment held that the issue was not whether all reasonable steps had been taken to protect confidential information, rather whether those steps were effective. The test adopted is:

> The Court should restrain the firm from acting for the second client unless satisfied on the basis of clear and convincing evidence that the effective measures have been taken to ensure that no disclosure will occur.

The presumption

Only the advisory firm can know how effective confidentiality protection steps may be. Accordingly – and quite rightly – the House of Lords held that once the former client had established that the advisory firm was in possession of information imparted in confidence which was or may be relevant to a certain adverse brief, the burden shifts onto advisers to show that even so there is no risk that the information will come into the possession of those acting on the new adverse retainer.

Chinese Walls

The New Zealand Court of Appeal in the *Russell McVeagh* case treated these as having considerable significance. There is a wide-spread divergence throughout Commonwealth jurisdictions of the efficacy and therefore the legal importance of these devices. Tellingly, Lord Millett observed:

> There is no rule of law that Chinese Walls or other arrangements of a similar kind are insufficient to eliminate the risk. But the starting point must be that, unless special measures are taken, information moves within a firm.

After commenting upon the consultation paper on fiduciary duties and regulatory rules issued by the UK Law Commission, Lord Millett reviewed the Chinese Walls established in the present case. He declared them to be ad hoc and erected within a single department where the personnel exposed to each of the adverse retainers worked with each other in circumstances where partners and managers were accustomed to sharing information and expertise. In short, the arrangements fell short of KPMG demonstrating that they were effective to quarantine Project Lucy information from Project Jemma staff. It seems likely that any intra-departmental ad hoc arrangements such as this will fall, on principle, to be thought similarly ineffective although, no doubt, this in each case will depend upon the quality of the evidence adduced.

Express or implied consent

In the *Russell McVeagh* decision no express or implied consent by the applicant for the injunction was argued. In the *KPMG* decision, there was no argument of express consent but the House of Lords addressed the question of whether Bolkiah in retaining KPMG in the knowledge that they were BIA's auditors must be taken to having consented to KPMG undertaking further assignments for BIA in the nature of the auditing role. Thus, the KPMG retainer for BIA before Project Jemma, which reported and resummarised facts evident from their audit, may well have been permissible as within the scope of that implied consent. Project Jemma was, however, quite a different matter.

Constructive knowledge

Is the knowledge of a partner in the firm always to be imputed to all other partners? The House of Lords rules that there is no cause to invariably impute or attribute the knowledge of one partner to his fellow partners. In the end, the actual possession of confidential information is a question of fact to be proved or inferred from the circumstances of the case. This is in line with the ability of the advisers to taken on a subsequent adverse brief provided there are effective information quarantine arrangements.

Legal effects of two simultaneous retainers

The majority of the New Zealand Court of Appeal reviewed Russell McVeagh's actions over the time when it had simultaneous inconsistent briefs. They ruled this history irrelevant to the question of an injunction restraining future acting where no such simultaneous inconsistency was present. Thomas J dissented on the basis that it was inequitable for Russell McVeagh to profit from obtaining the second brief in circumstances which breached fiduciary duty to its first client, Tower. This question did not directly arise in the House of Lords but its approach was that it was only during the currency of two inconsistent briefs that fiduciary issues were alive. Logically, therefore, it would have reached a similar conclusion to the New Zealand Court.

VOIDABLE PREFERENCES

In *Go-Direct Marketing Ltd v Pasadena Holdings Ltd (In Liq)* (M 944/98, Morris J, 4 November 1998), the new voidable preference provisions of the Companies Act 1993 received further judicial attention. The plaintiff, formerly known as Tisco Services Ltd ("Tisco") went into voluntary liquidation in October 1997. Between May and July 1997 some $70,000 was paid to Go-Direct to cover both accrued indebtedness and continuing direct marketing services. The liquidator applied to set aside the payments under s 292 Companies Act.

Go-Direct opposed the application on the grounds first that the payments were made in the ordinary course of Tisco's business under s 296(3) Companies Act, and that secondly it received the payments in good faith and altered its position in the reasonably held belief that they would not be set aside and it would be inequitable to order recovery or recovery in full.

Section 292(3) provides that transactions within six months of the date of liquidation are presumed to be made when the company was unable to pay its debts and to be made otherwise than in the ordinary course of business. The burden is upon the recipients to prove to the contrary. Although Morris J found that Go-Direct was not aware of the severity of Tisco's financial problems, it was generally well aware of its unsound financial state at the time the payments were made. Hence, Go-Direct failed, on the evidence, to rebut the presumption.

Go-Direct's next had to satisfy the Court that the payments made by Tisco to it were in the ordinary course of Tisco's business. Morris J aggregated Go-Direct's knowledge of Tisco's unsound financial state with the requirements that Tisco's principal shareholder and sole director signed a personal guarantee covering past and future services. His finding was that payments were not made in the "normal" course of business. One should observe that "normal" course of business is not the test; rather it is the ordinary course of business.

The last element was the question of whether Go-Direct could rely upon s 296(3). The criteria are:

- receipt in good faith;
- reasonably held belief that the payments invalidly made would not be set aside;
- alteration of position in accordance with that belief; and
- it would be inequitable to order recovery or recovery in full.

Morris J referred to the test approved by the Court of Appeal in *R v Orbit Electronics (Auckland) Ltd* [1989] 4 NZCLC 65,170. In that case, in similarly worded legislation under the 1955 Act (s 311A(7)) the Court of Appeal held that the requirement for good faith must, at least, involve the recipient to have honestly believed the transaction would not involve any element of undue preference. He further adopted previous decisions holding that the issue of good faith involves a consideration of the state of mind of the person to whom payment is made. His Honour held on the facts that Go-Direct was aware there would be some real element of preference and therefore the payment was not received in good faith. Section 296(3) therefore did not apply.

In one sense, this decision maintains a consistency of principle with a number of decisions. However, at another level, one must worry whether the Courts have now become too protective of the rank and file of creditors. This decision, along with *Anntastic Marketing* reviewed at [1998] NZLJ 396 effectively means that where the payee is aware of the company's financial difficulties, it is unlikely that it will be able to satisfy the tests under ss 292 and 296. It seems that any insistence upon immediate payment for goods and services as a condition of their supply (*Anntastic*) or an obligation to pay immediately and to catch up past overdue payments will neither qualify as being in the "ordinary" course of business nor in as received good faith.

But is that what the legislature intended? Indeed, does it strike a fair balance between the creditors generally and the particular creditor? It is perhaps fair to suggest that the Courts may be taking a too particular and overly hindsight view of such transactions and the recipients' real knowledge base. Probably, also, Go-Direct can be aggrieved at not only the severity of the ruling of Morris J but also on his refusal to allow part, at least, of the payments to be retained.

In the commercial world, traders are frequently aware of liquidity problems with their customers. Some are temporary and seasoned, some permanent and endemic; some arise out of a brazen policy to defer debts for as long as possible on an interest free basis rather than drawing upon available facilities from bankers. How is a creditor such as Go-Direct to discern the extent of its customers' financial difficulty and whether it has access to facilities such that – if forced – it could pay its creditors as they fall due? Morris J relied upon Go-Direct's insistence upon a personal guarantee. Such a technique is commonplace as it provides an added incentive for the proprietor to ensure that payments are made on time otherwise his personal resources will be at risk. It does not necessarily imply a knowledge of a more widespread inability to pay all debts as they fall due.

In the particular case, Morris J accepted that Go-Direct neither knew of a huge indebtedness of Tisco to IRD nor its severe financial difficulties in May, June and July 1997. He relied rather upon an exchange of correspondence by which Tisco endeavoured to renegotiate conditions of supply and "freeze" past debts as evidence that Go-Direct "was well aware of the unsound financial state of [Tisco] at the time these payments were made". This is far from being the only necessary implication to be taken from the letters. Indeed, absent knowledge of the wider and more profound financial difficulties of Tisco, it is an implication not likely to be taken by many in day-to-day commerce. Applying the test of considering the actual state of mind of the person to whom the payment is made as being an indicator of good faith, a finding of its absence seems harsh.

Next there is s 296(3). From the judgment, it appears that although some of the $70,000 paid had been applied against past indebtedness, nonetheless, work was done in the period of the payments which exceeded those values in payment. No attempt was made in the judgment to consider whether under s 296(3)(b) Go-Direct should have received some or part of that amount. Morris J correctly points out that given the finding of lack of good faith such further inquiry was not strictly necessary. Yet he goes on to find:

> Here had [Tisco] not received the payment, it would have stopped work and clearly saved itself some expense. By carrying on because of the revenue generated by its work, [Tisco] and possibly some of [Tisco's] creditors have possibly benefited. Probably other persons have lost moneys by continuing to deal with [Tisco] over a period when it was clearly insolvent unable to pay its debts and indeed was ridding itself of such assets as its possessed. In these circumstances it cannot be inequitable, given my findings as to [Go-Direct's] knowledge or [Tisco's] circumstances to refuse it relief.

Advisers must clearly warn clients that as soon as the client is advised of a non-payment of an account due to alleged financial difficulties of the company it is at risk that any further payments received will become voidable, *notwithstanding that they relate to current work or are received upon assistance that work is paid for on stringent credit terms.* In principle, even payments in advance may not work as, *there will not be the requisite good faith* if advance payment is made in the reasonable apprehension of the payer's inability to pay all of its debts as they fall due. The result is a lottery, the consequence of which is known only in hindsight and dictated by whether the company survives the statutory six months from the payment.

The logical consequence is that as soon as a trader becomes aware that a customer may have financial difficulty he should immediately cease trade until satisfied to the contrary. This is, of course, wildly impractical and will hasten the demise of companies which, with reasonable trading indulgences given by their creditors, can trade out of temporary difficulties. This surely cannot be the intended policy. If it is, the law should be reviewed and amended.

It is popularly known that routinely certain liquidators on appointment seek to avoid all payments made within six months of the liquidation on the footing that they will benefit the general body of creditors. It will be for the individual creditor to displace the statutory presumptions leading to voidability. This process is likely to mean these sections of the Companies Act will continue to receive close and detailed attention from the Courts.

INNOCENT LAW PRACTITIONERS' RELIANCE UPON AUDIT

In *Stringer v Peat Warwick Mitchell & Co* (CP 71/91, HC Christchurch, 17 August 1998) Master Venning was obliged to determine whether an auditor appointed under the Law Practitioners Act owed a duty to the innocent partners in the law practice for defalcations by another partner. The case was argued on an application to strike-out.

There was first the remarkable argument that s 189 of the Law Practitioners Act afforded a statutory protection from suit to the auditors. The relevant portion of that section provided protection to the council of the New Zealand Law Society, the District Law Society or any committee appointed by the council or member or employee of the council and "any other persons appointed under this Act to perform any function, in respect of anything done in pursuance of this Act". Master Venning had no hesitation in finding that this section was not intended to be wide enough to encompass an auditor and accordingly declined to strike-out on that basis.

Whilst the result abounds in common sense, it is far from easy to reconcile it with the plain words of the Act. Master Venning holds (correctly) that the auditors are appointed by and are agents of the New Zealand Law Society. Given that finding, it is surprising that the agents (the auditors) do not enjoy the protection of s 189 when their principals (the New Zealand Law Society) will. Surely if there is to be a responsibility to the public – or at least the clients of the particular practice – it should be borne by both the Society and the auditors who have their respective and inter-dependent roles under the legislation.

Tortious duty of care

The second principal issue was whether the auditors owed a duty of care in tort to the innocent partners in a law partnership. The tests in *South Pacific Manufacturing* of sufficient proximity of the relationship between the wrongdoer and the victim was admitted by the existence of policy considerations negativing or restricting a duty. Master Venning had little difficulty in holding the duty of care tests to be satisfied. He had, however, misgivings about finding a legal liability as a result of the duty because he felt a number of public policy issues operated to negative it. These he summarised as:

> The audit was completed under the Law Practitioners Act to protect the funds of the solicitor's client not other principals in the firm from dishonesty or negligence.

Interestingly, this observation seems to be relevant to proximity rather than policy. In other words, no relevant duty of care was undertaken to the innocent principals of the solicitors' firm.

The second is that the auditors' obligation to the New Zealand Law Society does not require, by inference, a co-existing duty to the innocent principals of the firm. Again, one might observe that the relevance of this is to the existence of the duty rather than to any point in policy.

The third ground that the auditors "may well owe a duty of care directly to the solicitor's clients". Again, with the greatest of respect, this is of marginal relevance. A professional may hold co-existing duties to a number of different classes of people. It is not easy to see why owing a duty to the clients negatives a duty to the solicitor principals nor that is elucidated in the judgment.

Fourthly, the special nature of a legal partnership was said to be relevant. The prime obligation to comply with the relevant solicitor's trust account and nominee regulations is that of the solicitor to the client as the innocent partners are equally responsible with the guilty partner to the client. To impose a duty on the auditors therefore is to have them superintend on behalf of each of the partners, the activities of each of the others. Again, this issue probably goes more to the existence of a duty than it does to the public policy point. In truth, the auditors' report under the Act is not for the benefit of those partners as the relevant legal proximity has not been established.

The fifth policy issue advance is really a variant of the last. If the defaulting partner cannot claim against the auditors (and there is some legal precedent to support that) why should his partners? It would militate against internal controls within the partnership and make the auditors de facto insurers of the innocent partners. Of course, this argument applies in every case where a consultant is held liable although the real loss has been caused by another party who is the principal wrongdoer. Does the co-existent liability of architects on building contracts encourage sub-standard building development and workmanship?

Then there is the question that imposing a legal liability on auditors would lead to substantially increased audit fees and a reluctance on the part of auditors to accept appointments to solicitors' trust audit engagement. This is a valid policy point but not one which has – although often argued – rarely been given much weight by the Courts. The judgment concludes –

> As a matter of principle, solicitors ought not to be able to abrogate this prime responsibility to third parties for losses where the solicitors themselves fail to satisfy those statutory obligations. It follows that nor should they be able to obtain indemnities or contributions from other parties.

If this is intended to be a broad statement of principle, it is doubtful whether it is correct. If – as it was probably intended – it relates to a larger over-view of policy issues against the creation of a legal duty, one must still wonder about its correctness. The imposition of a liability on the auditor will not abrogate this responsibility to third parties. At best, it might provide a contribution claim by the innocent partners against the solicitors.

The recently released Law Commission paper on Contributory Negligence (Report No 47 Civil Liability and Contribution Act) illustrates how co-existing obligations can be adjusted between wrongdoers in individual cases to achieve the desired objectives.

In the end, it appears that the right conclusion was reached on the imposition of the tortuous duty, not for questions of policy but rather that the case in all the circumstances failed to satisfy the principal test that the negligent facts or misstatements (the audit opinion) was intended to be addressed for the benefit of a class which included the innocent principals of the law firm.

CREDIT CONTRACTS AMENDMENT ACT 1998

The Credit Contracts Act 1981 provides a code for dealing with disclosure between debtors and creditors on credit contracts. Formerly omitted from this statutory regime of disclosure requirement was a guarantor. The legislature has passed the 1998 Amendment Act requiring a similar level of disclosure to guarantors as is required between creditor and principal debtor. This means initial modification and continuing disclosure. Penalties are provided for failure to disclose. A new second Schedule to the principal Act Part IA defines disclosure as essentially including a signed copy of the guarantee and the other disclosure information which the debtor would receive from his creditor.

The Amendment Act comes into force on 1 March 1999 and its transitional provisions mean that it does not apply to a credit contract made or guarantee entered into before that date. Whilst existing unaltered contracts backed by a guarantee that preexists 1 March 1999 will require no disclosure, the position regarding modification of credit contracts (and accordingly guarantees) is less certain. Here the (revised) credit contract may have been entered into after the commencement of the Act albeit that the continuing guarantee pre-dated it. Prudence and caution would lead one to disclose in such situations. ❑

MEDIATION LEGISLATION – WILL WE FOLLOW AUSTRALIA?

ALTERNATIVE DISPUTE RESOLUTION

edited by Carol Powell

The Mediation Act 1997 came into force in the Australian Capital Territory on 1 July 1998. The Act creates a registration system whereby a mediator can apply to "approved agencies" to become a "registered mediator".

In order to obtain registration a mediator must:

(a) pay any fee payable to the approved agency;
(b) satisfy the agency that she has achieved the standards of competency prescribed by the Act (which standards are specified in an instrument prescribed for that purpose under the Act); and
(c) satisfy any requirements of the agency that relate to mediators.

Registration expires three years from the date it is granted or renewed.

Once registered a mediator and any mediation process in which the mediator is involved is protected by the Act in four ways.

Admissibility of Evidence

Any communication made in a mediation session or document prepared for the purpose of or in the course of a mediation or pursuant to a decision taken or undertaking given in a mediation, is not admissible in any proceedings (with an exception contained in the Evidence Act 1995).

Secrecy

A registered (or formerly registered) mediator is expressly forbidden to disclose any information obtained in a mediation session except in the following circumstances:

(a) the disclosure is required by law;
(b) the disclosure is made with the consent of the parties;
(c) the disclosure is made with the consent of the person who gave the information;
(d) the mediator believes on reasonable grounds:
  (i) a person's life, health or property is under serious and imminent threat and the disclosure is necessary in order to avert, or mitigate the consequences of, it realisation; or
  (ii) the disclosure is necessary in order to report to the appropriate authority the commission of an offence or prevent the likely commission of an offence – where offence means violence or threat of violence to a person or intentional damage or threat of such damage to property.

Protection from defamation

Mediation sessions and documents and material produced at a mediation session or given to a registered mediator for the purpose of conducting a mediation session attract the same privilege with respect to defamation as exists in relation to judicial proceedings.

Protection of mediators

When a registered mediator performs his or her functions as a mediator in good faith, he or she has the same protection and immunity as a Judge of the Supreme Court of Australia.

The New Zealand Situation

For Australian mediators the Act ties up in just a few pages a number of loose ends which have plagued the mediation professionals in New Zealand for some time.

The legislation removes a number of taxing ethical dilemmas for mediators, making it clear when the confidentiality provisions can be ignored for situations which are sufficiently grave.

It also gives the weight of statute behind the provisions which are standard in most New Zealand mediator's conditions of appointment, providing immunity from prosecution.

Finally, the registration procedure is a way of ensuring standards of mediation practice amongst registered mediators. As a consequence it may well be the case that parties will begin to ensure that their choice of mediator is registered as part of the selection process.

New Zealand has been struggling for several years endeavoring to fit mediation practice and training into the NZQA formula which would assist with the standards issue. In the meantime the formal bodies which represent mediators: LEADR and AMINZ, both have procedures in place to maintain the standards of mediators who are registered on their panels of mediators. LEADR is also an approved agency in Australia. This has the effect of ensuring the standards of members of those organisations but not other mediators who practise under their own umbrella. A similar piece of legislation in New Zealand may well assist in resolving these issues in a clear and cost effective way.

Perhaps this could be an opportunity to learn from the Australian experience and ensure a professional standard with adequate protection from ethical dilemmas and law suits for practitioners in New Zealand at a time when mediation is becoming a recognised means of dispute resolution.

WHAT ARE THE AVAILABLE PROCESSES?

There are now a large number of processes available for the resolution of disputes as an alternative to Court proceedings. Many of the processes can be used in conjunction with others where appropriate. Indeed it is becoming more common for parties to formulate their own process to deal with disputes, often at the time of forming a contract. Some of the most often used ADR processes include:

Mediation

Mediation involves an independent third party who manages a process whereby the parties are encouraged to redefine their dispute as a problem framed in terms of each party's needs and interests. While the structure of the process will vary for each mediation, as a general rule the process will involve the mediator introducing the process to the parties followed by each party expressing their view of the dispute. The mediator will then work with the parties to develop a list of issues to be discussed or an agenda.

The discussion which follows will act as a means of information exchange between the parties on each issue. This part of the process may involve the mediator meeting with the parties in private session or caucus. The private session is a means of allowing the party and mediator to raise issues which a party may not wish to discuss in front of the other party. It also allows the mediator to carry out reality checking and to work with the party to ascertain their BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative to a negotiated agreement) (Roger Fisher, William Ury and Bruce Patton).

The parties are then encouraged to develop options which may resolve aspects of the dispute and which meet the needs and interests of the parties. As this part of the process develops the parties then negotiate directly to reach an agreement.

Conciliation

Conciliation is a similar process to mediation. The conciliator is generally acting under a statutory authority, for example the Human Rights Act, which will mean that the process is governed by statute and there may some outcomes which are prohibited as being contrary to the intent of the statute. In some cases the conciliator may act as a shuttle negotiator communicating settlement offers to the parties on each other's behalf. A conciliator may be required to give a report or a recommendation at the end of the process if the parties are unable to reach a settlement.

Non-binding expert appraisal

This is a process whereby the parties to a dispute which involves a technical element agree to mutually format a question or series of questions on which they seek an expert opinion. The opinion received is not binding on the parties but will be used to assist with the negotiation or other dispute resolution process.

Binding expert evaluation

This process involves the parties to a dispute agreeing that technical issues be determined by an independent third party with expertise in the relevant technical area. The parties will jointly select and instruct the expert and will agree to be bound by the decision of that expert. The expert may inspect the relevant site/goods/documents, discuss the issues with the parties and witnesses and may even hold a hearing, depending upon the instructions. A binding evaluation can be used as the ultimate resolution of a dispute which is purely about the technical issue, or in conjunction with other processes, such as negotiation or mediation, for a more complex dispute.

Arbitration

Arbitration is effectively a private Court hearing with an arbitrator or panel of arbitrators who act as the decision makers. The arbitrators are chosen by the parties to the dispute and can hold expertise in the subject matter of the dispute.

In New Zealand, arbitrations are governed by the Arbitration Act 1996 ("the Act") which applies to all arbitrations where the place of arbitration is or would be New Zealand. The Act provides rules of procedure which will apply to arbitrations within its jurisdiction.

While there is room for flexibility in the arbitration process and the way in which an arbitrator obtains the information required to reach a decision, as a general rule an arbitrator will hold a hearing at which evidence is submitted and submissions given on behalf of the parties in dispute. The parties can choose whether to be legally represented. The arbitrator will make a decision which is binding on the parties subject to very limited rights of review.

Mini trial

A mini trial is a generic term used to describe many forms of trial or hearing of a dispute outside the traditional Court process. The form of a mini trial, though not fixed, is in general terms in trial format, that is a case is put forward by or on behalf of each of the disputants. The case can be by submissions (oral or written) and may or may not include presentation of oral evidence.

This process is often used by corporate organisations to resolve inter-corporate disputes.

The form and format of a mini trial varies according to the agreement reached by the disputants themselves. Often the process will exclude lawyers and may even exclude expert witnesses. In most cases the trial has an agreed time limit in which each party must present its case. This has the benefit of focusing on the essential issues for each party.

The decision makers are often a panel comprised of senior management representatives from the parties themselves who in some cases may be assisted by an expert or Umpire. Each party presents its case in the agreed form and then the panel retires to discuss the case and to negotiate an outcome. In some cases where a negotiated outcome cannot be reached the parties may agree to be bound by the decision of the Umpire.

MEDIATOR PROFILE: GEOFF SHARP

Geoff Sharp has been at Bell Gully's Wellington office for the last 15 years specialising in commercial litigation, in particular, banking and insolvency. He was a partner for the last six of those years and has now left the firm to set up as a commercial mediator practising from the Bar in Wellington. Whilst at Bell Gully he headed up the litigation division for some years and formed the firm's ADR practice group, which is now very active mediating commercial disputes for clients.

Geoff has been involved in conflict management/dispute resolution in one form or another throughout his legal career and believes that he has developed a relatively sensitive sense of conflict.

Geoff's interest in mediation has its origins in his experience with litigation clients over the last ten years. Corporate clients then, and more especially now, display a strong, distaste for litigation and most business people view litigation as wasteful, unproductive, disruptive, distracting and expensive. Most of all it is unpredictable and confusing for consumers and they now want a better way of dealing with their business disputes that will see them maintain control of costs and outcome.

In the early 1990s Geoff's approach to conflict began to develop and he actively sought skills in alternatives to litigation. This change evolved into the ADR/mediation interest and practice which he now has. Somewhere during that evolution there was a philosophical change in his view of how disputes were best handled.

Geoff is Harvard, LEADR and CDR Associates trained and is on the Board of LEADR. He is also a mediation panel member of the Arbitrators and Mediators Institute as well as being on the mediation panel for the private resolution of employment disputes with a number of large organisations in New Zealand. Geoff intends to specialise in the commercial dispute resolution area offering lawyers and clients the alternative of efficient, cost effective private dispute resolution.

He will practise from:
Level 12, Logica House
49 Boulcott Street, Wellington
Phone: 04 499 5395
Fax: 04 499 5396.

THE MILLENNIUM ACCORD

The millennium bug or problem has created much discussion over the past couple of years. Essentially, it is a perceived problem which businesses and individuals may face next year when potentially numerous IT systems fail to recognise the year 2000 date change. Clearly this has the potential to create a large number of disputes which could have far reaching impact.

CEDR (Centre for Dispute Resolution) in Europe has responded to this potential for dispute by creating an initiative bringing together the following dispute resolution bodies from around the world: CEDR (Europe), JAMSEndispute (USA), LEADR (Australia and NZ), Hong Kong International Arbitration Centre (Asia) and Singapore Mediation Centre (Asia). These bodies have agreed to cooperate in connection with "the Millennium Accord" which is designed to:

- reduce the potential for confrontation and dispute between businesses and/or public sector organisations arising from the millennium problem;
- encourage and facilitate the exchange of information on any millennium problem on a without prejudice basis; and
- promote a cost-effective approach to resolving millennium problem differences and disputes, whether domestic or international.

Accord principles

The Accord contains five principles:

- A millennium problem is a mutual problem not a competitive opportunity;
- A mutual problem may be solved faster and more cost-effectively by communication and cooperation rather than confrontation; Timely dispute prevention is preferable to retrospective redress; Communication and cooperation enhance timely dispute prevention;
- Any difference or dispute about a millennium problem ought to be resolved without resort to adjudicative resolution methods ("ARMS" – eg litigation or arbitration) by using the Millennium Accord Procedure ("the Accord Procedure").

Companies or organisations are invited to support the principles by signing a Declaration of Support which is not a legally binding commitment but rather a public declaration of commitment to problem solving (a willingness to use the Accord Procedure) and a recognition that many IT systems are connected.

Accord procedure

The Accord procedure follows the traditional dispute system structure, allowing for early identification of potential disputes or differences with processes to resolve the dispute at the earliest possible time thereby preventing the escalation of the dispute. Effectively, there is a two-stage process (with the flexibility to allow the first stage to be circumvented where the parties choose). The first stage is a negotiation stage at management level between individuals who have the authority to settle the dispute and who have not personally been directly involved in the problem which gave rise to the difference or dispute.

Where settlement is not achieved at the first level, the second level is mediation, administered by and in accordance with the procedure or rules of the relevant Accord Body.

This is an example of some the leading dispute resolution organisations in the world taking an initiative which, by anticipating a potentially enormous series of disputes, may well result in a cost effective, non-confrontational and cooperative resolution of the problems within reasonable time frame.

INTERNATIONAL CONGRESS OF MARITIME ARBITRATORS THIRTEENTH MEETING

1-5 MARCH 1999, Aotea Centre, Auckland New Zealand

The Arbitrators and Mediators Institute of New Zealand are proud to host the Thirteenth International Congress of Maritime Arbitrators. This is the first time the event will be held in New Zealand with the last event in 1996, taking place in Paris.

The Congress offers a unique opportunity for anyone involved in maritime law to attend this informative meeting and to submit a paper for presentation to a prestigious international audience.

The International Programme Review Chairman has received over 50 papers from around the world, all of a very high standard, from authors who are highly respected internationally in the world of maritime law and arbitration.

Each individual session has a theme. As well as updating participants on developments in maritime arbitration in the leading arbitration centers, two sessions will look at whether maritime arbitration delivers what it promises. The papers in these sessions make a valuable contribution to the debate on what users expect from the maritime arbitral process and how that process can be improved.

Both sessions deal with the usual substantive topics of carriage of goods, bills of lading and charterparties. There is also an in-depth look at topical issues of limitation, the ISM Code, salvage and pollution and security measures and enforcement. The final two sessions deal with the vexed question of the relationship between arbitration and the Courts as well as the still relatively unused concept of ADR.

Plenty of time has been set aside for discussion and floor participation at the end of each session. The high point of the last day of the Congress is a mock arbitration and something rather special is planned for this.

Coupled with an exciting social programme, this will be the Congress talked about for years to come

For a copy of the Registration Brochure and full programme details please contact:

Linda McKay, Congress Manager

Tel: + 64 9 529 3242 or

Fax: + 64 9 520 0718

PO Box 2009, AUCKLAND or

e-mail icma@cmsl.co.nz ❑

WHAT'S HAPPENING

1999

February 9
AMINZ Breakfast Seminar, Auckland

February 24-25
Administrative Law Conference
Wellington

February 26
AIC Workshop
ADR in The Public Law Arena
Wellington

March 1-5
International Congress of Maritime Arbitrators
(ICMA XIII)
Auckland

March 8-10
Joint Conference on International Commercial
Arbitration
AMINZ/ICC/Australian Centre of International Commercial Arbitration/The Institute of Arbitrators & Mediators Australia
Sydney

March 9
AMINZ Breakfast Seminar

March 24-27
LEADR 4 day Workshop
Auckland

March 26
LEADR Workshop
Personality, Mediation and Mediators

April 13
AMINZ Breakfast Seminar

April 15
AMINZ Seminar
Role of Arbitration in Employment Contracts

May 11
AMINZ Breakfast Seminar

May 15
AMINZ Seminar
Advanced Mediation

June 1
AMINZ Breakfast Seminar

June 17
AMINZ Seminar
Preliminary Meetings/Award Writing Seminar

June 22
LEADR Refresher Mediation Course
Wellington

June 23-26
LEADR 4 day Workshop
Wellington

July 6
AMINZ Seminar
Arbitration Procedures under the New Act Seminar

July 13
AMINZ Breakfast Seminar

July 30
AMINZ Annual Conference

August 10
AMINZ Breakfast Seminar

September 14
AMINZ Breakfast Seminar

September 30
AMINZ Seminar
Mediation Ethics

October 6-9
LEADR 4 day Workshop
Auckland

October 10
LEADR Refresher/Accreditation Day
Auckland

October 12
AMINZ Breakfast Seminar

November 9
AMINZ Breakfast Seminar

November 13
AMINZ Seminar
Advanced Arbitration

2000

July 28-30
LEADR 7th International Conference
Regent Hotel
Sydney

RAMSTEAD EXPLAINED

CRIMINAL PRACTICE

with Robert Lithgow and Aroha Puata

In ***Ramstead*** the Judge spoke privately to the foreman of the jury and received an ambiguous note from the jury.

Harley Thomas was a young man espousing National Socialist ideas at a student party in Wanaka. About 45 minutes after he left a petrol bomb was alight on the front lawn. No forensic evidence implicated the accused. The Crown Solicitor delivered a solid attack on Nazis in WWII aimed at bridging the evidential gap. The trial Judge considered the Crown conduct relevant and acceptable. The Court of Appeal did not. Further, they said the Judge should have stopped it.

Song Van Nguyen was accused of shoplifting. He was chased and detained and returned to the shop (which was then locked). The pre-trial Judge accepted argument that Nguyen was the subject of a citizen's arrest; and that that power of arrest was a public duty; therefore the Bill of Rights protections applied. The Court of Appeal held that "protections" under the Crimes Act 1961 do not constitute "powers". The Bill of Rights Act was therefore not relevant.

Aka Mihaka Manga was released on parole then recalled. The Crown argued that time spent on remand became irrelevant in the calculation of his release date following a recall. The Court of Appeal attempted to make sense of the rats-nest in the Criminal Justice Act's most muddled part. Two of the judgments are themselves extremely complex but one can predict that the three combined will become a collector's item for students of statutory interpretation. Interestingly, the Court of Appeal notes that the Department of Corrections applied the correct formula until it received "legal advice".

RAMSTEAD v R

PC 2 December 1998, Lord Browne-Wilkinson, Lord Steyn, Lord Hoffmann, Lord Hobhouse of Woodborough, Lord Millett.

The circumstances of *Ramstead* may be known to varying degrees amongst New Zealand lawyers but we set out the facts and background from the Privy Council's decision:

> The essential question is whether a conviction ought to be quashed because the trial Judge, contrary to established principle, failed to disclose to counsel a note in the form of a rider to proposed verdict before the jury announced their verdict.
>
> ...
>
> The trial related to the deaths of three patients who died during the course of surgery performed by the appellant. The indictment contained three counts of manslaughter and three statutory charges of making false statements as to the causes of the deaths of the three patients. At the end of the prosecution case the Judge discharged the appellant on one count of making a false statement. On the manslaughter charges the issues before the jury were breach of duty and causation.
>
> Shortly before 6 pm on 24 October after the jury deliberated for over 24 hours over three days, the jury sent two notes to the Judge. One note recorded the jury's intended verdict, viz not guilty verdict to two manslaughter charges; guilty on one manslaughter charge (count five which involved the death of a Miss Muncie); not guilty on one charge of making a false statement; and the note further recorded the failure of the jury to arrive at a verdict on the other charge of making a false statement. In the second note the jury stated:
>
> With respect, the jury wish to make the following comments:
>
> We have discussed the charges requested by Your Honour. Even though we have come to decisions, we would respectfully ask that the following be considered.
>
> In all cases due care from the skill and knowledge were breached but we were unable to establish these features as an essential cause.
>
> Without informing counsel the Judge invited the foreman of the jury to see him in his Chambers. The Judge subsequently recorded that he asked the foreman "if the verdicts he had given me were unanimous, notwithstanding the second note, and he confirmed they were". The Judge then said that the foreman should read out the second note after delivering the verdict. The foreman ... [consulted the jury] ... and told the Judge that the jury did not want the note read out and "that it was for [the Judge] to do with as [he] thought fit".
>
> The Judge returned to Court. The jury was brought into Court and it announced its verdicts as foreshadowed in the first note. The jury confirmed that the verdicts were unanimous. The Judge discharged the jury. The Judge then proceeded to sit in Chambers and for the first time revealed to counsel the existence of the second note. The Judge adjourned the proceedings for a week for legal argument on the effective of the rider. In the meantime, no conviction was formally entered.
>
> On 1 November 1996, one week later, the Judge explained in open Court what had occurred in regard to the rider. In explanation the Judge said that he did not consider a conviction on 24 October because he

considered the rider was "inconsistent" with a verdict of guilty of manslaughter on count 5. He heard argument and the Judge still regarded it as possible to read the rider as referring in respect of causation in all three of the manslaughter cases. That he observed that "it is possible to read it in conjunction with the plainly unanimous verdict inconsistent with it". He explained this meaning by the following interpolation:

> In all cases, due care skill and knowledge were breached but we are unable to establish these failures as an essential cause IN ALL CASES (the capitals were inserted by the Judge).

He concluded that "an interpretation consistent with the formal verdict, open on the wording of the note and consistent with the interpretation is to be preferred". Relying on a contextual interpretation the Judge ruled that the appellant was properly convicted. The Judge sentenced the appellant to six months' imprisonment, suspended for six months.

On appeal to a five Judge Court of Appeal, a unanimous reserved decision dismissed the appeal and concluded in respect of the rider that "there was no ambiguity or any reasonable possibility of error or confusion, the three verdicts mean what they say".

The Court of Appeal confirmed that the Judge should not have had discussions with the foreman of the jury in his Chambers and that the Judge should have disclosed the rider to counsel immediately. However, the Court of Appeal concluded that there was no prejudice to the accused because in its view the jury had reached a unanimous decision about Miss Muncie. The Court of Appeal's view was that even if counsel had been made aware of the contents of the rider, the verdict of guilty would still have resulted.

In the Privy Council it was argued that the note was ambiguous. The Solicitor-General conceded that if the note did raise a doubt whether the law had been properly applied by the jury then the conviction must be quashed. However the Crown argued that in the circumstances the Court of Appeal came to the only realistic conclusion.

Their Lordships set out various propositions accepting that once the jury had retired there must be no secret communication between the jury and anyone, not even the Judge. The purpose of the rule is said to be this:

> First of all, to ensure there is no suspicion of any private or secret communication between the Court and the jury, and secondly, to enable the Judge to give proper and accurate assistance to the jury on any matter of law or fact which is troubling it.

The majority of the Privy Council, Lords Browne-Wilkinson, Steyn and Hoffman, considered that compliance with the formal rules was necessary to ensure the integrity of the system. That a substantial failure to comply with basic trial procedural rules may lead to quashing of verdicts which would otherwise have been "true".

The majority considered that:

> [in context] the rider was ambiguous and ... there was a real possibility that the jury was still confused at the end of the trial about the element of causation.
>
> In Their Lordships' view there was a miscarriage of justice. Further, Their Lordships were not satisfied that if the irregularity had not occurred the jury would still inevitably have convicted Dr Ramstead. The conviction must therefore be quashed.

Further, stated to be an independent ground of their decision, the majority considered in any event there was such a substantial departure from established procedure as to amount to a denial of a fair trial under the general law. On that ground, related to the Judge talking to the foreman, the conviction "must be quashed".

In a strongly worded dissent Lords Hobhouse and Millett did not consider the note ambiguous. The minority saw the note as a simple explanation of the reasoning behind the verdicts and perhaps to indicate that the jury had not completely exonerated the accused from allegations of fault in relation to the other two patients who had died. The minority accepted that there had been a procedural irregularity but, as there was no ambiguity in the note, it was not a material irregularity. There was no miscarriage of justice.

The net result is that the trial Judge, five Judges of the Court of Appeal and two Law Lords considered the conviction safe. Three Law Lords considered the note ambiguous. The two dissenting Law Lords did not allow for the possibility that the fact that three of their brethren found the note ambiguous was a relevant consideration in the determination of what was (effectively) a second appeal. Equally, in respect of the procedural irregularities, the minority made the obvious distinction between irregularity and a *material* irregularity. Because everything that had happened between the Judge and foreman in relation to the note was argued before the trial concluded, no miscarriage of justice in fact occurred.

This ragged ending to the *Ramstead* saga is no doubt of some comfort to Mr Ramstead. However, that there could be such sharp difference of opinion between our most senior and experienced Judges sitting in criminal appeal (including our Court of Appeal) on a simple set of undisputed irregular circumstances, remains acutely unsatisfactory.

CROWN COUNSEL

R v Thomas CA 305/98, 15 December 1998, Henry, Tipping, Salmon JJ, Tipping J 14 pp.

Harley Thomas was a young man espousing Nazi ideas at a student party in Wanaka. At one point the female host said to the appellant "what if I was a Jew?" to which Mr Thomas responded "get me a lighter". He was eventually asked to leave. About 45 minutes after Thomas left, a petrol bomb arrived on the front lawn. Thomas was charged with attempted arson.

There was no forensic evidence linking Thomas and the bomb. The Crown case was that Thomas was obsessed with Nazism and in particular with eradicating Jews, that he erroneously believed that the occupants of the house were Jewish and had thrown the bomb in an attempt to burn down the house. The Crown Solicitor attempted to bridge the evidential gap in what was "not the strongest circumstantial case in the world" with, inter alia, evidence of:

- Nazi atrocities in WWII;
- photographs of Nazi tattoos on the accused's body;
- a library book about the holocaust and newspaper cuttings related to hate crimes seized from the accused's house.

The trial Judge considered evidence of Nazi atrocities relevant and the Crown Solicitor's conduct acceptable. The Court of Appeal did not. Further, they said the Judge should have stopped it.

The trial Judge ruled the evidence admissible as going to the issue of identity. However, as Court of Appeal observed, (the Judge) by that meant the identity of the alleged petrol bomber. The Crown Solicitor sought to establish that identity largely by motive, and sought to establish the motive by Mr Thomas's beliefs.

In the event the Court did not reach any firm view of the admissibility of some or all of the material, basing their decision on the use the material was put to by the Crown and the trial Judge's response. First, the scant probative value of the evidence in question did not clearly outweigh the prejudice to the accused and was therefore arguable inadmissible. Second, the Crown Solicitor's approach to witness examination and closing address was to stress the unpalatability of Nazi doctrine and anyone who adhered to such a code of belief; an approach that was clearly prejudicial to the accused. For example, the Crown Solicitor began his closing address as follows:

> The great paradox about this hearing is that the system that national socialism and its adherents would seek to destroy is the very one that guarantees the accused a trial.

And closed the address with a quote from Winston Churchill. For this reason, even if the evidence was properly admissible, at the very least a clear direction from the Judge was required. The Judge's summary did not specifically refer to the "grossly prejudicial photographs, or the tenor or detail of the Crown's closing address".

The Court of Appeal relied on *R v Roulston* [1976] 2 NZLR 644, 654, the leading case relating to the duties of counsel for the Crown. In particular, counsel for the Crown must not employ language or other tactics likely to inflame the jury against the accused or otherwise prejudice the fairness of the trial. They further held that in such a case it was the right and duty of the trial Judge to intervene if Crown counsel oversteps the mark. In this case, the Crown Solicitor's conduct had created a real risk of miscarriage of justice both of itself and when coupled with lack of remedial directions from the Judge. Further, the damage to the appearance of justice was irretrievable so such conduct could well have been beyond correction by direction. Thomas' conviction was quashed and a directed verdict of acquittal was entered.

"CITIZEN'S ARREST"

R v Nguyen CA 269/98, 2 December 1998, Eichelbaum CJ, Richardson P, Henry, Keith, Tipping JJ (Richardson P 15 pp).

This case was an attempt to invoke the protection of the New Zealand Bill of Rights Act where shop employees followed and physically detained a suspected shoplifter. Surprisingly the Court effectively held that there is no power of citizen's arrest in New Zealand, only various protections from civil and/or criminal liability. We say "surprisingly" because both standard texts (*Adams* and *Garrow and Turkington*) assume such powers exist.

Two retail store employees followed Nguyen out of the store and into the car park. One of the employees told him she believed he had stolen something and asked to look under his shirt. Nguyen spoke very little English but he gestured negatively and tried to push past the employee. She took hold of him and returned him to the store. The shop doors were locked and he was taken to the manager's office. The police were called and Nguyen was charged with stealing goods valued in excess of $100. In the District Court defence counsel argued that he was arbitrarily arrested and detained in terms of s 22 of the New Zealand Bill of Rights Act and that that arrest or detention took place in the car park and continued until the arrival of the police. Therefore, the evidence obtained as a consequence was a breach and should be excluded. In a pre-trial ruling the evidence was excluded on that basis. The Solicitor-General appealed.

The actions of private citizens attract the Bill of Rights by virtue of s 3(b) of the Act if done in the performance of any public function, power or duty conferred or imposed by or pursuant to law. Otherwise, the general law regulates the actions of private citizens and the subsequent involvement of the police cannot retrospectively engage the Bill of Rights. The Court of Appeal held that the shop assistants were not acting in the performance of any public function, power or duty conferred by law. All powers of arrest are statutory in New Zealand. The Crimes Act does not confer any power of citizens' arrest except where a constable calls on them for assistance. The Court also held, (reversing the Judge's finding of mixed fact and law) that, despite following the accused, physically holding him, returning him to the shop and locking him in, the shop employees were not purporting to exercise a power of citizen's arrest.

Citing the commission on the draft code report of 1879, the Court pointed up the distinction between powers and protections (or immunities or privileges) that has always been a feature of the Crimes Act. The 1961 rewrite of the Crimes Act removed a number of citizen's arrest powers but retained the protections. This had led to a degree of misapprehension but ss 35-38, 42 and 52, which provide varying degrees of immunity for persons arresting without warrant, are focused and limited and do not constitute a function, power or duty conferred on private citizens. Therefore, in the opinion of the Court, Nguyen was detained but there was no statutory power to detain and no common law authority was identified so the actions of the shop employees did not come within the ambit of the Bill of Rights. Therefore, the Crown appeal succeeded.

If the Court is correct in determining that there is no power of citizen's arrest, then presumably the protections contained in the Crimes Act relate to purported exercises of a power or exercises of a purported power. This much misunderstood part of our law is certain to provide future cases in the Court of Appeal. If there is no power of arrest, then presumably a shoplifter can use force to escape.

REMAND TIME AND FINAL RELEASE

Attorney-General v Manga CA 91/98 1-10-98 Henry, Thomas, Tipping JJ.

The release date of sentenced prisoners is calculated by the Department of Corrections. Prisoners seldom seek legal advice. Section 90 of the Criminal Justice Act 1985 provides the basic outside limits described as "final release date". There are various basic rules depending on the category of sentence length and offence type.

On appeal, the Crown advanced a somewhat legalistic analysis that would mean a recalled parolee lost any credit for remand. After a lengthy examination of the words and phrases of the much amended sections of Part VI of the CJA, the Court ultimately interpreted the provisions related to credit for pre-sentence custody (remand in custody at whatever stage) in a manner consistent with legislative history of the provisions.

Prior to 1985 sentencing Judges took pre-sentence remand time into account to the extent that they considered appropriate. Section 80 of the CJA 1985 required Judges to specify time spent on remand on the committal warrant. There were practical problems in calculating the exact date. The 1993 amendment directed Judges to ignore time spent in custody; the Secretary of Justice (ie the prison authorities who had all the dates at hand) could calculate the exact dates and no doubt argue with the inmate in the event of a dispute. Therefore, time spent on remand in custody was time spent in reduction of the sentence.

The Court of Appeal considered that had Parliament intended to deny inmates a credit for the time spent in custody prior to sentence then Parliament would have said so. To hold otherwise would leave open the possibility of a prisoner with significant pre-trial remand time serving a longer sentence than the Court had imposed. Thomas J referred to the Court's role as protector of the individual subject and

> [T]he fundamental principal that no person is to be imprisoned except by the judgment of the Court or while awaiting trial before the Court.

His Honour went on to state:

> No one can be imprisoned by executive fiat. Nor, did Parliament presume to legislate directly to imprison any person who may incur disfavour. It is recognised that imprisonment, including fixing the term of the imprisonment within the statutory limits is the constitutional prerogative of the Courts.

This note cannot do justice to Their Honours' scholarly breakdown of the difficult (some would argue hopelessly incoherent) provisions of Part VI Criminal Justice Act, blandly entitled "Administration of Fulltime Custodial Sentences". However, we can tell you that the upshot of the decision is that the calculation of Sentence Expiry Date within the meaning of s 2 of the Criminal Justice Act 1985 must take into account any period of pre-sentence custody as referred to in s 81(7) of the Act.

We end by repeating the plea of Tipping J:

> The relevant legislative provisions (Part VI Criminal Justice Act) are so complex that steering a path through them is rather like trying to find your way through the Hampton Court maze. I strongly recommend that early attention be given to both structural and conceptual simplification.

If Court of Appeal Judges struggle with these provisions what chance has a prison administrator or an unrepresented prisoner? Curiously, Tipping J points out that the Department of Corrections calculated the dates according to the Court of Appeal's ultimate interpretation from 1993 until October 1996 when they received "legal advice" to adopt the approach that the Crown sought to support in the appeal.

PRACTICE NOTE

The Practice Note dated 2 November 1998 issued by the Chief Justice and Chief District Court Judge relates to sexual offences involving child complainants and child defendants. The practice note is simply an expansion of previous practice notes to include child defendants.

MONEY LAUNDERING

R v Wallace CA415/98, 16 December 1998, Richardson P, Blanchard, Salmon JJ (Blanchard J, 9 pp).

Mrs Wallace appealed against a sentence of two years and three months' imprisonment for one representative charge of money laundering pursuant to s 257A of the Crimes Act 1961. Her husband had been convicted on charges arising out of the large scale operation of manufacture and supply of amphetamines (speed). The precise amount of money involved was not clear but the family had over $1 million in unexplained income over a period of two years. This case is thought to be the first decision on sentence for money laundering alone; s 257A was introduced by the 1995 amendment.

In dismissing the appeal, the Court of Appeal approved the statement of the English Court of Appeal to the effect that those who launder drugs money are nearly as bad as those who actually do the dealing (*R v Greenwood* (1994) 16 Cr App R (S) 614). Our Court considered that whilst not technically party to the principal crime (hence the need for separate offence) money launderers were "nearly as bad". It was therefore held that the sentence should bear a relation to sentences for the particular principal offending involved. The more serious the principal offending, the more serious the laundering. The primary factor in sentencing drug offenders is the deterrence of others and so it must be to the fore in sentencing for money laundering associated with drug dealing.

This is a harsh interpretation, especially in the situation of domestic involvement in the money laundering offence. It is not the only interpretation available and it is not mandated from the legislative wording. It is natural that sentencing for money laundering will be on some kind of scale, depending on the seriousness of the underlying so-called principal offending. However, in this case principles relating to drug offence sentencing are grafted on to the money laundering offences so that deterrence becomes the prime issue and personal circumstances count for little. It should be noted that the maximum for the drug offences under consideration is 14 years and in the case of Class A offences would have been life imprisonment as opposed to the seven year maximum for money laundering.

DIAGRAMS FOR THE JURY

R v Mason CA 183/98, 1 October 1998, Eichelbaum CJ, Anderson, Elias JJ, (Elias J, 5pp)

The appellant was convicted of assaulting a police officer with intent to obstruct her in the execution of her duty (s 191(2) Crimes Act). She appealed on the ground that the jury was given a sketch during its retirement not formally produced as an exhibit.

On cross-examination, counsel for the appellant had referred the constable to a diagram of the Police car interior. At counsel's invitation, the constable made a sketch of the appellant's body position in the rear of the vehicle. When the appellant gave her evidence a clean copy of the diagram was produced as a defence exhibit. Both copies went to the jury.

Dismissing the appeal, the Court held that the constable's sketch had been executed in Court by a witness and therefore constituted direct non-verbal testimony and did not require formal production. The original technical drawing and the measurements written by the appellant did require verification because they were created out of Court. As a matter of practice it was accepted as "sensible" that the sketch be given an exhibit number for identification purposes. ❑

SHARED OWNERSHIP OF LAND

D F Dugdale, Law Commissioner

presents the latest Law Commission discussion paper

It can be argued that the law owes its most inspired and innovative developments not to judicial creativity (and still less to that of legislators and those who advise them) but to the ingenuity of conveyancers in finding ways around legal obstacles.

The express trust is a venerable example. There were the various devices employed to circumvent restrictions on usury (which have their modern counterparts in Islamic banking). The 19th century saw grow up the practice of conferring on debenture-holders the power to appoint receivers who were notionally agents of the company; and the invention of the true hire-purchase agreement. In New Zealand in more recent times there have been concocted flat and office owning companies and cross-leases.

But exploiting a legal loophole while solving immediate problems can result in long-term complications. It is with some of these complications (in relation to cross-leases) that the Law Commission's recent discussion paper (*Shared Ownership of Land* PP 35) is in part concerned

The paper proceeds on the premise that cross-leases should properly be viewed as time-bombs waiting to explode. (Anyone who doubts the likelihood of trouble may care to study as a taste of things to come D W McMorland's account at (1997) 7 BCB 276 of the case of *Hopper Nominees Ltd v White and Dryden* (HC Auckland CP 199/74 Judgment 28 February 1997)). No new cross-leasing should be permitted. Existing cross-leases should be convertible at the election of all interested parties (and in the teeth of any local body opposition) to straightforward sub-divisions or unit titles.

Cross-leases not voluntarily converted in this way should after five or ten years be compulsorily phased out, the mechanism proposed being simply a prohibition of registration of dealings following expiry of whichever period is selected. The paper recognises that the proposal will impose a cost on owners including of course survey costs. A mechanism is suggested to resolve issues arising as among co-owners. There will need to be proper definition of exclusive use areas and formal easements regulating rights of way, party wall rights and such service connections as those for water, gas and electricity.

The Commission suggests that the raison d'être of flat and office owning companies ceased with the passing of the Unit Titles Act 1991. Existing companies can be left in place. There is already machinery for their voluntary conversion to unit titles under the Unit Titles Act. But the creation of new flat and office owning companies should be forbidden. The Commission understands that some owners of interests in existing flat-owning companies enjoy exercising the absolute power that the constitutions of such companies can give them to prevent transfer of or sub-letting to persons whom they classify as not quite their type.

The paper then moves to a consideration of the various changes the Commission has been advised are needed to the Unit Titles Act. There is a proposal to dispense with the body corporate in the case of very simple developments. We try to put to rest existing uncertainty as to whether the polyhedron which constitutes a principal unit can include or be comprised solely of air space outside any building.

At present the unit entitlement is determined according to the value of units at the outset and proposals are made to introduce some flexibility to take into account the sorts of changes that can occur during the life of a building. The value of an upper unit can reduce if its view is built out. The value of any unit can change as a result of zoning alterations (if downstairs units are permitted to be used as retail shops for example). The proposal to include air space in units permits an alteration in the dimensions of buildings which can affect unit value.

The problem of unit holders who fail to pay their dues is addressed. There is a proposal to make first mortgagees liable in the same way as they are for rates and to require District Land Registrars not to register dealings unless a s 36 certificate is produced with power to the body corporate to withhold such certificate if there are arrears. Discussion is invited on whether as a last resort body corporates should have a power of sale of the units of defaulters. An analogy is the power in Table A to the Companies Act 1955 for a company to sell shares over which it had a lien.

There are proposals in relation to the contribution to outgoings of the proprietors of future development units and some tentative suggestions in relation to body corporate rules. Should the requirement of unanimity for a rule change be altered? Should the 80 per cent threshold for an application to the Court to approve a change despite lack of unanimity be altered? (It means that unless there are five or more units a single proprietor can obstruct change.)

Finally, there is a proposal to determine liability to maintain access strips where ownership is simply shared by the powers of the back lots rather than the pan-handle being sliced into segments with reciprocal rights of way.

The period for making submissions closes on 31 March 1999. The Commission's proposals are proffered as one way of solving problems that should not just be left to fester. It is important to a great number of New Zealanders that we get the answer right and the Commission will be most grateful for the views of those experienced in this field.

Any further inquiries should be addressed to Megan Leaf at the Law Commission, PO Box 2590 Wellington, Telephone (04)-473-3453, or Fax (04) 471-0959 or by e-mail to Megan.Leaf@lawcom.govt.nz. ❑

WORLD TRADE BULLETIN

Gavin McFarlane, Titmuss Sainer Dechert, and London Guildhall University

updates us on WTO disputes

BANANA WAR INTENSIFIES

Once again the EU and the United States appear willing to go to the very brink in a trade dispute. Just before Christmas Washington published what it described as its "final list" of goods exported by the EU which will be subject to US trade sanctions from February unless a resolution is found before then. It is calculated that the value of these goods will be over £350 million in annual value. Although whisky is not at present on the hit list, the United Kingdom will be among the chief sufferers, for as much as 20 per cent of this amount may fall on British goods destined for America. Other major targets of US sanctions will be Italy, France and Germany. Holland and Denmark will however escape these retaliatory duties, as they have not associated themselves with the EU banana regime, and accordingly the United States does not regard them as a target for its sanctions. Powerful commercial forces are ranged behind the two sides. In the American corner, US based exporting companies deal with virtually all the banana crops coming from Central and South American countries within the US sphere of influence. In the opposite corner are the European companies responsible for importations into the EU from Caribbean states formerly the colonies of Britain, France, Spain and Portugal. Although there is much truth in suggestions that the majority of these independent states have little else to support their economies apart from bananas, it is not entirely cynical to suggest that the main event of the evening is the scrap between America's Chiquita company, and the European company Fyffes.

The EU trade commissioner is Sir Leon Brittan, who has described the US proposals as unilateralism at its worst. The United States is mounting its retaliatory duties under its "s 301" trade legislation; this provision has long antagonised America's allies and trading partners, who place it on a par with Washington's taste for extra territorial attempts to regulate international trade. The legality of s 301 is being challenged by the EU in a reference which is being made to the WTO dispute resolution process. The United States in turn has indicated that it will have its sanctions in operation by the beginning of February, unless the EU calls for arbitration on the value of exports. In this case, the US would delay the commencement of sanctions. But these are difficult times for the world's trading systems; both sides could easily find themselves embroiled in a trade war which would have extreme economic dangers attached to it. A cleaner form of arbitration would be for both sides to invite the original appellate body of the WTO to rule on whether it considered that the EU had in fact altered its banana importation regime sufficiently to comply with the original WTO ruling (as the EU argues), or whether no effective adjustments have been made (which is the American contention).

MONETARY UNION, TRADE BARRIERS AND PROTECTIONISM

At the heart of all trade disputes such as the banana war is the clash between protectionism and free trade. In many cases governments tend to apply the doctrine which suits them most in each particular case, so that there is a striking lack of consistency when disputes are put under the microscope. Broadly speaking, the states which make up the developed western world are in favour of greater free trade, while the less developed states seek to protect their home industries. But there are varying degrees of enthusiasm, and even the most enthusiastic freetraders such as the US and the EU are swift to erect protectionist barriers in the form of anti-dumping and retaliatory duties when they feel their interests are being threatened

The launch of the Euro is related to the advance of the free trade advocates, in the sense of oiling the machinery which makes trade flow more easily. The process which began in the original Common Market had the removal of tariff barriers as an objective, as a fundamental principle of a customs union. But tariffs in the form of ad valorem or specific monetary duties can be circumvented by non-tariff barriers. There is a wide range of devices which can be applied at the point of importation, such as tests applied nominally to check for product safety, quality control and health or sanitary standards. The rules of the WTO and GATT contain agreements to regulate whether for example sanitary and phytosanitary tests imposed by an importing state are in reality artificial barriers to importation which infringe trade rules. Within the EU these were largely struck down with the introduction of the single market. Once these had been demolished, attention turned to the non-tariff barriers which are still available to the governments of individual nation states. To some extent the case of acceptance or otherwise of the social chapter can fall into this category. It is undoubtedly the case with tax harmonisation, as anyone concerned with the administration of excise duties will readily testify. But crucially there is friction over exchange rate harmonisation, for the EU member states which still remain outside monetary union will be free to devalue their national currencies against the Euro in order to bring about an advantage for their exports.

But the movement towards ever greater integration exposes those organising it to scrutiny of whether the benefits which were promised over the decades are being achieved. "No pain, no gain" is a slogan which has been voiced in one way or another in every EU member state for more than a generation, but the reality is that real employment opportunities continue to erode. This has been particularly true in the manufacturing and craft sectors as industries have relocated to less regulated areas of the globe which offer vastly cheaper employment costs. The problem which will increasingly confront governments in the developed countries which have pursued free trade and economic integration with such vigour is that they may be running out of time to convince their populations that these result in increased prosperity. The result may be a concerted movement back to forms of trade protection. These may not initially take the form of monetary tariffs, but there remains plenty of scope for the re-erection of non-tariff barriers.

INTERNATIONAL CLASSIFICATION DEVELOPMENTS

The Harmonised System (HS) for international Customs classification of goods is currently undergoing major revisions. These are designed to facilitate the implementation of various international agreements which either concern trade liberalisation implementation, or govern the cross border movement of goods of environmental and social concern. The Harmonised System is also the principal basis for the elaboration of harmonised rules of origin currently being undertaken by the World Customs Organisation. Although the HS is a world-wide system for the classification of goods, and widely recognised as a valuable tool for monitoring international trade, it currently suffers from the absence of a binding mandatory system for the settlement of disputes. Nor is it yet within the structure of the World Trade Organisation, although there is a certain amount of dovetailing. Some measures are currently being taken to control international trade in certain types of hazardous waste and scrap under the Basle Convention "CITES". In connection with the same convention, amendments have been made to the HS system to create more transparency in the classification of plants and animals which are endangered or on the verge of extinction. A certain amount of HS adjustment to classification is taking place to reflect the progressive elimination of import duties on certain categories of information technology goods. This is related to the Information Technology Agreement of the World Trade Organisation, introduced as part of the GATT Uruguay Round. Much housekeeping remains to be done

ACCESSIONS TO WTO

The greater part of world-trade law news is of necessity taken up by reports on inter government disputes, to reflect the unexpected explosion of litigation under the new system, and the jurisprudence which is being built up under it. But the World Trade Organisation continues to consolidate the progress made since the end of 1994, when the Uruguay Round was eventually finalised. The applications for membership by China and Russia are currently under consideration; both pose important questions which are likely to affect the future direction of the global trading community, and the legal system on which it is based. China had been one of the original signatories to GATT in 1948, but after the revolution in 1949, the Taiwan based government of Chiang Kai Shek announced that China would leave the GATT system. The revolutionary government in Beijing never recognised this withdrawal; subsequently in 1986 China notified the GATT of its wish to resume its status as a member. Since then the WTO has come into existence. The current working party on China's status is also considering trade in services, new rules on non-tariff measures, and rules for intellectual property rights. Annexes are being considered intended to provide WTO members with guarantees that China, as with other new members, would be able to implement the reforms or other transitional measures which it had promised. It remains to be decided exactly when China will join, and whether its accession would be as a developed or a developing country. In the case of Russia, negotiations are still continuing. Should China elect to join the WTO as a developing country, it would be incongruous if Russian accession were to be accepted on the basis of the status of a developed country.

CUSTOMS AND COMPUTERS

One of the latest rulings under the WTO system has considered in detail an appeal from a tribunal in a member state under the Community Customs Code. The matter concerns a decision of the Duty tribunal in the United Kingdom, sitting in London.

The subject matter of the WTO case is local area network equipment ("LAN"), and the correct approach to classification of this equipment for Customs purposes. The issues raised are of the greatest importance to the world trade legal system. One of the most important matters to be highlighted by the proceedings is the continuing friction arising from arrangements for Customs classification in international trade. As long ago as 1983 the former Customs Cooperation Council finalised what has become known as the "harmonised system", more fully the Harmonised Commodity Description and Coding System. This entered into force in 1988, prior to the finalisation of the GATT Uruguay Round. A number of member states at that time entered into a GATT protocol which was designed to take account of the Harmonised System. The former Customs Cooperation Council is now known as the World Customs Council, but there has not been a full blending of the classification system. In particular, the Harmonised System has not been drawn into the family of GATT agreements, nor is it administered by the World Trade Organisation ("WTO"). It is carried on under the auspices of the World Customs Organisation ("WCO") and in particular the rules for interpretation are subject to the management of the WCO. The convention for the Harmonised System of classification does operate a system of arbitration on classification matters. These are in the form of opinions, and depend on the aggrieved parties making an application for arbitration. But there is no binding system of appeals such as is provided for in Customs matters under the Community Customs Code, or in international trade matters under the WTO's dispute resolution system. It is an obvious conclusion that while the Harmonisation System which came into force in 1988 did introduce a certain order and discipline to Customs classification of goods, it was not accompanied by any obligations as to the final detail in national tariff classifications. And so far as the GATT is concerned, member states are endowed with a broad discretion about the structure of their national tariffs, and the classification of goods in the framework of that structure.

Classification of LAN equipment

During the Uruguay Round GATT negotiations, one of the most protracted issues (among many!) was the question of duty on computers and computing equipment. This was intensified by the fact that while computer hardware clearly constitutes goods, the developments which were taking place at the same time in intellectual property law following two decades of dispute were finally concluding that computer software should be protected by the international copyright system, rather than under the international patent arrangements. So when the ink dried on the Uruguay Round at Marrakesh, the EU had agreed to a range of duty between nil and 2.5 per cent, for "automatic data processing machines", for "electrical apparatus for line telegraphy or photography" between nil and 3.6 per cent, while for "television receivers" it was set at between 8 and 14 per cent.

In 1996 a Duty tribunal sitting in London had dismissed an appeal against a decision of Customs brought by International Computers Ltd and upheld the contention of Customs that a PCTV device, which was a combination of personal computer and television set should be classified as a television receiver. This had the effect of applying a higher rate of duty than was attracted on importation by automatic data processing ("ADP") machines. By regulation 1165/95, the EU had classified LAN adapter cards as "electrical apparatus for line telephony or telegraphy", which resulted in a higher rate of duty on importation. Later the EU Commission published regulation 1153/97, by which multimedia personal computers were classified as "electronic assemblies for incorporation into automatic data processing machines". This had the effect of putting multimedia personal computers into a classification for Customs purposes which attracted a higher rate of duty than plain automatic data processing machines.

In November 1996, the United States requested consultations with the EU under art 4 of the Dispute Resolution Procedure and art XXII:1 of GATT 1994 on tariff classification of LAN equipment by the EC countries. Canada and Korea subsequently asked to be joined. Consultations took place, and eventually a panel was set up to examine the matter. The panel found that the United States was entitled to a legitimate expectation that LAN equipment would continue to be accorded tariff treatment as automatic data processing machines in the EU, based on the actual tariff treatment during the Uruguay Round, particularly that which had been applied in the United Kingdom and in Ireland. These two member states were the major export market for US production. The panel also found that the United States was not required to clarify the scope of the EC's tariff concessions on LAN equipment; it also found that a reclassification of LAN equipment by the United States which had taken place in 1992 was not relevant to the formation of that country's legitimate expectation about the EC tariff treatment of like or similar products. The panel added that it was clear from the evidence it had taken that the legitimate expectations of the United States had been frustrated by the subsequent change in classification practice which had taken place in the EU, including the reclassification of adapter cards under regulation 1165/95. The panel held that LAN equipment should have obtained the tariff treatment given to ADP machines in sched LXXX of the EC tariff. The EC had violated art II:1 of GATT 1994 by failing to grant to imports of LAN equipment from the United States no less favourable treatment than that provided for under heading 84.71 or heading 84.73 of that schedule. In consequence the panel ordered that the EC as being in breach of the GATT provisions, should bring its treatment of LAN equipment into conformity with those provisions.

There has been a degree of dissatisfaction among certain member states of the WTO about the frequency with which decisions under the dispute resolution procedure at first instance have been overturned by the appellate body. This was yet another matter in which there were serious differences between the views which had been taken at the two levels of adjudication. At both levels it had been argued on behalf of the EC that due process was being abused by the United States by its failure to identify sufficiently the product and the measure which formed the subject matter of the dispute. It was also contended by Brussels that such description as was tendered by the US did not permit the EC adequately to understand or answer the allegations which were being made. On these two points at least both the panel and the appellate body were in agreement in rejecting the EC's contentions. But that was about as far as the higher level of the WTO system was prepared to go in approving of the first instance panel.

The appellate body disagreed with the panel's conclusion that the meaning of a tariff concession in a member state's schedule could be determined in the light of the "legitimate expectations" of the exporting state. It denied the relevance of the EEC-Oilseeds panel which the present panel had relied on. The concept of reasonable expectations had been developed in the context of non-violation complaints. To apply the concept as the panel had done in the case of a violation complaint was to meld the two legally distinct concepts of violation complaints and non-violation complaints under art XXIII of GATT into one uniform cause of action; this was not in accordance with established GATT practice.

The appellate body also rejected the panel's view that art II:5 of GATT 1994 confirmed that legitimate expectations are a vital element in the interpretation of art II:1 of GATT 1994 and of the relevant tariffs. On the contrary, it is clear from the wording of art II:5 that it did not support the view of the panel. There was nothing there which suggested that the expectations of only the exporting state can be the basis for interpreting a concession in a state's tariff for the purpose of determining whether that state has acted consistently with its obligations under art II:1. The appellate body also disagreed with the panel's view that the maintenance of the security and predictability of tariff concessions would be seriously undermined if concessions were to be interpreted on the basis of subjective views of certain exporting states alone.

The panel was also criticised in strong terms for failing to consider the Harmonised System and its explanatory notes, to which both the EC and the US had been parties during the Uruguay Round Negotiations. The panel's finding that the US was entitled to "legitimate expectations" that LAN equipment would be accorded tariff treatment as ADP machines was reversed. It followed that the EC had not acted inconsistently with the requirements of art II:1 of GATT 1994 by failing to accord imports of LAN equipment no less favourable treatment than provided for in sched LXXX.

There are two important conclusions to be drawn from this dispute and the judgments to which it has given rise. One is that the reputation of the dispute resolution procedure of the World Trade Organisation is not enhanced by the frequency with which the appellate body overturns the findings of the panel of first instance; this all the more so when the differences are so wide, and the comments made by the higher body verge on the contemptuous. The second is that there is an urgent need for certainty in the application of tariff classification; this is particularly true in the case of dispute resolution, and the absence of a system which is binding makes for difficulties which those involved in international trade should not be obliged to confront at the threshold of the twenty-first century. ❑

MRA AND THE PROFESSION

Robert S Chambers QC

considers Trans-Tasman Mutual Recognition and its implications for lawyers

The Trans-Tasman Mutual Recognition Act 1997 ("the 1997 Act") has raised some tricky problems for district law societies. The Board of the New Zealand Law Society ("the NZLS") has given advice to district law societies as to the implications of the 1997 Act for them: *Further Memorandum for District Law Societies on the Trans-Tasman Mutual Recognition Act 1997*, dated August 1998, with annexed Revised Guidelines (available from any district law society). (The Further Memorandum is hereinafter called "the NZLS memorandum".) Unfortunately, that advice is, in my opinion, wrong in two important respects. The effect of the NZLS memorandum is to undermine significantly the rights of Australian legal practitioners to practise law in this country. For that reason, therefore, it is likely that at some point a district law society will be challenged by a disgruntled Australian lawyer if it applies the NZLS memorandum.

THE ESSENCE OF THE 1997 ACT

The essence of the 1997 Act so far as occupations are concerned is contained in s 15(1), which reads as follows:

> The Trans-Tasman mutual recognition principle in relation to occupations is that, subject to this Act, an individual who is registered in an Australian jurisdiction for an occupation is entitled, after giving notice to the local registration authority for the equivalent occupation –
>
> (a) To be registered in New Zealand for the equivalent occupation; and
>
> (b) Pending such registration, to carry on the equivalent occupation in New Zealand.

The term "Australian jurisdiction" is defined in s 2(1) as "a participating jurisdiction". At the date of writing (November 1998), the participating jurisdictions are the Commonwealth of Australia, the Australian Capital Territory, New South Wales, Victoria, and Tasmania. The other states and the remaining territory are expected to become participating jurisdictions within the next year.

What the 1997 Act broadly means, therefore, is that someone registered in an occupation in a participating jurisdiction is entitled to be registered in the equivalent occupation in New Zealand. The principle is clear: how the Act applies in specific circumstances is somewhat more difficult.

It is clear that the Trans-Tasman mutual recognition principle applies only to occupations in respect of which "registration" is required in both Australia and New Zealand. (In this article, "Australia" means the Commonwealth of Australia and the participating states and territories.) Obviously, if a particular occupation is the subject of registration in only one jurisdiction, the 1997 Act does not bite. "Registration" and "registered" are given a wide meaning in s 4. "Registration" is defined as "the admission, approval, certification (including, without limitation, the issue of practising certificates), licensing, registration, or any other form of authorisation, of an individual required by or under law for carrying on an occupation" and "registered" has a corresponding meaning. Subsection (2) provides that if an individual is required by or under law to have more than one form of authorisation to carry on an occupation, then "registration" includes each form of authorisation that any relevant local registration authority grants. As we shall see, the practice of law in New Zealand is an occupation to which subs (2) applies.

THE TRADITIONAL ROUTE FOR AUSTRALIAN PRACTITIONERS

For the purposes of this article, I use the expression "Australian practitioners" to refer to legal practitioners registered in one or more of the participating states and territories. Before considering the effect of the 1997 Act, I shall set out briefly how Australian practitioners wanting to practise in New Zealand normally proceeded prior to the passage of the 1997 Act.

Obviously the first step was to be admitted as a barrister and solicitor of the High Court of New Zealand. (Since 1983 it has not been possible to be admitted as a barrister or solicitor only: Law Practitioners Act 1982 ("the 1982 Act"), s 43(1). That remains the position today following the passage of the 1997 Act.) Up until the passage of the 1997 Act, an Australian practitioner applied to the NZLS to ascertain what examination requirements the NZLS might have. The NZLS conferred with the Council of Legal Education before making its decision in any case. The Council of Legal Education had authorised "a fast track admission process" for Australian practitioners of at least five years' standing. Such practitioners were not required to pass any further examinations in this country. Those with less experience might be required to pass some examinations here.

Armed with the blessing of the NZLS, the Australian practitioner then applied in the normal way for admission as a barrister and solicitor. Once admitted, he or she, now also, of course, a barrister and solicitor of the High Court of New Zealand ("a New Zealand barrister and solicitor"), was immediately entitled to a practising certificate under s 57 of the 1982 Act. Three sorts of practising certificates are available under the 1982 Act: barrister, solicitor, or barrister and solicitor. (It is believed that no one in New Zealand, prior to the passage of the 1997 Act, held a practising certificate solely as a solicitor. There were and are no advantages in taking out such a certificate.) It was entirely the choice of the Australian practitioner – now also, of course, a New Zealand barrister and solicitor – as to which sort of practising certificate he or she took: the district law society had and has no discretion in the matter. Armed with the appropriate practising certificate, the Australian practitioner could practise here either as a barrister sole or as an employed barrister and solicitor. If the Australian practitioner wanted to practise here as a solicitor on his or her own account, then he or she had to make an application to his or her DLS Council for consent and had to comply with the other requirements of s 55 of the 1982 Act.

THE NEW ROUTE

Even after the 1997 Act, it would still be possible for an Australian practitioner to follow the traditional route. What the 1997 Act has done is open up another avenue which the Australian practitioner may elect to follow, if it suits him or her better. It is important to note that the Australian practitioner does not have to follow the 1997 Act route. It is an additional route, not the only route. That is made clear by s 38 of the 1997 Act, which specifically provides that nothing in the 1997 Act "prevents an individual from seeking registration or being registered for an occupation under a law other than this Act".

Following the passage of the 1997 Act, the Australian practitioner does not need to apply to the NZLS for credits. The Australian practitioner may be admitted here as a barrister and solicitor solely by virtue of the fact that he or she is an Australian practitioner: the 1982 Act, s 44(4). This is a new fast-track route. If the law is what I say it is in this article, then it is the route which nearly all Australian practitioners would choose to take in preference to the traditional route. It is not necessarily the best route to follow, however, if the law is what the NZLS thinks it is. I shall explain that further below.

Before the passage of the 1997 Act, there were two routes under s 44 of the 1982 Act by which a person could be judged qualified for admission as a barrister and solicitor. Since the passage of the 1997 Act, which (by s 88(1)) repealed s 44 of the 1982 Act and substituted a new s 44, there have been three ways of being judged qualified for admission, the new third way being an entitlement under the 1997 Act. Whichever way a candidate qualifies for admission, however, the end result is identical: the candidate becomes a New Zealand barrister and solicitor.

Of course, admission as a New Zealand barrister and solicitor does not of itself entitle one to practise law. One needs a practising certificate. To get that one applies to the district law society in the district of which one intends to practise. In normal circumstances, s 57 of the 1982 Act governs entitlement to practising certificates, and as explained above, the entitlement is as of right. If, however, the applicant:

(a) has not at any time during the period of two years after his or her admission, or during the period of two years after the expiry of the last practising certificate of any kind issued to him or her, whichever period is the later, held a current practising certificate of any kind; or

(b) is an undischarged bankrupt; or

(c) has since the date of his or her admission or the date of the issue to him or her of the last practising certificate of any kind, whichever date is the later, been a patient in a mental hospital,

then the applicant will not come within the s 57 regime but instead must apply to his or her DLS Council for a practising certificate under s 58. The DLS Council must not authorise the issue of a certificate under s 58 unless it is satisfied that the applicant is of good character and is a fit and proper person to practise as a barrister or as a solicitor or as both, as the case may require: the 1982 Act, s 58(5)(a). There is a right of appeal from the DLS Council's decision to the New Zealand Law Practitioners Disciplinary Tribunal: ibid, s 58(6).

What effect does the 1997 Act have on the process of applying for and obtaining practising certificates? First, it is necessary to appreciate that every law of New Zealand is now to be read subject to the 1997 Act, unless that law or the 1997 Act otherwise expressly provides: the 1997 Act, s 5(1). Secondly, s 17(1) of the 1997 Act provides as follows:

> (1) For all the purposes of the law of New Zealand, every law of New Zealand dealing with registration is deemed to include as a ground of entitlement to registration and renewal of registration, subject to the provisions of this Act, the ground that an individual seeking registration or renewal of registration is registered in an equivalent occupation in an Australian jurisdiction.

Sections 57 and 58 of the 1982 Act are laws "dealing with registration". ("The issue of practising certificates" is expressly included in the definition of "registration" in s 4 of the 1997 Act.) The practising certificate regime is, therefore, now deemed to include as a ground of entitlement to registration (ie the issue of a practising certificate) the ground that the applicant is registered in an equivalent occupation in an Australian jurisdiction. What that therefore means is that the Australian practitioner can either rely on his or her New Zealand qualifications for registration (ie for the issue of a practising certificate) or on his or her Australian qualifications. Provided the applicant for a practising certificate does not fall within s 58, the only qualification needed for a practising certificate is admission as a New Zealand barrister and solicitor. An Australian practitioner, provided he or she does not fall within s 58, will therefore be able to utilise his or her New Zealand qualification, ie the fact that he or she has been admitted as a New Zealand barrister and solicitor. The Australian practitioner will not need to rely on the other ground of entitlement introduced by s 17(1) of the 1997 Act. Of course, if the Australian practitioner wants to rely on this alternative "ground of entitlement", he or she may. In that event, the Australian practitioner would have to follow the registration procedure prescribed by the 1997 Act, and, of course, in this instance he or she will be relying on his or her Australian legal qualifications. Generally speaking there will be little advantage to the Australian practitioner in following that course. It would be much more cumbersome, expensive, and time-consuming. The only time that the Australian practitioner is likely to elect to utilise his or her rights under the 1997 Act is if he or she would come within s 58 of the 1982 Act, if relying on his or her New Zealand credentials. For instance, suppose an Australian practitioner got admitted here but then did not take out a practising certificate, a state of affairs which existed for more than two years. That practitioner may find it easier to get a practising certificate utilising the s 17(1) ground of entitlement rather than pursue the s 58 procedure.

THE NZLS POSITION

Admission

What I set out above is what I contend the law to be. But it is not the position advocated by the NZLS Board. The Board has no quarrel with the choices Australian practitioners have with respect to admission. There can be no possible dispute about the different routes leading to admission. Parliament has made its intention explicit by the repeal of s 44 of the 1982 Act and the substitution of the new s 44. In any event, admission is not within the control of district law societies, still less the NZLS, but rather is a Court-controlled process.

Where the NZLS and I part company is with respect to the issue of practising certificates. The NZLS takes the view that, once a candidate has elected to become a New Zealand barrister and solicitor via the Trans-Tasman route, that practitioner must utilise that same route when applying for his or her first practising certificate. The applicant must make a formal application to his or her district law society in its capacity as the local registration authority for the issue of practising certificates. The NZLS refuses to acknowledge the Australian practitioner's new status as a New Zealand barrister and solicitor. In particular, the NZLS fails to give effect to s 38 and the right it gives to individuals to become registered if they wish by complying with New Zealand registration requirements if they can. In addition, the NZLS effectively misconstrues s 17, the function of which is to add Australian registration to existing grounds of registration under New Zealand law.

For Tasmanian practitioners, compliance with the NZLS memorandum and the attached guidelines will be an irritation: the practitioner will have the expense of unnecessarily assembling all the material required for a 1997 Act application.

Much more than irritation will be caused, however, to practitioners in the other participating jurisdictions, namely the ACT, New South Wales, and Victoria. In all three jurisdictions, applicants are admitted as "legal practitioners" or "barristers and solicitors". In New South Wales and Victoria, however, one holds a practising certificate either as a barrister or as a solicitor. In the ACT, one holds a practising certificate either as a barrister and solicitor or as a barrister sole. Under the NZLS memorandum, a New South Wales legal practitioner with a practising certificate as a barrister may apply here only for a barrister's practising certificate. A New South Wales legal practitioner with a practising certificate as a solicitor may apply here only for a practising certificate as a solicitor, not even as a barrister and solicitor. The same applies to Victorian practitioners. With respect to the ACT, those with a practising certificate there as barristers and solicitors are entitled to any sort of practising certificate here, but an ACT barrister may take out only a barrister's ticket in this country.

The NZLS reasoning is based on equivalence of occupations. The NZLS has determined that the occupations of barrister, solicitor, and barrister and solicitor are all different – or at least "not equivalent" for the purposes of the 1997 Act. It is not the point of this article to debate whether that view is right. Rather, the point is to challenge the NZLS assertion that Australian practitioners can rely only on their Australian qualifications when seeking practising certificates here and cannot rely on their New Zealand qualifications.

The other lawyers who will suffer under the NZLS memorandum are those admitted under the 1997 Act and working here and not currently having a practising certificate in Australia. I am told that there have been two applicants in this category who have applied to the Auckland District Law Society for practising certificates. They have been told, in accordance with the NZLS memorandum, that they must obtain practising certificates in Australia before their request for a practising certificate here can be considered. Neither application has proceeded because the applicants have not been prepared to take out Australian practising certificates, presumably because they had no intention of using them.

A further oddity of the NZLS position is this. Suppose a New South Wales solicitor is admitted here as a barrister and solicitor and then obtains (in accordance with the NZLS memorandum) a practising certificate as a solicitor. One may then spend the next 20 years here, become a partner in a firm, but even after all that time one will not be able to take out a practising certificate as a barrister and solicitor. There is nothing that can be done about that in New Zealand, according to the NZLS, because the die was cast by the choice to be admitted here using the Trans-Tasman route: the NZLS memorandum, para. 15. It is surely odd that there is no way to change status by actions in this country. Nor is it any solution to return to New South Wales in an attempt to take out a barrister's ticket there. Even if one could get such a ticket, that then would entitle one, according to the NZLS, only to a barrister's ticket here! There is no way in which a New South Wales legal practitioner who has had the folly to get admitted via the Trans-Tasman route can ever take out a practising certificate as a barrister and solicitor here, whatever one offered to do in either New Zealand or New South Wales. And this notwithstanding that he is a "legal practitioner" in New South Wales and a New Zealand barrister and solicitor! That surely is an extraordinary state of affairs and is a powerful indication that the NZLS position is wrong. On the argument presented in this article, of course, the New South Wales practitioner would be entitled to a practising certificate as a barrister and solicitor, in terms of s 57 of the 1982 Act, relying on his New Zealand qualification and status as a New Zealand barrister and solicitor. If, however, the NZLS position is correct, then, as I indicated above, Australian practitioners from New South Wales, Victoria, and the ACT should think carefully before determining the route they will follow in order to gain admission here. They may well be advised to follow the traditional route, especially if they are of five years' standing. Under the traditional route, they would be able to practise as they wished, and would not have to go through the 1997 Act procedure in order to obtain a practising certificate.

There is one caveat I should add to that advice. Unfortunately, the Council of Legal Education has prematurely revoked the "fast track admission process" for Australian practitioners, on the basis that "an even faster track is available" to such practitioners under the 1997 Act: see NZLS Memorandum on Legal Practice in New Zealand: Information for Practitioners from Other Countries, dated 19 August 1998, p 2. The revocation was premature for two reasons. First, practitioners from some Australian jurisdictions cannot yet use the 1997 Act procedure. Secondly, the NZLS attitude on practising certificates, as explained in this article, means that some Australian practitioners may still want to utilise the traditional route, and would accordingly have appreciated making use of the "fast track admission process" developed for Australian practitioners. Even though that particular process may not now be available, it is inconceivable that the NZLS would require Australian practitioners of five years' standing to sit any further examinations should they choose to obtain admission by the traditional route.

Practice on own account

To practise on one's own account as a solicitor requires more than just a practising certificate as a solicitor or as a barrister and solicitor: one must also obtain the consent of one's

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REMOVAL OF THE COMPULSORY RETIREMENT AGE

Anna Fitzgibbon and Rebecca Roberts, Jackson Russell, Auckland

review issues arising from 1 February

AGE DISCRIMINATION

Discrimination on the grounds of age in employment has been unlawful in New Zealand since 1 April 1992 following the enactment of the Human Rights Commission Amendment Act 1992. That Act amended both the Human Rights Commission Act 1977 and s 28 of the Employment Contracts Act 1991 ("ECA"), the latter defining "discrimination" as it related to employment. In general terms, the amendments to those Acts made it unlawful to treat a person less favourably than others or to require them to retire or resign because of their age.

Section 21(1)(i) of the Human Rights Act 1993 defined "age" as follows:

> "Age", in relation to a person, means any age within the period beginning with the date on which that person ceases to be required to be enrolled in a registered secondary school under s 20(1) of the Education Act 1989 and ending with the date on which that person becomes entitled to national superannuation under s 3 of the Social Welfare (Transitional Provisions) Act 1990

The first case where a claim of age discrimination was upheld under the Human Rights Act 1993 was *Gruschow v Totalisator Agency Board* (CRT 22/97, 29 August 1997). Mr Gruschow a 41-year-old male, claimed that he was not offered an interview for a job as a Trainee Manager with the TAB because of his age.

The Complaints Review Tribunal found that the TAB had refused to employ Mr Gruschow because of his age. The TAB's agent had asked Mr Gruschow's age relatively early in the conversation which led Mr Gruschow to believe that the TAB would not consider employing him unless he was younger. Compensation in the sum of $5000 was ordered against the TAB.

HUMAN RIGHTS ACT 1993

The Human Rights Act 1993 ("the Act") took effect on 1 February 1994 and repealed previous Human Rights legislation. The report of the Justice and Law Reform Committee, on the Human Rights Bill stated at pp 7-8:

> The subcommittee believes that age per se does not determine a person's ability or productivity and should not be used as the criterion for access to employment, Reliance should instead be placed on the person's ability to perform the task required.

The Law Reform Committee's reasoning has been applied in the Act, in that while the definition of age is more or less the same as in the Human Rights Commission Amendment Act 1992 (except that the definition of age commences at age 16 rather than when a person ceases to be required to be enrolled in a registered secondary school), from 1 February 1999, there is no upper age limit as before.

Retirement issues

So, from 1 February 1999, the upper limit of age protection currently contained in the Act (being the date on which a person qualifies for NZ superannuation) will be removed with the effect that any person over the age of 16 years can be unlawfully discriminated against by reason of their age and can challenge such discrimination under the Human Rights Act.

The removal of the upper limit of protection of persons from age discrimination will clearly have an effect on the workplace. Employees can no longer be expected to retire at the age of 60 or 65 as has been customary, and employers cannot force them to do so. Employees will be entitled to remain employed for as long as they have "ability to perform the task required" (Justice and Law Reform Committee, 7-8 above)

The Act's purpose is set out in its long title as being "... to provide better protection of human rights in New Zealand or in general accordance with United Nations Covenants or Conventions on Human Rights".

Section 21 of the Act is the central provision detailing what constitutes unlawful discrimination. Age is included in s 21(1)(i) as being one of the prohibited grounds of discrimination.

Section 22 defines discrimination in employment matters as follows:

> **22. Employment** – (1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer –
>
> (a) To refuse or omit to employ the applicant on work of that description which is available; or

(b) To offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or

(c) To terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or

(d) To retire the employee, or to require or cause the employee to retire or resign.

Obviously, employers who have employment contracts containing retirement clauses or policies requiring employees to retire at a certain age or providing benefits if an employee retires, will have to reconsider their whole approach to retirement. Unless the retirement policy falls within an exemption under the Act, if the employer attempts to enforce it after 1 February 1999, the employee may be able to successfully challenge any enforcement action taken by the employer.

Partnerships

It should be noted that partnerships are subject to the discrimination provisions of the Act. As with employees, it is unlawful; to refuse or omit to offer admission as a partner, to offer less favourable terms and conditions as a partner than others, to deny any partner an increased status or a share in the profits or to expel a partner by reason of any of the prohibited grounds of discrimination which includes age. There are exceptions – if a partner, because of age or disability has a restricted capacity to participate in the partnership, the discrimination provisions do not apply.

Retirement incentives

Many partnerships/employers have retirement policies which contain incentives to retire. For example, those who retire between 50 to 60 years of age may receive a financial benefit which exceeds that which those over 60 years would receive. Does such a practice breach the circumstances of the Act?

There is a risk that such schemes can breach the provisions of the Act if the employee is coerced into retirement. Stephen Trew in his article "Early Retirement Incentives: Carrots, Sticks and the Human Rights Act 1993" (1996) 2 HRLP 105 has considered what is a difficult area. He provides a useful checklist for determining whether or not an employee retired voluntarily at p 116:

> The present writer believes that the issue whether an employee has retired voluntarily or whether an employer has "caused" an employee to retire under s 22(1)(d) Human Rights Act 1993, can be determined under the following questions:
>
> (1) Did the employee want to retire or continue working?
>
> (2) Could the employee have continued working?
>
> (3) If the employee had wanted to keep working, did the employee retire because of the benefits from the employer's ERI offer as compared to continued work?
>
> (4) Was there employer conduct that would cause the reasonable employee to take the benefits when:
>
> (a) the employee would have preferred working; and
>
> (b) the benefits were not such as would, by themselves, reasonably convince an employee to retire early?

EXISTING AND FUTURE CONTRACTS

Existing contracts

Until 1 February 1999 it is still legal for compulsory retirement clauses to have effect in both individual and collective employment contracts. After 1 February 1999, a provision contained in a contract which specifies an age of retirement will not be enforceable. This means that although parties have agreed to a retirement age in a contract, it appears that it will not be enforceable if the employee chooses not to comply with it.

However, s 149 of the Act provides that if an employment contract was in writing and in force on 1 April 1992 and specified a retirement age, the parties to the contract can confirm or vary the age specified in the contract, and such a clause will continue to be enforceable – s 149(1) and (2) of the Act.

If parties cannot agree to either confirm or vary the age, the basic assumption in the Act against compulsory retirement will apply. For this exclusion to apply, the requirement to retire must form part of the employee's employment contract and cannot be simply specified in, for example, a document setting out the employer's retirement policy – s 149(4) of the Act.

Future contracts

Section 19 of the Employment Contracts Act 1991 ("the ECA") allows employers and employees to enter into employment contracts "as they think fit". Therefore, an employer and an employee entering into an employment contract could agree to a retirement age. This is a difficult issue. Presenting an employee with a contract which contains a retirement age and asking for their "agreement" may not be considered agreement. Section 28(1) of the ECA prohibits employers from retiring, requiring or causing employees to retire on the grounds of age. Age has been given the same definition as that in the Human Rights Act, s 28(3) of the ECA. Including a retirement age in an employment contract in such circumstances and attempting to enforce it may well lead to a successful personal grievance claim. If parties genuinely agree to the employee retiring during the term of the contract, it is submitted such an agreement would be lawful.

Including a retirement age in an employment contract may not currently be in breach of either the ECA or the Human Rights Act, after 31 January 1999 enforcing such a provision when an employee refuses to be bound by it, may breach both the ECA and the Human Rights Act.

"Ability to perform the task"

Employers must have a proper reason for terminating an employee's contract. They can no longer require an employee to retire at a given age. Proper reasons may include redundancy, poor performance or misconduct. In each situation, the requirements of procedural fairness which apply to the termination of any employment contract will apply. If poor performance is the issue, there is a requirement that the employee be given warning as well as an adequate opportunity to respond to the complaint of poor performance.

An important factor to consider, in implementing any regime to identify under-performing employees, is that such a scheme may itself be subject to a complaint to the Human Rights Commission should it appear to be biased against a protected group of persons. In other words, employers should be cautious in implementing any testing regime specifically in response to concerns about performance of older workers. This may in itself give rise to a presumption of age discrimination and in turn precipitate litigation from older employees.

Employers would be well advised to have fair and consistent policies which apply to all employees in respect of performance and other such related employment issues.

Another important factor to consider in what might appear to be fast developing into a minefield is the issue of reverse discrimination.

Section 73 of the Human Rights Act provides that reverse discrimination is acceptable if it is done in good faith and for the purpose of assisting or advancing persons or a group of persons against whom discrimination is unlawful and those persons may reasonably be supposed to need assistance to achieve an equal place with others in the community.

In ensuring that an employer is not discriminating against older workers, the employer should also be mindful to ensure that it is not causing reverse discrimination against younger workers.

In the United States, case law has developed which allows employers to terminate older workers' employment only if their output is lower than a reasonable standard, and not if the input costs associated with his/her employment are higher.

Input costs include such things as special equipment required for the job, for example, visual or hearing aids or higher training costs.

This is consistent with s 29 of the Human Rights Act dealing with disability, which requires employers to provide special services, facilities or equipment for people with disabilities to perform the duties of their job if it is reasonable to do so.

In general, larger better resourced employers will have a higher onus on them to accommodate special needs of workers with disabilities, in contrast to smaller employers where the costs and impact of such requirements will be taken into consideration.

Again as noted above if employees become physically or mentally incapable of carrying out their job their employment may be terminated on performance or medical related grounds provided the requirements of procedural fairness are observed.

EXCEPTIONS

If an employer seeks to retire a person who is performing and who challenges such action, then the employer will have to rely on one of the exceptions contained in the Act.

Genuine occupational qualification

Under s 30 of the Human Rights Act, age discrimination is permitted where it is a "genuine occupational qualification" that is, the performance of the job requires that a person be a specific age. Such a qualification is specified in the Act as being either for reasons of safety, "or for any other reason". There may be attempts to rely on this exception to undermine the protection against age discrimination granted by the Act. However, the reasons would have to be good ones.

Public safety

An example where this exception may be applied is in the area of public safety. Public safety has supported similar exclusions in overseas jurisdictions. In *Hodgson v Greyhound Line Inc* 419 US 1112 (1975), the United States Supreme Court considered the following factors:

(a) the employees' functional age, that is their physical capacity to perform the job, as opposed to their actual chronological age;
(b) the practicality of individualised testing in terms of effectiveness; and
(c) the costs of assessing age qualification.

In a leading Canadian decision *Ontario Human Rights Commission v Etobicohe* [1982] 132 DLR (3d) 14 at 19 the Supreme Court established a two step test to determine whether or not the genuine occupational qualification exception can apply as follows:

(a) A limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interest of the adequate performance of the work and, not for any ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the code.
(b) A limitation must be related to the performance of the employment in that it is reasonable and necessary to ensure the efficient and economical performance of the job without endangering the employee, his or her fellow employees and the general public.

Section 27 of the Act provides that nothing shall prevent different treatment based on sex or age unless, for reasons of authenticity, being a particular sex or age is a genuine occupational qualification required for that position or employment. For example, the mandatory requirement that bar staff be over the age of 20 years.

The same test is applied as under s 30 of the Act and the Canadian *Etobicohe* decision. This has required a consideration of the nature of the duties, existing workplace conditions and their effect on the employees.

Disability

Section 29 provides an exception in relation to persons with disabilities. It is lawful to discriminate on the grounds of disability if the employer cannot be reasonably expected to accommodate the disability, or that the employee's disability creates an unreasonable risk to the employee or to others. This section will also apply to age related disabilities.

Section 29 provides a test which is to be applied before the exception can be relied upon in respect of (age) related disabilities. Firstly, is it reasonable to provide the special services and facilities required by the disabled person or does the environment in which the disabled person performs the duties create an unreasonable risk of harm to the disabled person or others and it would be unreasonably disruptive to reduce that risk to a normal level, s 29(1)(a) and (b). Secondly, can the activities be adjusted so that another employee takes on tasks which the person with the disability is unable to perform and whether such a transfer of tasks would cause an unreasonable disruption.

PROPOSED AMENDMENTS

In August 1998, the Minister of Justice introduced the Human Rights Amendment Bill which addresses the issue of age linked retirement benefits by providing some limited protection.

Proposed amendments include a clause making it lawful for employers to pay retirement benefits to employees if:

(a) The employee's entitlement is determined by age and/or length of service; and

(b) The retirement benefit is a term of an employment contract that is in force on 31 December 1998 and the employee is party to it.

The clause also provides that if a retirement benefit is a term of an employment contract, as at 31 December 1998, the payment of the retirement benefit will remain lawful when:

(a) The parties enter into a new contract and the employee remains entitled to the retirement benefit;

(b) The employee's employer changes as a result of restructuring, reorganisation, etc provided that the employee remains entitled to the benefit under an agreement.

The effect is not to make retirement benefits that do not satisfy the clause, unlawful, but rather to confirm the legality of the retirement benefits which are covered.

SUMMARY

The practical changes brought about by the Human Rights Act can be summarised as follows:

- Employees can no longer be expected or compelled to retire at any particular age unless one of the exceptions in the Act applies.
- Performance, rather than age will be the key factor to determine an employee's ongoing employment.
- Evaluation systems should be introduced and maintained for all employees.
- Evaluation systems must be fair to all employees and not be biased against older employees or exert pressure on them to retire by inferring they are no longer required or wanted.
- Employers should explore means of enabling employees to remain working in areas where performance is not dependent on age.

CONCLUSION

As can be seen, the removal of the compulsory retirement age will affect employers, employees and those in partnerships. The changes brought about by the removal will pose a challenge to those businesses including those partnerships which have relied on retirement as part of their personnel policies, to ensure a movement and rejuvenation of staff or partners within their organisation.

In New Zealand, with its increasingly older population, perceptions of employing older people will need to adjust. Just being 60 or 65 years of age is no longer a reason to remove an employee from the workplace or a partner from a partnership. ❑

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DSL Council and fulfil the requirements of s 55 of the 1982 Act. The NZLS has taken the position that s 55 is not affected by the 1997 Act: the NZLS memorandum, para. 17. Accordingly, Australian practitioners – now too, of course, New Zealand barristers and solicitors – wanting to practise as solicitors on their own account in this country must comply with s 55 and cannot call in aid the 1997 Act or their Australian qualifications. In particular, an Australian practitioner wanting to become a principal will have to prove that, during the last eight years, he or she has had not less than three years' legal experience in New Zealand: the 1982 Act, s 55(2)(a). The only way around that restriction, if the NZLS is right, is for the Australian practitioner to make an application to the High Court under s 55(3).

In my view, the NZLS position is wrong and s 55 is subject to the 1997 Act. Under s 55, there is a regime for law society "approval" before a New Zealand barrister and solicitor can "commence practice as a solicitor on his own account". That DSLCouncil "approval" is a "registration" (as defined in the 1997 Act), required by the 1982 Act for carrying on the occupation of practising as a solicitor on one's own account. To practise as a solicitor on one's own account without this approval is an offence: the 1982 Act, s 55(9). It is the third "approval" ("registration") one requires before one can practise as a solicitor on one's own account, the other two being admission as a barrister and solicitor and a practising certificate as a barrister and solicitor (or as a solicitor, which, until the NZLS memorandum, was effectively defunct).

Of course, a district law society, when considering a s 55 application in which the applicant was relying on his or her Australian registration as a solicitor entitled to practise on his or her own account, could impose conditions on the registration here in accordance with s 20(3) of the 1997 Act.

CONCLUSION

There are therefore two significant errors in the NZLS interpretation of the 1997 Act in so far as it affects the legal profession.

The first error is the ignoring of s 38 and the misapplication of s 17(1) of the 1997 Act. The NZLS position fails to allow Australian practitioners to elect, when applying for practising certificates, whether to utilise their New Zealand qualifications or their Australian qualifications. The 1997 Act adds a further ground of entitlement for "registration". It does not preclude an individual from making use of existing (ie pre-1977 Act) grounds of entitlement, if he or she can fulfil such ground or grounds. The effect of this error is significantly to affect Australian practitioners' rights to practise law in New Zealand. It also leads to bizarre results: a New South Wales legal practitioner, for example, admitted via the Trans-Tasman route can never practise here as a barrister and solicitor, notwithstanding that he or she is also a New Zealand barrister and solicitor. There is no way he or she can achieve his or her desired status here, no matter what he or she does or offers to do in New Zealand or New South Wales! That cannot be right – and is not right.

The second error is the view that the s 55 regime, prescribing how a New Zealand barrister and solicitor gets approval to practise as a solicitor on his or her own account, is not subject to the 1997 Act, with the consequence that Australian practitioners will be seriously hampered in their ability to commence practice as solicitors on their own account here. Unless they go to the trouble and expense of applying to the High Court for leave, they will have to practise here as employed solicitors for at least three years. That is likely to be most unappealing to an Australian solicitor of many years' experience as a principal who wishes to move to New Zealand. The NZLS view of the law is wrong. The s 55 regime is subject to the 1997 Act. ❑

BANKS AND KNOWING RECEIPT

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examines the current state of play

This paper discusses a number of issues of importance in respect of the equitable cause of action called "knowing receipt". First, has it anything to do with constructive trusts? Secondly, what special features are there in the banking context which might impact on this form of liability? Thirdly, what are the requirements for liability, and how do these reflect the underlying rationale of the action? This area of the law has been bedeviled by conflicting voices (my own included!), but it appears that some semblance of order is now appearing. A new property-based approach is beginning to demand attention, and it may solve many of the problems in this area.

CONSTRUCTIVE TRUSTEESHIP?

Equitable liability in knowing receipt has been historically and linguistically linked to constructive trusteeship. However, the term "constructive trustee" in this context is no more than a shorthand form of saying "liable to account [for the loss caused by knowing receipt] as if one were a constructive trustee". The phrase "as if one were a constructive trustee" adds nothing. It refers at most to a personal obligation in the recipient defendant. It does not refer to a real or proper trusteeship with trust property and beneficiaries. Indeed, the substantive liability of knowing receivers is not part of trust or fiduciary law at all. Certainly, the equitable liability of a third party who becomes involved in a breach of trust or fiduciary duty by receiving trust property is not inherently part of the law of "constructive trusts", however that law is made up. (See further C Rickett and R Grantham, "Towards a More Constructive Classification of Trusts" [1999] LMCLQ, forthcoming; CEF Rickett, "Towards a Clearer Classification of Trusts", Inaugural Lecture, The University of Auckland, 12 October 1998.)

It is time to come clean on this and avoid the gobbledegook of that terminology. Fortunately, an influential Judge has recently drawn attention to the problem. In *Paragon Finance plc v DB Thakerar & Co (a Firm)* (CA (Eng) 21 July 1998), Millett LJ (as he then was) discussed the use of "constructive trust" terminology in these circumstances:

> [T]he expressions "constructive trust" and "constructive trustee" have been used by equity lawyers to describe two entirely different situations. ... The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.
>
> ...
>
> The second class of case ... arises when the defendant is implicated in fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be "liable to account as a constructive trustee". Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions "constructive trust" and "constructive trustee" are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are "nothing more than a formula for equitable relief": *Selangor United Rubber Estates Ltd v Cradock* [1968] 1 WLR 1555 at p 1582 per Ungoed-Thomas J.

Later on, his Lordship said the constructive trust terminology was "remedial [but 'necessarily confined to a personal remedy'] ..., though not in the sense in which it is used in the United States and Canada, where it is the basis of a discretionary proprietary remedy". It was "a catch phrase ... employed ... to justify the exercise of equity's concurrent jurisdiction in cases of fraud. 125 years later it is surely time to discard it. If we cannot bring ourselves to discard it, at least we can resolve not to take it literally."

The remedies for knowing receipt reflect the fact that the liability is not inherently a constructive trust liability. If found liable, the recipient defendant must pay over as equitable compensation a sum equating to the loss suffered by the beneficiary (or perhaps, if knowing receipt is regarded as restitutionary, monetary "restitution" equating to the recipient defendant's gain). A proprietary remedy might well be granted in some circumstances, where it is appropriate, and that remedy might be (confusingly) called a "constructive trust", but that is not the same as saying that liability is in constructive trusteeship.

THE BANKING CONTEXT

A claim in knowing receipt in the banking context needs to be understood within the matrix of the banker-customer (creditor-debtor) relationship, which provides important presumptions as to the nature of a bank's title to or interest in funds on their receipt when deposited or collected. A bank does not receive funds from depositors as a trustee, unless it acts as an express trustee, in which case it receives and holds funds not as bank but as trustee. A bank, on receipt of deposited funds, becomes entitled to use those funds as its own property. Of course, that proprietary entitlement of the bank is tempered by its contractual position with its customer, whereby the customer acquires a debt owed by the bank, or reduction of a debt it owes the bank. But, even in a case where a bank knows its customer is a trustee and/or fiduciary, the bank does not, by virtue of that fact itself, become a trustee (express or constructive) of the deposited funds. These propositions are incontrovertible: see *Foley v Hill* (1848) 2 HL Cas 28; *Goddard v DFC Ltd* [1991] 3 NZLR 580 (HC), [1992] 2 NZLR 445 (CA); and *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75. This framework impacts on the law of knowing receipt. It throws up special problems in defining receipt. In one sense, the bank receives the funds; in another sense, that receipt is circumscribed by the contractual matrix. It also throws up particular issues about the role of the bank's knowledge in founding liability.

REQUIREMENTS OF LIABILITY

The requirements for a successful "knowing receipt" claim are not absolutely clear. There are three possible variations, dependent upon the conceptual approach one adopts to knowing receipt liability.

Dishonest wrongdoing in equity?

This analysis builds on the modern understanding of dishonest assistance liability. It is now established (following *Royal Brunei Airlines v Tan* [1995] 2 AC 378) that, to succeed in "dishones assistance", a plaintiff must prove:

(a) The existence of a trust or fiduciary duty which is breached by the fiduciary;
(b) The "assistance" by the defendant in that breach;
(c) The dishonesty of the defendant in rendering that "assistance"; and
(d) Loss suffered by the plaintiff as a result of the dishonest assistance.

Something more must be said about requirement (a). In *Equiticorp Industries Group Ltd v A-G* [1998] 2 NZLR 481, 540, Smellie J suggested that the first requirement could be satisfied if there were some unauthorised basis or act, apparently distinct from a breach of fiduciary duty. He extended this notion to knowing receipt as well. There is no authority for this suggestion, which would extend considerably the reach of both dishonest assistance and knowing receipt liability. It was in any event obiter, since the Judge held there had been a breach of fiduciary duty (in the traditional sense) in the facts. Further, Smellie J did not repeat his suggested "unauthorised act" basis when he dealt later in his judgment with another separate dishonest assistance claim: see pp 664-665.

Although dishonest assistance, like knowing receipt, has historically been called "constructive trustee" liability, this is extremely confusing. There is no role for trusteeship at all. This is clearly an equitable liability to compensate for loss caused by participation, dishonestly, in a breach of a fiduciary's fiduciary duties. It is, as Lord Nicholls recognised in *Tan*, the equitable equivalent of the tort of inducing a breach of contract. It is an equitable tort (or "wrong"), for which the primary remedy is equitable compensation. The tort is committed by the defendant when the requirements as outlined above are met, and it can be seen as the breach by the defendant of a duty on him not to assist dishonestly in a breach of trust or fiduciary duty by a trustee or fiduciary. The duty owed by the defendant is, however, neither a trustee duty nor a fiduciary duty (ie the defendant is neither a trustee nor a fiduciary). One school of thought sees this analysis as extremely significant in reaching an understanding of the true basis of knowing receipt.

To found liability in dishonest assistance, the assistance must have been provided "dishonestly": see *Tan*. Lord Nicholls said that "acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances" and that "for the most part dishonesty is to be equated with conscious impropriety" (p 389). The test for dishonesty seems two-fold, with an objective and a subjective element. The objective element is designed to prevent people from setting their own standards of behaviour to avoid liability: see p 389. There must be an examination of the circumstances and the standards of behaviour expected of honest people on the given facts to assess whether there has been objective dishonesty. At the second stage of the inquiry, there is an examination of the particular behaviour of the alleged assister. Was the alleged assister conscious of the impropriety of his acts or omissions, so that it could be said that he is dishonest, as assessed against the objective standard? In that sense, it seems that the personal attributes of the defendant assister might be relevant. There is also, in the cases, a close link between dishonesty and the notion of "commercially unacceptable conduct", which is concerned with the situation in which a commercial party takes a risk in its business activities in a way which might jeopardise the position of others: see *HR v JAPT* (Ch D 19 March 1997, Lindsay J).

The analysis of knowing receipt as a form of equitable wrongdoing proceeds in this way. Recipient and accessory liability in equity are both historically (*Barnes v Addy* (1874) 9 Ch App 244) and doctrinally linked. They are manifestations of a single form of liability in equity of a third party who participates in a breach of trust. Participating in a breach of trust is to breach one's own primary duty not so to participate. Participation may result in the receipt of the beneficiaries' property by the third party, as one manifestation of helping or assisting; and participation may also occur by helping or assisting in the breach without receipt of trust property.

If this analysis is sustained, then the consequences are that: (i) "receipt" and "assisting" are simply two forms of the act of participation; (ii) dishonesty is required for what is a form of "intentional" equitable tort; and (iii) equitable compensation is the primary remedy, since the tort focuses essentially on loss suffered by the plaintiff. Strong support for this approach, and in particular that dishonesty (or at least knowledge within the first three *Baden* categories (see herein), amounting thereby in effect to "dishonesty") is required for liability, is found in most of the English cases: see *Barnes v Addy* at 251-252; *Williams v Williams* (1881) 17 Ch D 437, 445-446; *Re Blundell* (1889) 40 Ch D 370, 382-383; *Carl Zeiss Stiftung v Herbert Smith (No 2)* [1969] 2 Ch 276, 290-292, 298-299, 300-301, 303-304; *Re Montagu's Settlement* [1987] Ch 264, 276-282, 285; *Barclays Bank Ltd v Quincecare* [1992] 4 All ER 363, 375; *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 488; *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769, 777; *Jonathan v Tilley*, CA (Eng), 30 June 1995; and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 707. This approach also has the strong support of Professor Finn (now Finn J of the Federal Court of Australia): see "The Liability of Third Parties for Knowing Receipt or Assistance" in *Equity, Fiduciaries and Trusts 1993* (ed DWM Waters), 195.

Unjust enrichment liability?

At common law any liability founded on receipt of money (where title to the money passes to the recipient) is primarily by way of the action for money had and received. This recovery lies in the law of unjust enrichment, where –

although title passes to the transferee – the intent of the transferor is vitiated (by, for example, mistake, failure of basis, or, as some suggest, ignorance). A crucial feature of this liability is that it is strict liability.

Another view of knowing receipt liability seeks to argue that its true doctrinal link is with common law receipt liability, rather than with equitable dishonest assistance liability. Accordingly, recovery is restitutionary and is justified by the principle of reversal of unjust enrichment at the expense of the plaintiff, and liability is strict. The defendant is then permitted to plead defences in mitigation, most notably in a banking context change of position and ministerial receipt. This analysis, divorcing knowing receipt from dishonest assistance, is supported widely by academic proponents of the law of unjust enrichment: notably P Birks, "Misdirected Funds: Restitution From the Recipient" [1989] LMCLQ 296; P Birks, "Trusts in the Recovery of Misapplied Assets: Tracing, Trusts and Restitution" in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (1992), 149; C Harpum, "Knowing Receipt and Knowing Assistance: the Basis of Equitable Liability" in P Birks (ed), *Frontiers of Liability, Volume 1* (1994), 9. There are some decisions which have paid lip service to the theory, while actually applying a compromise position as discussed herein. See *Equiticorp* at 539-540, 629-641; *Powell v Thompson* [1991] 1 NZLR 597 (possibly the closest decision yet to adopting strict liability); *Kootootang Nominees Pty Ltd v ANZ Banking Group Ltd* [1998] 3 VR 16 (an especially full discussion of the cases and other authorities). It is important to note also that in *Tan*, at p 386, Lord Nicholls made a comment that implied that receipt-based liability in equity should be restitution based. His Lordship developed this theme in an important essay published recently: see "Knowing Receipt: The Need for a New Landmark" in WR Cornish, R Nolan, J O'Sullivan and G Virgo (eds), *Restitution: Past, Present and Future* (1998), 231. His Lordship suggested that, although strict liability should be the order of the day, a dishonest receiver may well find himself subject to wider "fiduciary" duties than an innocent receiver. Certainly, a knowing receiver would struggle to establish an effective defence, but this suggestion goes further than that, to suggest a more potent or extended form of liability.

On this restitutionary approach, the term "knowing" in knowing receipt must be dropped as being misleading. Other important consequences would be:

(a) the onus on the plaintiff would be minimised considerably, to establish only (i) that he had an equitable property right, and thus value, (ii) which value was received by the defendant when the relevant asset was received (even if the defendant received a good title), and (iii) that there was unjustness (ie that so far as the plaintiff was concerned the defendant's receipt of the asset was without effective intention or basis);

(b) the onus on the defendant would be increased considerably, to establish either (i) that one of the liability pillars in the plaintiff's case was not established (either legally or on the facts), or (ii) that there was an applicable defence or some possibility of relief (especially change of position, where it now appears that the defence under s 94B Judicature Act 1908 has been subsumed by a much wider "equitable" defence or relief jurisdiction – see *The National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*, CA54/97, 12 November 1998; or ministerial or agency receipt. In respect of both defences, the defendant's knowledge will be highly relevant, since only a bona fide defendant can press the defences. The onus will be, it seems, on the defendant to establish his or her bona fides.);

(c) the primary remedy would be monetary, but its basis would be restoring to the plaintiff the gain made by the defendant (restitutionary damages).

Equitable wrongdoing requiring only constructive knowledge?

There is a number of New Zealand decisions which appear to adopt a position whereby receipt liability does not require dishonesty by the recipient (although dishonesty obviously suffices), but where a negligent failure to establish the true position suffices: see *Westpac Banking Corp v Savin* [1985] 2 NZLR 41; *Marr v Arabco Traders Ltd* (1987) 1 NZBLC 102; *Powell v Thompson*; *Equiticorp Industries Group Ltd v Hawkins* [1991] 3 NZLR 700; *Nimmo v Westpac Banking Corp* [1993] 3 NZLR 218. This was, in effect, also the position adopted by Smellie J in *Equiticorp*. These cases discuss any knowledge requirement using the five-fold categorisation of Peter Gibson J in *Baden v Societe Generale du Commerce SA* [1992] 4 All ER 161:

(i) actual knowledge;
(ii) wilfully shutting one's eyes to the obvious;
(iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;
(iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man;
(v) knowledge of circumstances which would put an honest and reasonable man on inquiry and failure to make such inquiries.

It is generally said that categories (i)-(iii) are cases of actual knowledge, which can roughly be equated with dishonesty or want of probity, and categories (iv)-(v) are cases of constructive knowledge (but not constructive notice).

The result of the New Zealand decisions cited above appears to be that any one of these five types of knowledge by the recipient will found liability. In so far as it is possible to say with any level of certainty what the present favoured position is in New Zealand, this appears to be it. However, the constructive knowledge test is not immune from challenge. The following two points are particularly pertinent:

(a) Assuming *Savin* to be the leading case, the judgments are not unequivocal as to the requirements of liability. Furthermore, *Savin* was decided before the explosion of cases on the issue, and it is not unlikely that the decision will not be the last word in New Zealand.

(b) The speech of Lord Browne-Wilkinson in *Westdeutsche* contains important comments about the conscience-based approach regarded by his Lordship as fundamental to equity; and there is a growing awareness in respect of knowing receipt that we are dealing not with trusts and trusteeship, but with personal liability in equity. His Lordship stated (at p 707, emphasis in original, although it is to be regretted that he retained the language of "constructive trusteeship"):

> The bank contended that where, *under a pre-existing trust*, B is entitled to an equitable interest in trust property, if the trust property comes into the hands of a third party, X (not being a purchaser for value of the legal interest without notice), B is entitled to enforce his equitable interest against the property in the hands of X because X is a trustee for B. In my

> view the third party, X, is not necessarily a trustee for B: B's equitable right is enforceable against the property in just the same way as any other specifically enforceable equitable right can be enforced against a third party. Even if the third party, X, is not aware that what he has received is trust property B is entitled to assert his title in that property. If X has the necessary degree of knowledge, X may himself become a constructive trustee for B on the basis of knowing receipt. But unless he has the requisite degree of knowledge he is not personally liable to account as trustee: ... Therefore, innocent receipt of property by X subject to an existing equitable interest does not by itself make X a trustee despite the severance of the legal and equitable titles.

When the time comes for the Court of Appeal to re-examine knowing receipt liability, and when therefore the compromise position (probably the law in New Zealand) is compared with the favoured positions in other jurisdictions, it may well be that the compromise position will give way. Perhaps knowing receipt will be defined as an equitable wrong requiring dishonesty. Perhaps it will be defined as a liability arising out of the need to reverse an unjust enrichment. Much will depend, it would appear, on whether the House of Lords has spoken before then. Much will also depend on whether an alternative understanding of knowing receipt, which is beginning to be articulated, commands attention in the meantime. This alternative understanding arises out of recent scholarship on the crucial issue whether claims founded on property rights have a status of their own which does not require their being collapsed into either wrongs or unjust enrichment.

In any event, the compromise position, being the law at present, requires a plaintiff to prove the following requirements for a "knowing receipt" cause of action to succeed:

(a) The existence of a trust or fiduciary duty which is breached by the fiduciary;

(b) "[T]he beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff" (per Hoffmann LJ in *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685, 700);

(c) "[K]nowledge [within *Baden* (i)-(v)] on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty" (also per Hoffmann LJ) (note that this requirement incorporates knowledge of two matters – the existence of the trust or fiduciary duty, and the breach of that trust or fiduciary duty); and

(d) Loss suffered by the plaintiffs as a result of the knowing receipt.

THE NEED FOR "BENEFICIAL RECEIPT" BY THE DEFENDANT

When a bank receives funds on deposit, those funds become at the moment of receipt the property of the bank. At common law, in respect of an action for money had and received to reverse an unjust enrichment, the bank receives at law when it factually receives, even though when we say funds were deposited directly into an account, we mean no more than to assert the acknowledgment of a debt owed to a customer by the bank. The common law then permits a defendant bank to raise the defence of ministerial receipt (or agency), whereby the bank effectively points to the customer as the "real" recipient: see *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265; affd [1991] Ch 547; *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662; WJ Swadling, "The Nature of Ministerial Receipt" in P Birks (ed), *Laundering and Tracing* (1995), 243. This reasoning achieves the appropriate balance between the bank's potential liability to two parties – the payer and its customer. It accords priority to the contractual obligations of the bank to its customer, by requiring the plaintiff to proceed against the customer rather than the bank.

Advocates of knowing receipt as a restitutionary liability argue that the same analysis of receipt should be applied there. However, at present that is not so. There is no receipt for the purposes of knowing receipt, until there has been a "beneficial receipt", which is more than the factual receipt of funds by the bank. In practice, "beneficial receipt" amounts to saying that if an account is in credit at the time of receipt, the bank does not receive for its own benefit so as to amount to receipt for the purposes of knowing receipt.

"Beneficial receipt" does, however, give rise to difficulties in the context of overdrawn bank accounts. This was discussed by Millett J in *Agip* at 292 (my emphasis):

> The ["knowing receipt" class] is concerned with the person who receives for his own benefit trust property transferred to him in breach of trust. ... *The essential feature of [this] class is that the recipient must have received the property for his own use and benefit.* This is why neither the paying nor the collecting bank can normally be brought within it. In paying and collecting money for a customer the bank acts only as his agent. *It is otherwise, however, if the collecting bank uses the money to reduce or discharge the customer's overdraft. In doing so it received the money for its own benefit.*

Two points can be discussed. First, it seems that the "beneficial receipt" requirement reflects to some extent the operation of the ministerial receipt defence in the common law receipt claims. For example, Millett J's reasoning was applied in *Westpac Banking Corp v Nimmo*, where Blanchard J held that, even though the payment in breach of trust had been by cheque payable to the bank itself, the bank, on the facts, had received ministerially and not beneficially. The fraudulent fiduciary had paid the principal's money to the bank; the bank had then, within a short time, put the fraudster in possession of bank cheques and travellers cheques. This was held not to constitute beneficial receipt by the bank because the bank acted merely as a conduit or agent for its customer in passing on the funds. It should be recognised, of course, that the ministerial receipt defence, certainly at common law and probably in equity, can only succeed if the funds received by the bank have been effectively paid out or credited to the customer before the bank acquires notice of a claim: see *ANZ Banking Group Ltd v Westpac Banking Corp*, above, and *Bank of New Zealand v Westpac Banking Corp* (1991) 3 NZBLC 102,442. If not, the bank is the receiver for the purposes of liability.

Secondly, in view of Millett J's analysis, the issue of overdrawn accounts needs to be treated with care. Professor Cranston, as he then was, states in his recent book, *Principles of Banking Law* (1997) (at p 208) (emphasis added):

> There is a need to bring the legal analysis of beneficial receipt into line with banking practice. [Here, Cranston is referring to the fact that "as soon as money is paid into a bank it is, generally speaking, the bank's, to use as it wishes" – his p 207; see above para 4.3.] There is

> also a need to bear in mind that if "beneficial receipt" is widely defined, banks are exposed to huge potential liabilities – apart from any other liability they have as accessories. Consequently, beneficial receipt cannot be equated with the bank being benefited in the ordinary way through a payment in. It must be confined to situations of real benefit, for example, to the bank pressing the customer to reduce its indebtedness under a facility when the customer is of doubtful solvency.

While Millett J's comments in *Agip* suggest an all or nothing approach, Cranston's view is more banker-friendly in that it suggests a distinction between ordinary overdrafts and closely monitored overdrafts. In fact, Cranston's position is supported by Millett writing extra-judicially (see "Tracing the Proceeds of Fraud" (1991) 107 LQR 71, 83 fn 46):

> The mere continuation of a running account in overdraft should not be sufficient to render the bank liable as recipient; there must probably be some conscious appropriation of the sum paid into the account in reduction of the overdraft.

The cases suggest the legitimacy of such a distinction. In New Zealand, in cases where knowing receipt liability (with payments received into overdrawn accounts) has been upheld, including *Westpac Banking Corp v Savin*, above, *Anderson v Chilton* (1993) 4 NZBLC 103,375, and *Westpac Banking Corp v Ancell* (1993) 4 NZBLC 103,259, the banks were beneficially receiving because, on the facts, they could be said to be really and personally benefiting. Such benefit followed as a result of the banks' close monitoring of the relevant accounts because they were concerned about their exposure. As such, in Richardson J's words in *Ancell* (at 103,272), "[t]he inference [in such circumstances] that the bank was consciously benefiting from the resulting use of the funds of the [customer's beneficiaries] is inescapable".

PROPERTY-BASED ANALYSIS

There are then some doubts about the proper characterisation of knowing receipt. Is it founded on wrongdoing? Is it founded on unjust enrichment? Or is there another explanation? In my view, there is a better way of approaching knowing receipt, as a consequence of which either or both of the wrongdoing and unjust enrichment bases are placed in a more coherent framework. A claim in knowing receipt, analogously to the action in conversion in respect of common law property rights, functions as an indirect means of protecting a plaintiff-beneficiary's equitable proprietary interest.

That the law is responding to that property right is clear, since a subsisting equitable interest is a prerequisite to such a claim. Hoffmann LJ in *El Ajou*, as quoted earlier, stated that the beneficial receipt must be "of assets which are traceable as representing the assets of the plaintiff". Merely to assert a breach of fiduciary duty which does not consist of the misappropriation of property belonging in equity to the plaintiff will not found an action in knowing receipt. This point was reinforced by Rattee J in *Brown v Bennett* [1998] 2 BCLC 97: see R B Grantham and C E F Rickett, "Liability for Interfering in a Breach of Trust" (1998) 114 LQR 357; and note the Canadian position in *Gold v Rosenberg* (1997) 152 DLR (4th) 385 and *Citadel General Assurance Co v Lloyd's Bank Canada* (1997) 152 DLR (4th) 411, discussed in L Smith, "W[h]ither Knowing Receipt?" (1998) 114 LQR 394.

Whether the action in knowing receipt mediates the protection of the equitable property right through a wrong or through an unjust enrichment is a matter of some doubt. While, as we have seen, some treat knowing receipt as concerned with equitable tort, others treat it as concerned with the unjust enrichment of the recipient. Once it is perceived, however, that the action arises from the event of (equitable) property rights, and not from that of a tort or an unjust enrichment, and that it mediates the enforcement of those equitable rights, any unjust enrichment analysis of knowing receipt becomes distinctly wobbly. This is particularly so in respect of knowledge. If the action is concerned with equitable property rights, then liability cannot be strict. Where a common law property right is in issue, the liability of a recipient of the relevant asset will extend to both those who know and those who do not know of the property right. However, where an equitable proprietary interest is in issue, the knowledge of a recipient of the relevant asset is of fundamental significance to matters of liability. This is because the function of knowledge in the law of equitable property is to define the duration and priority of a person's equitable proprietary interest. Where equitable property is in issue, therefore, knowledge must have a role to play. That knowledge need not be actual knowledge (or dishonesty). Constructive knowledge is doctrinally sufficient. Indeed, the level of knowledge should logically be consistent with that required by other equitable doctrines performing similar functions (eg the bona fide purchaser for value without notice rule).

This alternative analysis supports it seems, the present New Zealand position. Indeed, it provides that position with intellectual coherence. In any event, as is clearly now the case with "dishonest assistance" since *Tan*, above, so also in "knowing receipt", constructive trusteeship has no place at all in defining the liability of the defendant. The defendant is not a (constructive) trustee prior to his receiving the property in which the plaintiff has an equitable interest. Nor does the defendant become a constructive trustee ipso facto on his receipt of the property. If he is liable, he is primarily susceptible to an award against him of equitable compensation to meet the plaintiff's loss or an account of profits to be disgorged (if a wrongdoing analysis is preferred), or an award against him of restitutionary damages (monetary "restitution" or an account) (if an unjust enrichment analysis is adopted). However, unlike "dishonest assistance", a "knowing receipt" defendant may also – on the same facts – be liable to an equitable proprietary remedy, if he not only received but still retains property identifiable through the process of equitable tracing. However, the equitable proprietary remedy cannot be a response to the "knowing receipt" claim, because the latter is not a direct proprietary claim. The equitable proprietary remedy requires a direct proprietary claim. (It is this distinction which Lord Browne-Wilkinson was making in the comments in *Westdeutsche* at 707 quoted earlier.) Further, the "knowing receipt" defendant may, in some very particular and limited circumstances which we cannot yet articulate with any degree of certainty, find himself subjected by imposition of the Court to something that makes him look like a "trustee" because it is an imposed proprietary remedy arising at the date of the Court's imposition (see *Fortex Group Ltd (In Receivership and Liquidation) v Macintosh* [1998] 3 NZLR 171, discussed in Rickett and Grantham, "Towards a More Constructive Classification of Trusts"). ❑