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FREEDOM OF SPEECH?

The Law Lords have heard the appeals in *Lange v Atkinson* from the Court of Appeal of New Zealand and in *Reynolds v Times Newspapers* from the English Court of Appeal. The identical Bench was assembled in the Privy Council and the House of Lords respectively (including Lord Cooke) and the two cases heard separately. Separate judgments will be produced.

This is the first time in a generation that this has occurred. Oddly enough, the prospect also arose last year in respect of the "Chinese Walls" cases, *Tower Corp v Russell McVeagh* and *KPMG v Prince Jeffri* but the New Zealand case was not pursued to the Privy Council. This leaves us in the strange position that a New Zealand Court of Appeal case appears to have been disapproved in substance but not in form.

There is room for at least theoretical concern about the process. The point of having the identical Bench in each case is presumably that the same principles should be applied in each case, even if some distinction between the cases causes different results. That being the case, there is room for the risk that a party in case A may be left feeling that the outcome of case A has been affected by an argument in case B to which counsel did not have the chance to respond.

This risk is of course mitigated in practice by the filing of written cases on appeal and by the fact that the Judges will understand this point for themselves, but in a system devoted to ensuring that parties feel that they have been fairly treated, it is not a trivial concern. It seems more important than whatever considerations were seen as preventing a single hearing.

And so to the substance. Public debate on this case is difficult since the media, who control public debate, have a clear interest in the outcome.

There is an obvious attraction in two simple ideas, that democracy requires public debate and that people who enter public life put themselves in the firing line. But there may be other principles and pragmatic matters to consider. The judgments of Their Lordships must be measured against some principles and a few are suggested here.

First is equality before the law. This should apply to politicians as much as anyone else. We should beware of dividing the population into classes and attaching different legal consequences to the membership of different classes. This stricture might be modified if a class were clearly definable and membership of that class were voluntary. Thus one might say that standing for elective office put one in the firing line. But that is not being done. In an era in which Judges are fond of saying that the dividing line between public and private is thin, it is ground for concern when the same Judges start saying that those in public life do not have the same rights to reputation as others. In the end the argument would become circular. Anyone sufficiently interesting for the newspapers to libel must be in public life in some way.

This leads to a pragmatic point. Few would say that our political parties have strength in depth. Clearly there are today, and regularly have been in the past, Cabinet Ministers who would never have progressed beyond the backbenches in a larger country. The Higher Salaries Commission has expressed concern about a need to raise the calibre of candidates for election to the House. A thick skin is a requirement for politicians, but the thickness of skin should not be allowed to become the only determining characteristic. This point is magnified in importance if the special treatment starts to spread beyond the bounds of the House. Its effect then would be to stifle public debate, rather than to encourage it.

Furthermore, unfashionable as it is to say so in New Zealand today, debate must be informed. It is not enough for people merely to state how they feel. While there is a public interest in debate, there is also a public interest in being able to assume that what one reads is accurate. Otherwise, one of two things will happen. Either debate will go off the rails and wrong decisions will be made or the public will discount what they read in the newspapers and have to expend effort verifying facts.

The next trap is in talking about the press as if it has rights and responsibilities different from others. In so far as the media has special responsibilities, they are entirely self-assumed. The media are not entitled to rights others are not. To claim that they are is, by definition, to claim a privilege. While there may be a practical sense in which the media plays an important political role, this does not mean that it should be legally marked out. The same problems will rapidly arise as arise in defining the class of potential victims. Will any home produced scandal sheet qualify or will you have to be approved by the government? What is in issue here is not the extent of any freedom of the press, but freedom of speech.

Freedom of speech is a value in itself. If it is defined in functional terms, as is fashionable (essential to the functioning of democracy) this leads to demands that freedom be restricted where it allegedly conflicts with this aim. Thus UNESCO tried to inflict the New World Information Order on us and we have the inequities of the restrictions on election advertising.

The first principle that the Law Lords should defend is that there is one law for all, politicians, journalists, bar-room debaters and those who just get on with their own lives. ❑

"AN INCREDIBLE BUSINESS OPPORTUNITY..."

Wayne Hudson and Katherine Hubert, Bell Gully Buddle Weir, Auckland

distinguish pyramid selling and multi-level marketing

The Commerce Commission has investigated a growing number of pyramid selling schemes and earlier this year announced that continuing enforcement action against the promoters and operators of such schemes would be one of its key enforcement areas in 1999. ("1999: the year to come for the Commerce Commission", Commerce Commission Media Release 1999/1) It appears that the growing presence of pyramid selling schemes in New Zealand has heightened general consumer awareness – multi-level marketing schemes, in particular, have experienced an element of caution in the New Zealand market. In 1998, the director of international business development for a United States based multi-level marketing company stated "New Zealanders are fairly cautious, less inclined toward get rich quick schemes and as a result put off by the reputation of some of those schemes". (Gautier, A "On the level", *Marketing*, March 1998, 24) This caution, if in fact it does exist, appears to be based on a misunderstanding of the differences between pyramid selling and multi-level marketing.

PYRAMID SELLING?

Multi-level marketing and pyramid selling schemes are different because the participants derive their income from different sources. While many multi-level marketing schemes have a pyramid structure, a participant only earns money by selling the scheme's goods or services. These earnings are derived from:

- goods or services that the participant sells; and
- goods or services sold by each new participant recruited into the scheme by the participant.

A participant in a multi level-marketing scheme does not receive any income for recruiting other people into the scheme. Because income is based solely on product sales, most multi-level marketing schemes have a well-established product range. Many are now also expanding into the market for services. For example, Amway, one of New Zealand's largest multi-level marketers, has a large product range (including household cleaners, dietary supplements, cookware, luggage and toys) and also has an arrangement with Telstra to market Telstra's toll services to small offices and home offices.

While participants in pyramid selling schemes also usually sell goods or services for reward, they earn most or all of their money by recruiting new participants. Because product sales are not central to the generation of income, pyramid selling schemes tend to be based around a single product or a limited range of "gimmicky" products.

According to the definition of pyramid selling schemes set out in the Fair Trading Act 1986 ("FTA"), pyramid selling schemes are schemes that combine the above factors and that are also unfair to many of the participants, in that:

- the financial rewards of many of those participants are dependent on the recruitment of additional participants; and
- the number of additional participants that must be recruited in order for a reasonable financial reward to be generated by each participant is unattainable, or unlikely to be attainable, by many of the participants.

This can be illustrated by assessing pyramid selling schemes in numerical terms. If, for example, a pyramid selling scheme is started by one person who sells the investment opportunity to ten people in order to achieve a certain level of return, and those ten people must in turn sell the investment opportunity to a further 100 people in order to achieve the return (and so on) then all the people in the world would need to be involved in the scheme by the tenth level, in order to support the existing participants. The vast number of people on the bottom layer (greatly outnumbering the people on the upper layers) are the losers, as there are no further people to sell the investment opportunity to.

It is a breach of the FTA to promote or operate a pyramid selling scheme. Individuals who are convicted of promoting or operating pyramid selling schemes can be fined up to $30,000, while companies that are convicted of promotion or operation can be fined up to $100,000.

Enforcement against pyramid selling

The Commerce Commission has been involved in enforcement action against the promoters or operators of various pyramid selling schemes. In 1998, for example, the Commission reached a settlement with the organiser of a scheme known variously as the Life Income Trust and the Perpetual Income Trust ("PIT"). (Commerce Commission Media Release 1998/74)

The PIT scheme was promoted on the basis that it would help people improve their health, finances and lifestyle and revolved around one product, a health supplement that participants had to purchase once every three months. Participants also had to pay $11 per week to participate. Participants were placed in a 3 x 5 level matrix or "trust", but were not required to recruit new participants, although

deductions were made from their earnings for management fees and "independent broker's commission". Once each trust had become "self-funding" (an event dependent on the rate that new trusts were formed and slotted into the matrix below the existing trusts), the trust's income would grow until each trust member received a permanent income of at least $50,000 per year. (Davies, A "Perpetual Trust tackles elixir of life scheme", The Independent, 4 March 1998, 13)

The PIT scheme's promotional literature used language usually associated with multi-level marketing – discussing the distribution of income into a participant's "upline", for example. This appears to be an increasingly common attribute of pyramid selling schemes. In 1997, for example, the Commerce Commission warned Endeavour International Ltd that a part of its retirement savings scheme promoted as a multi-level marketing scheme was, in the Commerce Commission's opinion, pyramid selling. (Commerce Commission Media Release 1997/55.)

Another concerning feature of the PIT scheme is that the organiser claimed the Commerce Commission had reviewed the scheme's literature and had no objections. This claim also appears to be commonly made in literature promoting pyramid selling schemes, despite the Commerce Commission stating on various occasions that it will not endorse any scheme or review associated literature or promotional literature for compliance.

The Commerce Commission found that the PIT scheme breached the FTA. The promised levels of income could not be generated by the activities of each trust in isolation. In order for the 3000 people involved in the scheme to receive the promised income, the Commerce Commission calculated that another 1,000,000 people would need to be recruited. For those people to recover only their costs, the Commerce Commission estimated that an additional 50,000,000 people would need to be recruited. The organiser of the PIT scheme signed undertakings admitting that the scheme breached the FTA and agreeing to stop the scheme and explain to participants why it had been stopped.

The Courts have supported the Commerce Commission's initiative by imposing substantial fines on those individuals convicted of operating or promoting pyramid selling schemes. As a result of Commerce Commission prosecutions, fines of $15,000 (plus costs) and $10,000 (plus costs) were imposed on two individuals convicted of operating the Black Magic pyramid selling scheme in 1997. (Commerce Commission Media Releases 1997/69, and 1997/81.) In May of this year, the Napier District Court convicted the promoter of the Joker 88 and Liberty Group Bonds pyramid selling schemes and later fined her $30,000, the maximum permissible fine for an individual under the FTA. The individual was also required to pay approximately $100 compensation to each of the 1,901 people who paid money into the schemes, in doing so imposing the highest compensation order a District Court can make. (Commerce Commission Media Releases 1999/61 and 1999/67.)

MULTI-LEVEL MARKETING IN NEW ZEALAND

Despite the legitimacy of multi-level marketing schemes, there is a considerable volume of material on the Internet (from mainly United States based web sites) documenting a backlash against them. (See, eg "Whats Wrong With Multi-Level Marketing?" http://www.vandruff.com/mlm.html) This material highlights a number of difficulties inherent in the multi-level marketing structure:

- the opportunity to participate in a multi-level marketing scheme may continue to be sold well after market saturation has occurred for the products sold by the scheme. Accordingly, participants recruited after a certain point are unlikely to make a profitable living from the scheme;
- multi-level marketing schemes may be in a better position to avoid the scrutiny of the Commerce Commission and other regulatory bodies by making misrepresentations in relation to their products that "would never be allowed to see the light of day in the real world of product promotion"; and
- tactics used by some multi-level marketing companies to recruit new participants are dubious, encouraging new participants to exploit their social networks to recruit participants and to spend large amounts of money to attend seminars and purchase motivational books and tapes.

Section 9 FTA addresses many of these problems, as it prohibits persons who are in trade from engaging in conduct that is misleading or deceptive, or likely to mislead or deceive. Sections 12 and 22(1) FTA also specifically prohibits misleading and deceptive conduct about the availability, nature, terms or conditions of employment, and false or misleading representations about the profitability, risk or other material aspect of any business activity which it is claimed can be carried on from home. Also prohibited are false or misleading representations about any business activity which requires people to perform work, or to invest money and to perform associated work. (s 22(2))

The activities of the Direct Selling Association (the "DSA") also counter much of the backlash against multi-level marketing schemes. Many direct selling businesses in New Zealand belong to the DSA, including 22 multi-level marketing companies (among them Amway, Nu Skin, Enrich, Watkins and Tupperware). The DSA believes that New Zealand is a long way from reaching market saturation – its research indicates that direct sales volumes, for example, would need to triple before New Zealand has proportionately the same level of market penetration as Australia.

The DSA has developed a Code of Practice and it is a condition of membership that members adhere to the Code. The Code imposes various obligations on members as to the manner in which they sell goods. For example, all members must:

- not operate or be involved in any kind of pyramid selling scheme; (cl 10)
- not make any misleading statements regarding income or other benefits when recruiting new sales personnel;
- base any earnings or sales representations made to existing or prospective sales personnel on documented facts and information that is accurate and complete; (cl 31)
- ensure that sales personnel are aware of the Code and their obligations under it and comply with the Code as a condition of their contract with the member; (cls 25, 32) and
- give sales personnel a written agreement or statement containing all essential details of their relationship with the member and inform them of their legal obligations under New Zealand law. (cl 33)

Members must deal with consumer complaints promptly, fully and fairly. (cl 22) If the member does not resolve the complaint to a consumer's satisfaction, the member must

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RE PINOCHET

Alan Bracegirdle, Wellington

discusses the substantive issues in this epic case

This case is one of the more remarkable in recent times. It comprises three separate hearings before the House of Lords: a decision on the merits by five Judges in November 1998, a decision by five different Judges to set aside that decision in December/January, and a further decision on the merits by seven Judges in March 1999. (*R v Bartle and the Commissioner of Police ex p Pinochet* (House of Lords, 25 November 1998 and 24 March 1999), and *In Re Pinochet* (House of Lords, 17 December 1998 and 15 January 1999). In all, 13 different Judges were involved in these decisions in the House of Lords.

THE ISSUES

Although the case was affected (and also confused) to a significant extent by the terms of the relevant UK statute law, especially the State Immunity Act, it boiled down to a contest that the Courts could not avoid between two well established principles of customary international law, state immunity on the one hand, specifically of Heads of State, and crimes subject to jurisdiction at international law on the other hand. The two decisions on the merits had important things to say especially about the latter principle, which has been undergoing rapid development this decade. In the first decision, the question on appeal to the House of Lords from the Divisional Court (which had answered the question in the affirmative) was whether Senator Pinochet, who was present in the UK for medical treatment, was entitled to immunity in relation to proceedings for his arrest and extradition to Spain in respect of acts alleged to have been committed while he was Head of State in Chile. The House of Lords decided, by 3-2, that he was not entitled to immunity, with Lord Hoffmann the only Judge not to make any substantive comment, confining himself to concurring with Lord Nicholls in the majority. This decision was set aside in a unanimous decision by the House of Lords, in response to a petition by Senator Pinochet, after it was revealed that Lord Hoffmann had associations that he had not disclosed with Amnesty International, which had been granted leave to intervene in the appeal to the House of Lords.

In the second decision on the merits, a prior question also had to be considered by the House of Lords, that is, when conduct is required to be criminal under UK law for the purposes of an "extradition crime". Attention to this issue had resulted, at least in part, from additional charges raised by Spain which included offences at times when Senator Pinochet had not been Head of State. The House of Lords examined all the issues exhaustively in reaching the conclusion, by 6-1, that no immunity applied but only in respect of extradition crimes committed after 1988, when the UK legislation implementing the 1984 Convention Against Torture into UK law had entered into force and both Chile and the UK had become party to the Convention. The outcome of this second decision is that there has been a substantial addition to the record in terms of the international legal issues involved and an authoritative reinforcement of the scope and application of jurisdiction over international crimes, including accompanying limits to Head of State immunity. In this latter respect, the decision is consistent with the fact, perhaps not unrelated to globalisation tendencies, that state immunity has been on the wane for many years in the common law, while international criminal law (including the notion internationally that no one, not even Heads of State, are above the law) continues to develop apace.

The appeals were brought by the Crown Prosecution Service (on behalf of the Spanish Government and in response to its request for extradition). It is reasonable to assume that the request must have caused some consternation to the UK authorities. They would have had to consider the UK's international legal exposure to Spain if they acted other than in strict accordance with the applicable treaties on extradition. But they would also have had to consider the UK's international legal exposure to Chile in the event that it was decided to extradite Senator Pinochet. They may have considered whether the UK might prosecute him (and, indeed, might be regarded as obliged to do so under international law, at least if they did not extradite him). They may have considered the possibility of extraditing him to Chile for prosecution and trial there. On the other hand, Chile may have had its own international legal exposure to consider, since it might well be argued that Chile has been in violation of its obligations at international law, and accountable to other states accordingly, in not prosecuting Senator Pinochet for the alleged offences or cooperating in his prosecution elsewhere. Such concerns about their respective international legal responsibility may have added an edge to the involvement of both governments in the case.

THE DECISION

The effect of the second decision is that only a very few charges, of torture, remain in play against Senator Pinochet. At one end of the seven individual judgments is that of Lord Goff, who accepted that the Torture Convention provides for international jurisdiction over crimes of torture but considered that the Convention does not override, either expressly or by implication, the immunity of serving Heads of State (so-called immunity ratione personae) or, as in Senator Pinochet's case, of former Heads of State (immunity ratione materiae). He noted that Chilean counsel had conceded that art 1 of the Convention, which defines torture in terms of pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or

other person acting in an official capacity, encompasses Heads of State, but he concluded that they could be prosecuted only in their own states in the absence of a waiver of immunity. At the other end of the spectrum is the judgment of Lord Millett, who accepted the majority decision but said that he would have allowed the appeal in respect of torture offences wherever and whenever they were carried out.

Some of the judgments concentrated on comment on particular aspects of the problem. Thus, Lord Millett looked at the theory and historical development of jurisdiction over international crimes, Lord Hutton and Lord Phillips focused on the application of state immunity, including previous cases (most of which were of limited relevance because they were concerned with civil proceedings against states rather than the responsibility of individuals in criminal proceedings in respect of international crimes), and Lord Hope undertook a detailed analysis of the charges laid by Spain. It was noted that it is now well established that some categories of crime, of such gravity that they shock the consciousness of mankind and cannot be tolerated by the international community, have been criminalised at international law. Any individual who commits such a crime is regarded as mounting an attack on the international order, and offends against international law. (Increasingly, states may take jurisdiction over such crimes wherever they are committed. In some cases, they are required to punish the acts under their national law as criminal, whether due to obligations under customary international law (as in the case of piracy) or pursuant to a number of treaties where they are party to them. In these cases of universal jurisdiction, states are under an obligation either to prosecute the offenders if they are present within their territory, or to extradite them to another country for that purpose.) In short, all states are expected to cooperate in ensuring that there is no safe haven, or refuge, for such persons.

Lord Millett's more controversial contention was that the domestic Courts could take extraterritorial jurisdiction directly over crimes of universal jurisdiction

INTERNATIONAL CRIME

It was also noted that torture was an international crime under customary international law prior to the Convention. (Indeed, it was generally accepted that the prohibition on torture has the status of jus cogens, that is, a peremptory or overriding norm of international law from which no derogation is permitted.) What the Convention did was to oblige the states parties to exercise jurisdiction over torture universally, and to extend the prohibition to all (including isolated and individual) acts of official torture. Several judgments emphasised, with reference to former Heads of State, that no question arose of waiver of immunity or needing to imply terms into the Convention. Since Heads of State are prime examples of official persons to whom the Convention may apply, and official acts are the very objective of the Convention, it is therefore simply a matter of applying the Convention's express terms. Lord Browne-Wilkinson noted that it could not be the case that the person who might be the most responsible for official torture escaped liability, while inferior officials did not. Further, if immunity ratione materiae (which attaches to official acts and to the state and not to the personal status of a Head of State) did apply, it would extend to officials involved in carrying out the functions of the state, with the result that the Torture Convention (and implementing legislation of governments) would be frustrated. Lord Saville added that such immunity from jurisdiction in the case of official acts of torture cannot co-exist with, or be implied into, a Convention which obliges the punishment of official acts of torture.

Immunity ratione personae, on the other hand, attaches to the person and the office rather than the conduct or functions of a serving Head of State (that is, as Lord Millett put it, it is a status rather than subject matter immunity arising out of the notion that the individual is the personal embodiment of the state itself and not subject to the jurisdiction of any other state), and has traditionally been regarded as absolute. Although the Court did not have to answer the question of the immunity of a Head of State while in office, it appeared to accept that he or she would be protected. (However, it is almost certainly the case that, by virtue of art 7(2) of the 1993 Statute of the International Criminal Tribunal for Former Yugoslavia, there would now be no bar to Milosevic's immediate prosecution, whether for crimes against humanity or grave breaches of the Geneva Conventions, in the tribunal in The Hague, at least in respect of cases of torture going beyond isolated, individual acts and constituting attacks of a more systematic kind against the civilian population.)

In the view of the majority, extraterritorial torture offences could not be extraditable in the UK until jurisdiction had been taken over them, and they had been made extraditable, by statute. Lord Millett's more controversial contention was that the domestic Courts could take extraterritorial jurisdiction directly over crimes of universal jurisdiction at customary international law, by virtue of the principle that that law is part of the common law. He also considered that the charges against Senator Pinochet satisfied the customary international law requirements, since his offences were alleged to be part of a campaign of terror in Chile which had included the use of torture. (It might be noted that no real consideration appears to have been given to the possibility whether, once jurisdiction had been established by statute, the statutory provisions could apply in respect of offences under customary international law committed prior to the date on which the legislation entered into force. The argument would be that the acts constituted offences, including for UK purposes, at the time they were committed, but that no UK forum existed in which jurisdiction could be exercised over them. Once that gap had been filled, the offences could be prosecuted. Generally, the rule against retrospective effect applies to the offence, not the forum. Internationally, for example, it was no bar to the Yugoslav tribunal exercising jurisdiction over well-established international crimes that had been committed prior to the establishment of the tribunal, although the Statute of the International Criminal Court that was adopted last year specifies that the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute.)

One lesson from the case may be for states to keep their implementing legislation on international crimes under review in line with developments in customary international law. For example, as implemented by the Geneva Conventions Act 1958, New Zealand has undertaken under the Conventions to punish persons within its jurisdiction for

specified grave breaches of the Conventions wherever in the world the international armed conflicts occur in which such breaches are committed. Some have argued, by virtue of developments this decade in response to the atrocities in former Yugoslavia and the genocide in Rwanda and the negotiation of the Statute of the International Criminal Court (see, in particular, Meron, "War Crimes Law Comes of Age" (1998) 92 AJIL 462), that rape can probably now be regarded a grave breach, that violations of common art 3 of the Conventions (offences committed in internal armed conflicts which are not, however, unlike grave breaches, required to be subject to universal jurisdiction) may also now have acquired the status of international crimes over which all states can exercise jurisdiction, and that the traditional boundaries and distinctions between the various categories of crimes and between international humanitarian law and human rights law are collapsing. It may be acceptable therefore for domestic legislation to be extended in those directions, as it very likely would for extraterritorial jurisdiction to be taken under customary international law over crimes against humanity, which no longer require any link to armed conflict, whether international or internal, or to be confined to crimes committed by persons exercising state power. Among arguments in favour of doing so is that such extension of jurisdiction may be an additional point of pressure as the international community continues to struggle to fill the gaps in the international machinery and to deal more coherently and precisely with its serial killers, mass murderers and other megalomaniacs when masquerading as leaders – the Pol Pots, Saddam Husseins, Milosevics and Karadzics of this world – and that offenders may be more likely to seek refuge in other countries in a globalised world.

LORD HOFFMAN

A final comment requires to be made on the House of Lords' decision to set aside its first decision on the merits. This "procedural" decision has already been subject to comment (see Caldwell, "The Pinochet Saga" [1999] NZLJ 103 where it is noted that the decision raises more questions than it answers). The House of Lords concluded that Lord Hoffmann ought to have automatically disqualified himself because his associations with Amnesty International (primarily as director of its registered charity) made him a Judge in his own cause. In that event, it was unnecessary to go on to show any likelihood or suspicion of bias. It was also emphasised that the case was an exceptional one (although, it was admitted, not necessarily unique). The decision included resounding reasons: that justice should not only be done but also be seen to be done, that public confidence in the administration of justice is paramount, that Amnesty International had associated itself in the proceedings with the position of the prosecutor, and that this was criminal litigation. (This last point perhaps deserves further comment. It is not as if Senator Pinochet was on trial here – that will be for the Spanish Courts, if it ever eventuates. Nor is it as if any final decision on extradition was being taken – that is a subsequent matter for the Home Secretary, and subject to other steps in the legal process. What was at issue was a preliminary, if important, question of immunity. Moreover, in the context of this case, the fact that some of the most serious international crimes were at issue is not irrelevant. As part of the background, Lord Browne-Wilkinson noted in the second decision on the merits that "there is no real dispute" that "appalling acts of barbarism" were committed in Chile during the Pinochet regime. Nor, it might be added, was it denied that the acts had involved state violence and that General Pinochet had both led the military coup and subsequently taken over as Head of State for a long period when the alleged offences had continued.)

Nevertheless, if the decision had stopped with those reasons, it may have been destined to give rise to less attention. But some of the judgments also considered it necessary to explain the decision in terms of Lord Hoffmann's "interest". This may have been because automatic disqualification had previously applied only in cases of pecuniary or proprietary interest. In the present case, on the other hand, the "interest" that was identified was, most immediately, that Head of State immunity does not apply in relation to crimes against humanity and, over and above that, procuring the abolition of torture and other crimes against humanity as set out in the objects of Amnesty International and its charity. Lord Goff also pointed to Lord Hoffmann's interest in the outcome of the litigation, by virtue of his assumed commitment to the charitable objects of Amnesty International's charity. It might simply be observed that if interests, or promotion of causes, of that kind are going to lead to the automatic disqualification of Judges, they might find it more difficult to know how to proceed. To the extent that the decision may be understood as saying that, and as discouraging Judges from pursuing such "interests" in some manner, it may well be seen as a retrograde decision. ❑

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inform the consumer of his or her right to have the complaint referred to the "Code Administrator" at no cost to the consumer or the member. The Code Administrator is an independent person (currently, Sir Peter Quilliam) who can direct the member to remedy the complaint and, if applicable, apply suitable actions and sanctions. Such sanctions could include fining the member, suspending membership, or even expelling the member from the DSA and publicising such expulsion.

All members must advise the DSA on an annual basis of the number, type and outcome of consumer complaints they have received relating to the Code. The DSA analyses and compiles this information in a report, which is publicly available.

Copies of the DSA's Code of Practice are available from the DSA and from Citizen's Advice Bureaux across New Zealand. The DSA has also recently developed a web site (http://webnz.co.nz/dsanz) and the Code of Practice, together with a list of the DSA's members and other information about the DSA's activities, can be viewed there.

Any caution exhibited towards multi-level marketing is likely to be based on a misunderstanding of the differences between multi-level marketing and pyramid selling. This is not particularly surprising, given that several of the most recent pyramid selling schemes investigated by the Commerce Commission have wrongly proclaimed themselves to be legitimate multi-level marketing schemes. However, increased consumer awareness of the difference, and of bodies such as the DSA, is essential if consumers are to be protected from scams, but still be able to avail themselves of the opportunities to generate or supplement income that multi-level marketing schemes provide. While the definition of pyramid selling may be quite complex, perhaps the oldest adage is the most useful – "if something sounds too good to be true, then it probably is". ❑

"CLOSING THE LOOP"

Dr Gordon Walker, University of Canterbury and Dr Mark Fox, University of Indiana

explain why there is a "capital gap" for small and medium enterprises

The Ministry of Commerce now administers the Securities Act 1978 (the 78 Act) and related legislation. In our view, the provisions of ss 3 and 33 of the 78 Act are a major obstacle to Small or Medium Sized Enterprise (SME) fundraising because of the compliance costs associated with an offer to the public. Such costs are beyond the means of many SMEs. While empirical evidence on the finance "gap" for SMEs is well understood by the Ministry of Commerce, it is unclear whether the chilling effect of the Securities Act on SME fundraising is similarly appreciated. There is hence a need to "close the loop" and link empirical data on both the predominance of SMEs and their finance gap with the compliance cost problem flowing from the 78 Act.

Although there is a clear overlap between the SME funding problem and the design of ss 3 and 33 of the 78 Act, it is important to keep the two problems distinct. Overlap occurs in that much of the debate on the offer to public concept in New Zealand has been about compliance costs. That was the essence of the debate between Peter Fitzsimons and Peter Ratner in 1995. (See Fitzsimons, "Capital Raising and Offer to the Public" (1995) (1) C&SLB 4; Ratner, "A Reply to 'Capital Raising and Offers to the Public'" (1995) (2) C&SLB 20; Fitzsimons, "Play it [Again], Sam: Offers to the Public in the New Zealand Context" (1995) (5) C&SLB 63).) While the 78 Act does impose non-trivial compliance costs, such costs may be acceptable on public policy grounds *where a large issuer seeks large sums of capital from the public.* Thus, although we think there are good reasons for consigning the offer to the public concept to the scrapheap, the thrust of this argument is not against s 3 and 33 per se. The principal claim of this article is that these sections are simply unsuited to the needs of the vast majority of New Zealand businesses. As we shall see, large issuers comprise 0.5 per cent of all New Zealand businesses. SMEs comprise 99.5 per cent of New Zealand businesses. There is a lack of "fit" between the 78 Act and the economic characteristics of 99.5 per cent of New Zealand businesses.

THE EVIDENCE

In New Zealand, a SME is a business that employs fewer than 100 people (T Austin, M Fox and R Hamilton, *A Study of Small and Medium Sized Business Financing in New Zealand*, Wellington, Ministry of Commerce, May 1996; A Cameron, C Massey and D Tweed, "New Zealand Small Business: A Review" (October 1997) Chartered Accountants Journal, 4). In Table One we summarise the most recently available data on SMEs in New Zealand. These data are for economically significant enterprises: those businesses with over $30,000 annual GST expenses or sales, or enterprises in a GST exempt industry.

The total number of (non-agricultural) enterprises in 1998 was 290,260. Of these, 84.3 per cent employed five or fewer employees and 99.5 per cent employed fewer than 100 employees. Based on the number of persons engaged, most New Zealand businesses can be classified as SMEs. These SMEs employ 1.07 million persons, or an estimated 77 per cent of the labour force.

An examination of the trends in employment by different sized enterprises yields some interesting results. First, from 1988-92 all employment classes lost jobs except the 0-5 category (which had a net gain of 11 per cent). Of particular interest, of those enterprises that lost jobs, the hardest hit were the businesses that employ more people. The general decline observed in most employment size categories between 1988 and 1992 is largely attributable to the aftermath of the sharemarket crash, with businesses restructuring. By contrast, the 1992-96 period reflects a period of economic recovery. All employment size categories observed significant increases. The largest increases in this period were

Table One
The Significance of SMEs in New Zealand

	Enterprises			Employment		
	No	**%**	**Cumul. %**	**No**	**%**	**Cumul. %**
0-5	244,721	84.3	84.3	371,920	26.9	26.9
5.5-9.0	20,079	91.2	91.2	139,410	10.1	36.9
9.5-49	21,999	98.8	98.8	412,310	29.8	66.7
49.5-99	2,132	99.5	99.5	145,330	10.5	77.2
99.5+	1,329	100.0	100.0	316,000	22.8	100.0
Total	290,260			1,384,960		

Note: Employment figures are for Full-time Equivalent Persons Engaged (FTE). These equal the sum of the full-time employees and working proprietors plus half the part-time employees and working proprietors. Figures exclude agricultural production.

Source: Statistics New Zealand, *Labour Market Statistics 1998* (1999)

Table Two
Changes in SME Employment, 1988-1996

Size Category	1988-92 % Increase/ Decrease	1992-96 % Increase Decrease	1988-96 % Increase Decrease
0-5	11.0	9.4	21.4
6-9	-2.1	18.2	15.7
10-49	-6.8	16.9	9.0
50-99	-10.4	10.8	-0.8
100+	-19.6	6.6	-14.3

Source: A Cameron, C Massey and D Tweed, "New Zealand Small Business: A Review" (1997) (October) Chartered Accountants Journal, 4.

apparent in the 10-49 category (18.2 per cent) and the 50-99 category (16.9 per cent). Overall, the figures for 1988-96 show a picture of larger businesses contracting employment numbers and SMEs gaining employees.

Given the importance of SMEs to the economy, it is surprising that little attention has been paid to their funding requirements. It is not that the Ministry of Commerce is unaware of the problem. The problems experienced by SMEs in raising funds – the so-called "finance gap" – is well documented in studies commissioned by the Ministry itself. (See: T Austin, M Fox and R Hamilton, op cit; Coopers & Lybrand, *Factors Affecting the Supply of Capital for Small Company Growth*, Wellington: Ministry of Commerce, 1993). As stated, we think the real problem here is closing the loop and linking the Ministry's empirical research on the SME funding gap with what we know about the compliance costs imposed on issuers seeking to raise moneys from the public via ss 3 and 33 of the Securities Act 1978.

BUILT-IN DESIGN PROBLEMS

The key problem with ss 3 and 33 of the 78 Act consists of a built-in design flaw – the nebulous concept of "the public". Section 3 of the Act is an evolutionary maladaptation. The case law shows that the Courts had difficulty with the concept of "the public" before the 78 Act. The logical solution was to dispense with the concept and replace it with a general prohibition and clearly defined exemptions (precisely the solution adopted by the Australian legislation). Instead, the 78 Act retained the concept and attempted to define the term in s 3. The attempt was doomed to fail as the early case law on s 3 illustrates. Further, while the decision of the Court of Appeal in *Securities Commission v Kiwi Co-operative Dairies* [1995] 3 NZLR 26 has clarified some of the problems in s 3, it also serves to confirm its built-in design flaws. One example will suffice: an offer will be caught by s 3(1) of the 78 Act unless all the persons to whom the offer was made come within s 3(2). Thus, one misjudgment in the offering process will avoid the entire issue. This is objectionable on a number of counts. First, a law concerned with capital formation should be easy to understand, efficient and certain. Such a proposition applies, a fortiori, to a small capital importing country such as New Zealand given well-known domestic constraints on capital formation and intense international competition for capital. Second, uncertainty causes inefficiency. Generally, if legislation lacks clarity then costs will result. Professor Ian Ramsay has listed some of these costs as follows: increased legal research costs; litigation costs; judicial system costs; increased unlawful activity; decreased lawful activity, and discrimination. (Ramsay, "Corporate Law in the Age of Statutes" (1992) 14 Syd. LR 474, 482).

In terms of securities legislation, the uncertainty surrounding the concept of offer to "the public", creates difficulties for practitioners advising on compliance with securities law. In the result, those seeking to raise capital are faced with the costly option of erring on the side of caution and registering a prospectus when it may not be necessary, or carrying out extensive investigations into potential offerees to ensure they come within the exemptions. (Fitzsimons, "Capital Raisings and Offers to the Public" (1995) 1 C&SLB 4, 10.)

Issuers complying with the Act incur non-trivial compliance costs. (Walker and Fox "Costs Associated with Initial Public Offerings on the New Zealand Stock Exchange", [1995] 3 ICCLR 106.) In this small study of 20 companies making IPOs, we concluded that average fund raising compliance costs were 4.29 per cent of total funds raised. Interestingly, actual costs did not vary much between large issues and smaller issues. Hence, the proportion of compliance costs to funds raised was higher for smaller issuers. (See also Morel and Co, *Securities Act Study – A Report prepared for the Ministry of Commerce* (1994).) The Morel and Co study into fundraising by unlisted companies found that key reasons for not issuing a prospectus were cost and complexity. There was a consensus amongst companies surveyed that raising $1 million by a public issue with a prospectus carried costs of about $120,000 (ie approximately 12 per cent of funds raised).

Although it may be possible to rely on a narrow category of people under the s 3(2)(a)(i) and (ii) exemptions, this is unlikely to provide a sufficiently large pool of potential investors as the venture capital industry in New Zealand is small. Further, in the case of small companies, large institutions and habitual investors may decline to infuse equity unless they gain control. This has chilling effect on business start-ups. (See Morel and Co, op cit, 11-12.)

Rather than risk incurring prospectus costs or penalties for non-compliance, many companies (especially small ones who are less able to sustain such costs), may opt to raise debt capital through finance companies even if this is inappropriate to the stage of growth of the company and leads to cashflow difficulties. This limits not only those firms but also the economy as a whole as it seeks capital to grow and compete with overseas competitors.

ABSENCE OF "FIT"

Hence, the "offer to the public" concept simply does not fit with the characteristics of New Zealand businesses. Section 3 of the Securities Act ignores the facts that 99.5 per cent of all businesses in New Zealand are SMEs, employ 77 per cent of the total labour force and have difficulty raising equity capital. The offer to the public concept may be appropriate to the 0.5 per cent of large businesses but is inappropriate for SMEs which cannot afford the time or expense associated with a formal public offering. There is a need for better fit between securities regulation and the characteristics of the New Zealand economy.

SOLUTION ONE: REPEAL s 3

The solution to the evolutionary maladaptation of s 3 is extinction – the replacement of s 3 with a general prohibition on offering securities without a prospectus, subject to certain statutory exceptions. A model which New Zealand legislators could work from is the Australian Corporations Law.

(See generally, M Taylor, "Capital Raising in Australia" in G Walker, Gen. ed, *Securities Regulation in Australia and New Zealand* (2nd ed, 1998) 289.) Under the Corporations Law, the concept of offer to the public, which appeared in the Companies Code, has been removed and replaced by an overall prohibition on inviting or offering securities for subscription or purchase without a prospectus. The basic prohibitions are contained in ss 1018, 1019, and 1020. (See Australian Securities Commission, *Policy Discussion Paper on Fundraising* (20 June 1990).) The most significant exemptions are the "large investors" exemption (s 66(3)(a)) and the "personal offers" exemption (s 66(3)(d)). The "large investor" or "gold card" exemption applies to an offer where the minimum subscription is A$500,000 by each person to whom the offer or invitation is made. This exemption is justified on the "... grounds that investors of such large amounts do not need the protection which the law provides for the smaller investors, and are in a position to look after themselves". (See R Austin, "The Proposed Fundraising Provisions of the Proposed Corporations Legislation" (1989) 7 Butterworths Co Law Bulletin, 77, 92.)

The "personal offers" exemption is available where the offer or invitation is made personally and there are no more than twenty recipients of an offer or invitation in relation to securities of the same class within any twelve-month period (the 20/12 rule). This exclusion is a concession aimed at small-scale fundraising. Scope for fraud is limited by the requirement that the offers be personal (ie the offeree must be specifically identified and the offer is capable of acceptance only by the offeree). The personal offers exclusion can be usefully contrasted with the exclusion contained in s 3(2)(a)(iii) of the 78 Act (selected otherwise than as a member of the public). Both exclusions are targeted at personal offers but the Australian provision avoids any inquiry as to the meaning of "the public".

Replacing s 3(2)(a)(iii) with the Australian personal offers exclusion presents as an immediate solution to the present problems surrounding the New Zealand exclusion. If we view s 3 as a maladaptation, however, the only logical solution is extinction followed by a leap to the next evolutionary stage as manifested in the Australian legislation. More generally, the "offer to the public" concept highlights an urgent need for strategic thinking about securities regulation in New Zealand. The type of thinking required is well illustrated by the first major strategic review of the New Zealand economy, the *New Zealand Porter Report*. (See G Crocombe, M Enright and M Porter, *Upgrading New Zealand's Competitive Advantage* (1991).) The major finding of that report was "a misalignment between the structure of the New Zealand economy and ... today's global economy". (p 147.) Similarly, as we have argued, there is a misalignment between the structure of New Zealand business and its securities regulation regime which should be addressed by way of a strategic review seeking to link empirical data, national economic goals and securities regulation.

SOLUTION TWO: EXEMPT SME FUND-RAISING

As claimed, we can distinguish SME fund-raising from substantive reform of s 3 of the 78 Act. A quick fix is to exempt SME fund-raising to a level of (say) $500,000 by an amendment to s 5(5) of the 78 Act. The policy rationale is that capital formation for SMEs is of such importance to the New Zealand economy as to outweigh the investor protection mechanisms offered by the 78 Act. If this solution is objectionable on policy grounds, then an acceptable alternative is to introduce a new exclusionary class of accredited investor into s 3(2). To become an accredited investor, persons might lodge an application with the local Registrar of Companies and receive certification as an accredited investor. Issuers can then make offers to such persons in confidence that the 78 Act will not be infringed. A more radical solution is to bypass the 78 Act completely and utilise Internet technology to create a fund-raising mechanism based on the Enterprise Market operated by the Australian Stock Exchange. (See G Walker and M Fox, "An Internet Solution to the SME Finance Gap in New Zealand" [1999] NZLJ forthcoming.)

AUSTRALIAN REFORM

More generally, The Corporate Law Economic Reform Program (CLERP) Bill introduced into Federal Parliament in Australia on 3 December 1998 contains far-reaching provisions for fundraising for SMEs. (See: CLERP Special Issue (1998) 16(4) C&SLJ 233ff; R Baxt, "Company Law Reform – On the March Again" (1999) 17 C&SLJ 51 and CCH Australia, *Australian Corporations & Securities Legislation – Bills* (10th ed, 1999) (contains full text of CLERP Bill as originally introduced on 3 December 1999). Chapter 6D of the CLERP Bill contains the new fundraising provisions. Specifically, s 708 of the CLERP Bill (Offers that do not need disclosure) should be closely considered. These are small scale offerings up to $2 million (20 issues or sales within 12 months); sophisticated investors; professional investors; a sociated persons; present holders of securities and so on. (see CCH Australia, op cit, 263-268.) ❑

THE SHIFTING TERRAIN OF JUDICIAL REVIEW

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examines recent developments in administrative law in a revised version of the opening paper of the AIC 1999 Administrative Law Conference in Wellington

Administrative law embraces a host of subjects extending beyond the law of judicial review. During the AIC Conference, we will hear about the importance of the Treaty of Waitangi in administrative law, the growing stature of the Bill of Rights Act, the contribution of our Ombudsmen, international trends in administrative law, the overlay of our human rights legislation, MMP political processes, issues of commercialisation, alternative dispute resolution, and promoting judicial accountability.

However, any examination of administrative law sooner or later narrows to the Courts and the judicial process. I identify four key developments in judicial review in the modern era. These developments track two unifying themes – the simplification and the liberalisation of the law of judicial review. Recently in *Royal Australasian College of Surgeons v Phipps* (CA 70/98, 30 November 1998), the Court of Appeal identified the latter theme, the liberalisation of judicial review. "Over recent decades", the Court observed, "the Courts have increasingly been willing to review exercises of power which in substance are public or have important public consequences, however their origins and the persons exercising them [sic] might be characterised". The attending simplification of the law has been in part the cause, and in part the consequence, of the historical trend towards liberalisation.

The distinctiveness of our administrative law emerged during the era of the Cooke Court which championed the simpler, more direct terminologies of judicial review. However, the Richardson Court has since played a major role in shaping the focus of judicial review. *Electoral Commission v Cameron* [1997] 2 NZLR 241, *Peters v Davison* (CA 72/98, 17 November 1998), and *Phipps'* case are three key decisions whose cumulative impact is yet to be recognised. Each case tilts the law further in the direction of simplification and liberalisation.

ERROR OF LAW

The first development was a simplification waiting to happen. Last year in *Peters v Davison* [1999] 2 NZLR 164, the Court of Appeal recognised material error of law by a decision-maker to be a ground of review "in and of itself" (per Richardson P, Henry and Keith JJ). This confirmed what Lord Cooke of Thorndon suggested 16 years earlier in *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA). There he laid it down as a presumption of law that Parliament does not intend to allow administrative authorities to determine conclusively questions of law, including those determining the scope of an authority's powers. Questions of law, he said, remain always the ultimate responsibility of the Courts of general jurisdiction (at pp 133, 136 following *Re Racal Communications Ltd* [1981] AC 374, 382-383 per Lord Diplock). This clothed judicial review with the constitutional mandate to uphold the rule of law. "The essential purpose", said the Court of Appeal in *Peters v Davison*, "is to ensure that public bodies comply with the law" (per Richardson P, Henry and Keith JJ).

The expression "error of law" now encapsulates illegality as a ground of review. It is no longer legally relevant (as it once was) to ask whether the error caused the decision-maker to exceed its jurisdiction. All a plaintiff need show is that the decision-maker *erred* and that the error was *material* (the error must influence the outcome of the decision) (*Peters v Davison* per Thomas J, p 21 of the judgment. See also *R v Hull University Visitor, ex parte Page* [1993] AC 682, 702 (HL)). This test releases the law from the arcane language of "jurisdiction" and "jurisdictional error", and the esoteric distinction between jurisdictional and non-jurisdiction error. Expressions like "asking the wrong question" or "applying the wrong test" failed to distinguish between the two types of error. The House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 was a legal landmark which, for all practical purposes, abolished the distinction between jurisdictional and non-jurisdictional error. All errors of law committed in the course of a body's inquiry were treated as being "jurisdictional". Following *Peters v Davison*, however, one speaks simply of reviewable error of law. This rationalisation completes, for the ground of illegality, what Lord Cooke poignantly termed "The Struggle for Simplicity in Administrative Law" (in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (Butterworths, Wellington, 1986), p 1).

INTENSITY OF JUDICIAL REVIEW

Recent judicial developments have also rationalised the second primary ground of judicial review – irrationality (or *Wednesbury* unreasonableness). In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 Lord Diplock identified irrationality as a ground of review, based on the dicta of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Irrationality is the most problematic of the grounds. When sitting on review, the Courts insist they are concerned only with the legality, not with the merits, of a decision. The Courts will not substitute their own view of the preferred outcome for that of the specialist body. So the Courts have insisted that a decision must be outrageous or

perverse, where an official has "taken leave of his senses", before intervening on the ground of unreasonableness (*Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, 247-248 (HL)). They could then maintain the distinction between the *legality* and the *merits* of administrative action. The problem was that the standard so set was practically unattainable. Administrators rarely act perversely. They err, but seldom capriciously. So some Courts relaxed the standard and intervened on the lesser threshold of substantive unfairness. Some commentators despaired. They viewed this development as an erosion of the doctrinal foundations of administrative law. Some commentators even called on this ground of review (*Wednesbury* unreasonableness) to be abandoned, as it "inherently involves merits review" (see J McLachlan, "Substantive Fairness: Elephantine Review or a Guiding Concept?" (1991) PLR 12, 18-19).

However, recent events have quieted the disputation over merits-based review. The Courts have emphasised two features of judicial review: its varying intensity, and its contextual trappings. They have adopted differing standards of review, depending upon the totality of factors at hand ("the ingredients of the problem at hand dominate": Lord Cooke of Thorndon, Foreword to GDS Taylor, *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1991), p v). Local authority rating cases fall at one end of the spectrum, decisions affecting basic human rights at the other. The leading rating cases are *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41, *Wellington City Council v Woolworths (New Zealand) Ltd (No 2)* [1996] 2 NZLR 537, and *Waitakere City Council v Lovelock* [1997] 2 NZLR 385. In these cases, the Court of Appeal emphasised the democratic decisions of elected councils and their accountability to ratepayers, and insisted on the strict *Wednesbury* standard. The Courts will intervene, said the Court of Appeal, only in a "clear and extreme case" (*Wellington City Council v ECNZ (No 2)* [1996] 2 NZLR 537, 546). A plaintiff had to show "something overwhelming" (ibid, p 545). In human or civil rights matters, on the other hand, the Court has sanctioned substantive unfairness as a ground for intervening and the American methodology of "hard look" review (see *Thames Valley Electric Power Board v New Zealand Pulp and Paper Ltd* [1994] 2 NZLR 641 (CA); *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58, 66 (CA)). The Court has said it will use a "case by case" analysis of the principles to be applied (*Pharmac*, ibid). Factors that may affect the intensity of judicial review include the functions and status of the decision-maker (see *Electoral Commission v Cameron* [1997] 2 NZLR 421), whether the deciding body is democratically elected (see the local authority rating cases), the procedures the decision-maker adopts, the political or policy content of the decision, whether there is genuine scope for differing views, the effect of the decision on individuals (including the plaintiff), and the overall "justice" of the case (see *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 149 (CA)).

The varying intensity of judicial review was identified also at last year's Administrative Law conference. It was suggested that there was developing in our case law a methodology of substantive review, a methodology which I dignified with the description "constitutional review" (P A Joseph, "Constitutional Grounds of Judicial Review", *The Third Annual Administrative Law Conference*, AIC Worldwide, Wellington, 25-26 March 1998, Part II Conference Papers. See also "Constitutional Review Now" [1998] NZ Law Review 85). This form of substantive review is given to upholding basic public law values when administrative decisions would challenge or flout these values. Constitutional review has tended to evolve around the principles of the Treaty of Waitangi, international human rights obligations, and the New Zealand Bill of Rights, although further principles (eg proportionality and consistency of decision-making) may also come within the rubric "constitutional review". Constitutional review invites intensive scrutiny of administrative decisions, approximating to the intensity associated with substantive unfairness and "hard look" review.

The selective raising and lowering of the review threshold makes redundant the debate over the "correct" view of unreasonableness. There is, in fact, no contest between the differing views; the sliding threshold is part of the legal tapestry. The cases represent a broad spectrum, ranging from super-*Wednesbury* unreasonableness to substantive unfairness and "hard look" review. The context (the factual and statutory setting) guides the Court's intuition in identifying the appropriate review threshold. Some High Court decisions have embraced the *Woolworths* test with perhaps more enthusiasm than the Court of Appeal envisaged and applied it in contexts where the lesser test may have been preferred (see the decisions cited in Dr Graham Taylor's paper, Fourth Annual AIC Administrative Law Conference, Wellington, 24-25 February 1999, pp 12-13). Counsel bear responsibility for informing the Court that it has a discretion as to the appropriate threshold to apply. Thus one decision opted for the lesser test of "evident logical fallacy" in a case involving notification of a resource consent application (*Ports of Auckland Ltd v Auckland City Council*, HC Auckland, CP 306/98, Baragwanath J, 18 September 1998). The Court summarily observed: "The present case is towards the opposite end of the spectrum considered by the President in *Wellington City Council v Woolworths*. I prefer therefore the lower level test" (citing the "hard look" approach endorsed in *Pharmac*).

"EMPOWERED BY PUBLIC LAW"

Fifteen years ago, the House of Lords was emphatic that a body must be "empowered by public law" to invite judicial scrutiny (*Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 347, 409 per Lord Diplock). In the intervening years, Their Lordship's prerequisite has undergone transformation and is no longer a requirement of judicial review. Neither the source nor the character of the power is legally conclusive. Fifteen years ago, "public power" meant "statutory power". In 1992, the Court of Appeal made inroads when it held an exercise of the royal prerogative (the prerogative of mercy) could be reviewed for want of procedural fairness (*Burt v Governor-General* [1992] 3 NZLR 672). Today, the law of judicial review has moved apace and is not strictly confined to the exercise of powers legally conferred (statutory, prerogative, or common law). The English *Datafin* case took a giant step for judicial review (*R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815). It established that a non-legally constituted body (the Take-overs and Mergers Panel) may be susceptible to review, although it lacked any public power legally conferred. Its power was of its own making. It exercised a self-assumed regulatory jurisdiction, exercising de facto powers deriving from the consent of those whom its decisions affected. The Panel was amenable to review because it exercised a public *function* or *purpose*, not a public *power* grounded in law. *Electoral Commission v*

Cameron [1997] 2 NZLR 241 (CA) was the New Zealand equivalent. The Broadcasting Standards Complaints Board was held to be amenable to review, although it was a non-statutory body acting on behalf of an industry organisation, the Advertising Standards Authority. Again, the crucial element was the public regulatory function the Board discharged. It exercised no public legal power since it was not *empowered* by law to act. The remedial jurisdiction to grant declaratory relief is broad. The law does not require that there be a "decision" determining rights in a legally definitive sense (see *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; *O'Regan v Lousich* [1995] 2 NZLR 620 (HC); *Peters v Davison* CP 72/98, 17 November 1998).

CONTRACTUAL POWERS AND COMMERCIAL PUBLIC ORGANISATIONS

In appropriate cases, the Courts will review contractual exchanges even if they are commercial in nature and/or are entered into by public commercial organisations. It is a question of degree "the point at which a private commercial operation [may] merge into a public one attracting judicial review and public law duties" (*He Putea Atawhai Trust v Health Funding Authority*, HC Auckland, CP 497/97, Fisher J, 8 October 1998). The Courts will review the exercise of contractual powers in two situations: where a contractual power derives from statute (or the statutory context) (see *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA)), and where a contractual power derives from the constitutional instrument of a body corporate (see *Mercury Energy Ltd v Electricity Corp of New Zealand Ltd* [1994] 2 NZLR 359 (PC); *Phipps*). In *Phipps* the Court of Appeal affirmed the High Court's review jurisdiction "even although there may be no statutory power of decision or the power may in significant measure be contractual". The conferral of contractual power need be neither express nor specific; the power may arise by implication of a statutory scheme (eg *Webster*) or a constitutional document (eg Phipps), and trigger judicial review. The 1977 amendment to the Judicature Amendment Act 1972 significantly broadened the High Court's jurisdiction by extending the procedural base of judicial review to cover the exercise of power by bodies corporate under their constitutional instrument.

The relaxation of the former requirement "empowered by public law" has further relevance. By allowing review where the exercise of power is "in substance public" or has "important public consequences" (*Phipps*), it opens the door to review of corporatised or privatised trading entities, enjoying monopoly control of essential services. This is arguably the issue of the future, whether and/or to what extent corporatised or privatised essential-service providers should be made subject to review. Commercialising public functions does not alter the nature of the public service provided or the service-provider's market position (monopoly or near-monopoly supplier). Abuse of dominant position is an abuse whether or not a publicly-owned or a privately-owned entity perpetrates it. Professor Michael Taggart has advanced a cautious case for adopting a United States public utilities regime where publicly-listed corporations discharging public functions may be judicially reviewed ("Public Utilities and Public Law" in P A Joseph (ed), *Essays on the Constitution* (Brooker's, Wellington, 1995), p 214). He searched the common law precedents and found credible support in Sir Matthew Hale's principle of "business affected with public interest" and the common law doctrine of "prime necessity".

Under the present law, commercial operations are not a priori exempt from judicial review. Mechanisms exist for checking the commercial decisions of public bodies without borrowing from United States utilities law or resurrecting ancient common law doctrines. Whereas there were suggestions in *New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699 (CA) that commercial bodies such as publicly listed companies were exempt from review, later Courts have observed the impact of commercialised public functions and have emphasised the public consequences of commercial decisions by public bodies. These consequences may take transactions "out of the realm of the purely commercial and into the realm of quasi-governmental administrative decision which is reviewable" (*Napier City Council v Healthcare Hawkes Bay Ltd*, HC Napier, CP 29/94, Ellis J, 15 December 1994). Sometimes the Courts have stressed the centrality of the commercial transaction to the body's core public function, as the basis for reviewing Crown entities and related public bodies (see eg *He Putea Atawhai Trust v Health Funding Authority*). Similarly, the activities of state-owned enterprises are reviewable both under the Judicature Amendment Act 1972 (as amended 1977) and at common law. In *Mercury Energy* the Privy Council identified fraud, corruption, and bad faith as grounds for reviewing decisions to enter into or terminate commercial contracts for the supply of goods or services. The concept of "bad faith" is pregnant with possibility for further development. The High Court has expanded this concept to assimilate improper purposes and the overlapping ground of irrelevant considerations (*He Putea Atawhai Trust v Health Funding Authority*; *East Pier Developments Ltd v Napier City Council*, HC Napier, CP 28/98, Wild J, 14 December 1998). This assimilation invites mainstream judicial review of public authorities, including Crown entities and state-owned enterprises, under the general "error of law" analysis established in *Peters v Davison*.

THE SHIFTING TERRAIN

I finish on a cautionary note. The shifting terrain of judicial review recorded here too readily excites protestations of judicial activism. The rush to construe developments as judicial activism is at most wrong, and at best simplistic. The "pendulum swing" of activism versus restraint may monitor movements in scope of review doctrine over broad sweeps of time and accommodate cataclysmic events such as two world wars, when the national interest may call for judicial restraint. But this metaphor becomes a blunt instrument when employed to explain the subtle shifts in emphasis and tack that characterise the law of judicial review. These shifts identify, not an expansion of the grounds for intervention, but a shift in the focus or territory of judicial review. Judicial review pushes forward on one front, and retreats on another. In the present environment, the balance has tipped towards limited judicial review of industry regulatory bodies and public commercial organisations, and against review of self-regulating bodies such as democratically elected local authorities. As in all social or organisational systems, there is a balance that operates as a self-correcting mechanism against judicial usurpation. This "balance" is sometimes articulated under the banner of the separation of powers which itself is a guiding principle of modern constitutional government. ❑

UNREASONABLENESS AND AFTER

Dr Rodney Harrison QC, Auckland

continues his review of developments in administrative law

Lord Cooke's "unreasonableness" formulation represented an attempt to lay down, in a field vexed by elaboration, a straightforward but flexible test for the "*Wednesbury*" ground of review. In "The Struggle for Simplicity" he argued:

> Just as I have gone to the length of suggesting that fair means fair, so I ask you to entertain the serious possibility that reasonable means reasonable. The definition in the *Concise Oxford Dictionary*, reflecting as it should ordinary educated usage, is "within the limits of reason". ... Vituperative epithets like perverse, frivolous, foolish seem not altogether in place in the measured task of judgment, too emotive to be satisfactory as a criterion. "So unreasonable that no reasonable authority could come to it" and similar phrases are distracting circumlocutions. Simple and straightforward "unreasonable" is a strong term.

For a time it seemed possible that this approach would bear fruit. Thus in *Brind v Secretary of State* [1991] 1 All ER 720, 737-8; Lord Lowry, after reviewing some of the ways in which "*Wednesbury* unreasonableness" has been described, commented:

> These colourful statements emphasise the legal principle that judicial review of administrative action is a supervisory and not an appellate jurisdiction. ... A less emotive, but, subject to one qualification, reliable test is to ask: "could a decision-maker acting reasonably have reached this decision?" The qualification is that the supervising Court must bear in mind that it is not sitting on appeal, but satisfying itself whether the decision-maker has acted within the bounds of his discretion.

However, in *Mercury Energy Ltd v Electricity Corp of NZ Ltd* [1994] 2 NZLR 385, 388-390, an attempt at judicial review of the commercial operations of a state-owned enterprise, the Privy Council in an opinion delivered by Lord Templeman, as if to give the New Zealand Courts a lesson in the basics, stressed that judicial review is concerned "not with the decision, but with the decision-making process". It stated categorically that "the principles upon which the Court is permitted to interfere with a decision of a decision maker are to be found in the definitive judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* ([1948] 1 KB 223)". The Privy Council then thoughtfully, perhaps in case New Zealand Judges were unfamiliar with it, reproduced a large chunk of Lord Greene's judgment dealing with this issue.

To say that Lord Greene's judgment contains all of the principles upon which a Court is permitted to interfere with the decision of a decision maker, if that is what the Privy Council intended, is with the greatest of respect wholly inaccurate. Even if Lord Greene's analysis extends (as indeed it does) to matters dealt with above under the heading of illegality as well as what has become known as "*Wednesbury* unreasonableness", he was plainly confining himself to discussion of the principles on which the exercise of a discretion can be challenged. Lord Greene's judgment does not address issues such as procedural fairness, mistake of fact, misrepresentation or indeed traditional ultra vires.

Although in another way to which I shall come, the Privy Council's decision in *Mercury Energy* may have clarified New Zealand law, in the respects currently under discussion it has been the cause of some considerable confusion.

In *Wellington City Council v Woolworths NZ Ltd (No 2)* [1996] 2 NZLR 537, a five-Judge Court of Appeal rejected a challenge that sought to overturn as unreasonable and unfair to the plaintiffs a local authority decision to fix rates on a differential basis as between residential and commercial ratepayers. Without referring to the Privy Council decision in *Mercury Energy* but perhaps not uninfluenced by it, the Court in a judgment delivered by Richardson P went back to what might be termed full-blown "*Wednesbury* unreasonableness". Thus (at 545, 552):

> Even though the decision maker has seemingly considered all relevant factors and closed its mind to the irrelevant, if the outcome of the exercise of discretion is irrational or such that no reasonable body of persons could have arrived at the decision, the only proper inference is that the power itself has been misused.
>
> To prove a case of that kind requires "something overwhelming". ...
>
> [It requires] "... a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".
>
> Clearly, the test is a stringent one. ...
>
> For the ultimate decisions to be invalidated as "unreasonable", to repeat expressions used in the cases, they must be so "perverse", "absurd", or "outrageous in [their] defiance of logic" that Parliament could not have contemplated such decisions being made by an elected council.

As the Court of Appeal stressed in *Woolworths*, rating is a specialised area, requiring the exercise of political judgment by the elected representatives of the community and involving complex economic, social and political assessments. In short, in rating cases there are "wide public policy issues". However, the problem with *Woolworths* was that, as with *Mercury Energy*, the Court reverted to the formulaic approach of old, with its accumulation of epithets. Even more importantly, it similarly failed to confine its pronouncements on the standard of unreasonableness to the category of case

before it; or to contemplate the possibility that a variable standard existed, which might operate with less stringency as regards review for unreasonableness in other fields of activity. *Woolworths* set up a virtually insurmountable hurdle to review of the merits of a rating decision. However, notwithstanding the unqualified terms of the judgment, its effect in other areas is still being worked through.

The next case of note is *Waitakere City Council v Lovelock* [1997] 2 NZLR 385. That was another unsuccessful challenge to a local authority rating decision. What is noteworthy in *Lovelock* is the judgment of Thomas J, who had not been a member of the Court in *Woolworths*. While agreeing with the result, His Honour embarked on a lengthy review of what he described as the "super-*Wednesbury* test" as stated and applied in *Woolworths*. After criticising as Lord Cooke had done the circularity and over-use of epithets utilised in cases such as *Woolworths*, His Honour reasoned as follows (at 403):

> With epithets discarded we are left with the original *Wednesbury* test; is the decision so unreasonable that no reasonable authority could ever have come to it? Although uncluttered by unhelpful adjectives, however, the definition remains tautologous. An unreasonable decision is one which a reasonable authority would not make. Nor is unreasonableness analyzed. The nature of the concept remains obscure. ...
>
> Nor can the one test be regarded as being universal or of universal application. The standard of reasonableness, or unreasonableness, demanded by the Courts will vary depending on the subject-matter. As Lord Bridge of Harwich put it in *R v Secretary of State for the Home Department, ex P Bugdaycay* [1987] 1 All ER 940 at p 952, the Courts are entitled, within limits, to subject an administrative decision to more rigorous examination according to the gravity of the issue which the decision determines. He spoke of a decision affecting the most fundamental of all human rights, the individual's right to life, as one requiring the most anxious scrutiny. In the same case Lord Templeman extended at p 956 the Courts' special responsibility in the examination of the decision-making process to flawed decisions which may imperil liberty as well as life. Similar judicial sentiments abound. Nor is this judicial approach restricted to fundamental human rights. A decision interfering with freedom of expression, for example, is likely to attract a more stringent criterion than a decision interfering with trade. Similarly, a more rigorous standard can be expected where the decision is one bearing on a fundamental constitutional document or treaty and the rights which that document or treaty confers.
>
> The modern focus on fundamental human, civil and political rights ensures a close review – what might be said to be a hard look – at any decision affecting those rights. Clearly, the tolerance permitted a public authority in arriving at a decision affecting fundamental human and civil rights will be less than the latitude extended to the same or other authorities where such rights are not involved. It is factitious to suggest that the undiluted *Wednesbury* test should be applied in such cases. ... It is incongruent that the Court should ask of an authority's decision affecting, say, the life of an individual, whether the decision is so unreasonable that no reasonable authority could have arrived at it. Such a vital decision surely need not be outrageous, absurd or perverse before the Courts would be prepared to intervene. It is simpler to ask whether a reasonable authority acting with fidelity to its empowering statute could have arrived at the decision it did in the circumstances of that case.

Richardson P not unsurprisingly considered that *Woolworths* "must be taken as stating the law of New Zealand", and found it unnecessary to discuss the views of Thomas J. Blanchard J, a member of the Court in *Woolworths*, did however briefly comment (at 419):

> The restricted test of what is unreasonable adopted in [*Woolworths*] and applied by the President in this case serves to emphasise the inappropriateness of judicial intervention in the rate-striking process of a local authority save where it is obvious that the council's process and its outcome is indefensible.
>
> I readily accept that a less-restrained approach may be taken where judicial review is sought against another type of statutory body or against a local authority when it is performing a different function. The approach of the Court must be flexible but it must also be sensitive to the realities of the situation under review. This Court has very recently indicated in *Electoral Commission v Cameron* its preparedness to scrutinise the exercise of power in a broad way and to apply "a somewhat lower standard of reasonableness than 'irrationality' in the strict sense" where that is appropriate to the circumstances. But rate-fixing is a peculiarly inappropriate area for the involvement of Judges. ....

In *Roussel Uclaf*, the Court of Appeal (Richardson P, Henry, Thomas, Blanchard and Tipping JJ) applied the "standard test" laid down in *Woolworths*, but, significantly, left room for the application of a less stringent test of unreasonableness in different types of case (at 66):

> In some cases, such as those involving human rights, a less restricted approach, even perhaps, to use the expression commonly adopted in the United States, a "hard look" may be needed.

Where does all this leave us? Certainly not with an epithet-free test of unreasonableness for judicial review. However, we may well have reached the position – at least for the present – which I tentatively ventured in my 1992 article, namely that there is no single standard of irrationality (or unreasonableness), but rather one that is variable according to the subject matter ([1992] NZLJ at 248).

REVIEWABILITY

Reviewability concerns two separate but interrelated issues. The first is as to the availability of judicial review in terms of the jurisdiction conferred on the High Court by the Judicature Amendment Act 1972 (or under the prerogative writs, still available pursuant to Part VII of the High Court Rules). This issue will be seen as turning largely on whether the subject matter of the proposed review is one which the Court will regard as properly raising issues of public law and public administration, as against those of private law, arising as between private individuals. The second focuses on the particular subject matter of judicial review, with the inquiry being whether it is one suitable for review by the Courts (for example, in terms of policy content and the expertise of the decision maker), and if so, on what grounds.

The two-step inquiry just formulated is illustrated by the House of Lords decision in the *CCSU* case [1985] AC 374, where it was held that an exercise of the Crown's prerogative powers could properly be the subject of judicial review on the grounds of breach of a legitimate expectation as to consultation; but that the particular exercise of the power at issue, being founded on an assessment of the interests of

national security, was unreviewable. (Contrast *Church of Scientology Inc v Woodward* (1982) 43 ALR 587.)

As to the first of the two issues identified, namely the amenability of the body concerned to judicial review either in terms of the 1972 Act or the prerogative writs (or declaration), after a period of pendular oscillation demonstrated by the apparently conflicting decisions in *Webster v Auckland Harbour Board* [1983] NZLR 646 and [1987] 2 NZLR 129, and *NZ Stock Exchange v Listed* Companies Association [1984] 1 NZLR 699, New Zealand law can be said to have moved to a reasonably liberal position. The Privy Council decision in *Mercury Energy* holding that a decision made by a state-owned enterprise to terminate contractual arrangements which it had entered into was in principle open to judicial review under the Judicature Amendment Act 1972 (and as well, under common law) has brought a degree of certainty to this area. Subsequently, in *Electoral Commission v Cameron* [1997] 2 NZLR 421, the Court of Appeal held that the Advertising Standards Complaints Board, established by the Advertising Standards Authority (a body corporate) under its rules to adjudicate upon complaints of breach of the Advertising Codes of Practice, was subject to judicial review on established public law principles. Likewise, in *Pharmac v Roussel Uclaf* ([1998] NZAR at 65, 80), the Court of Appeal held that Pharmac, although not directly a creation of statute (other than the Companies Act), being established by public bodies for the purpose of carrying out a statutory objective, was subject to judicial review.

Recently in *Royal Australasian College of Surgeons v Phipps* CA 70/98, 30 November 1998 at p 11 – 17, the Court of Appeal rejected a submission that the College was merely exercising a contractual power to review a surgeon's practice under a contract which it had with the Crown Health Enterprise employing the surgeon, and held the resultant report capable of judicial review. The Court stated:

> One broad purpose of the 1972 Act, especially when taken with the 1977 Amendments, was to remove technical problems which had until that time bedevilled applications for judicial review by way of the prerogative writs and declarations. Rather, the attention of the parties and of the Court should be focused on the issues of substance, especially the issues of what actual exercises of power are reviewable and on what grounds. ... Over recent decades Courts have increasingly been willing to review exercises of power which in substance are public or have important public consequences, however their origins and the persons or bodies exercising them might be characterised. ... The Courts have made it clear that in appropriate situations, even although there may be no statutory power of decision or the power may in significant measure be contractual, they are willing to review the exercise of the power including review for breaches of natural justice, the ground argued in the present case.

Thus, the emphasis is now focused on issues of substance and in particular the nature of the function performed by the body or person in question, rather than purely on the legal nature of the body or person and of the powers which are being exercised. That approach, while not new in administrative law, has taken some considerable time to establish itself, owing to the concentration in some of the earlier cases on a literal approach to the words of the Judicature Amendment Act 1972. In effect, we seem to have come full circle, back to the two *Webster* cases earlier referred to.

The second stage of the two-step inquiry, focusing on the subject matter under review, is conceptually separate. As Gault J stated for the Court of Appeal in *Electoral Commission v Cameron* (at 430):

> Finding that decisions of the board are amenable to review still leaves for consideration the grounds upon which review may be granted. Decisions of unincorporated bodies exercising public regulatory functions may not easily fall for examination on conventional grounds of illegality, irrationality and procedural impropriety. In appropriate cases a more flexible approach may be called for.

This issue takes us therefore straight back to the content and scope of the individual grounds of substantive review. However, it is important to understand that, by reason of their high policy content or otherwise, some subject matters may, albeit rarely, be seen as effectively excluding review on one or more of the substantive grounds. A few brief illustrations will have to suffice.

In *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 641 the appellants were together with the Minister of Energy party to a joint venture agreement. The purpose of the joint venture was to carry out prospecting operations under a ten year prospecting licence, and mining operations under separate mining licences, in a defined area of Taranaki. After the expiry of the prospecting licence but while the joint venture was effectively still afoot, there was a major new discovery of oil. The other parties to the joint venture applied to the Minister for an extension of one of the joint venture's existing mining licences, to cover the new oil field. The Minister declined the application, and instead granted himself on behalf of the Crown a mining licence over most of the newly discovered field.

The disappointed parties succeeded in the Court of Appeal in overturning the Minister's decision, the majority holding that the joint venture agreement placed the Minister under a contractual obligation which precluded him from granting the new mining licence to himself. On further appeal, the Privy Council reversed. Their Lordships regarded the Minister as carrying out two quite distinct functions under the legislative scheme. In granting the licence to himself, the Minister was, it was held, quite clearly exercising his statutory function, while in receiving it (from himself) as grantee, he was performing his commercial function.

The Privy Council also disagreed that the Minister had breached the joint venture agreement in granting the licence to himself. They regarded the contractual obligations of the Crown under the joint venture agreement as irrelevant to the Minister's exercise of his statutory powers, which (once the contractual issue was disposed of) were not subject to review on the merits. Their Lordships approved a passage from the dissenting judgment of Richardson J which included the following (at 655):

> I would hold that the identification and determination of the national interest in this case was for the Minister alone and was not reviewable by the Courts. That in my view is the true intent and meaning of the statute in that regard. ... the whole thrust of the legislation is to subject the resource and its development and exploitation to the control of the Minister.

Shortland v Northland Health Ltd [1998] 1 NZLR 433 concerned a refusal of dialysis by a crown health enterprise in respect of W, an elderly diabetes sufferer. The dialysis was vital to maintaining W's life. An application for judicial review on W's behalf asserted that the decision to decline dialysis was unlawful on two grounds, namely breach of the "requirements of good medical practice", and breach of s 8

of the Bill of Rights ("right not to be deprived of life"). The application failed on both grounds. The Court stressed (at 442, 445) that:

> The area involved was one par excellence of clinical and professional judgment ... it is not for the Courts to be arbiters of the merits in cases of this kind ... [being] concerned only with the lawfulness of actions and decisions and not with the likelihood of the effectiveness of medical treatment.

However, a reading of the judgment as a whole reveals that the Court did examine in detail the question of "good medical practice" and the competing arguments as to the merits of the decision. Consistent with other recent pronouncements, the Court when considering the claim of breach of s 8 of the Bill of Rights stressed that "when questions about the right to life are in issue the consideration of the lawfulness of official action must call for the most anxious scrutiny" (at 444). There is therefore no suggestion of a *Woolworths* approach being adopted in this area.

When by comparison the subject matter of review is an alleged error of law on the part of the decision maker, we have now reached the stage where any material error of law will be judicially reviewable, regardless of whether it amounts to a breach of procedural fairness or goes to jurisdiction in the strict sense. Indeed, any distinction between jurisdictional and non-jurisdictional error of law can now be considered as redundant. This emerges clearly from the Court of Appeal's recent decision in the "Winebox Inquiry" judicial review case, *Peters v Davison* CA 72/98, 17 November 1998. See especially the joint judgment of Richardson P, Henry and Keith JJ at p 29-30; Thomas J at p 16-18; Tipping J at p 3-10. Their Honours generally adopt the approach developed in English authorities such as *R v Hull University Visitor, ex P Page* [1993] AC 682. However, the error of law, even if it need not go to jurisdiction, must materially affect a matter of substance relating to the decision ultimately reached. (The five Judges express the test in somewhat different ways. See Richardson P, Henry and Keith JJ at p 46; Thomas J at p 21; Tipping J at p 11.)

THE CURRENT CLIMATE

In my 1992 NZLJ article, I pronounced myself ready to risk being described as bold if not indeed rash enough to venture to identify an overall trend in the field of modern administrative law. I opined as follows (at 255):

> recent cases do tend to suggest that the understandable and indeed proper judicial cautiousness over intervention by way of judicial review may be hardening somewhat; and, indeed, that, except perhaps in relation to issues of procedural fairness, we may well have seen the high-water mark of judicial review interventionism in New Zealand.
>
> ... All this is not to say that meritorious cases will not continue to succeed. But at least outside of the area of [Treaty of Waitangi] litigation ... the applicants in the "big cases" involving issues of high policy may find the battle to be even more uphill than previously.

Since that was written, there has been as we have seen a number of significant developments in administrative law. Just as importantly in a practical sense if not more so, with the retirement of Lord Cooke and Justices Hardie Boys, Casey and McKay, a significant change in the composition of the New Zealand Court of Appeal has occurred. The earlier prediction concerning the overall trend appears to have been borne out. In some fields of public activity, such as rate-fixing by local authorities and state-owned enterprise commercial activities, the test of reviewability other than for illegality and (possibly) procedural unfairness has been set so high as to present hurdles which may be practically insurmountable. Even in the previously burgeoning field of Treaty litigation, the tide now seems to have turned against Maori applicants. (See by way of example only *New Zealand Maori Council v A-G* [1994] 1 NZLR 513; *Taiaroa v Minister of Justice* [1995] 1 NZLR 411; *New Zealand Maori Council v A-G* [1996] 3 NZLR 140; *Te Heu Heu*. Contrast *Mahuta v A-G*, HC Wellington, CP 67/99, Nicholson J, 31 March 1999.)

On the other hand, after a period of uncertainty generated by inappropriately broad statements in *Mercury Energy* and *Woolworths*, aiming to restrict the scope of review in particular areas, we may be moving towards a more focused approach, where different principles or standards of review are expressly recognised as applicable to particular fields of activity. Some will be afforded heightened scrutiny or a "hard look" (to use the American terminology). Others will be the subject of an explicitly-articulated doctrine of judicial deference. The latter approach, of judicial deference to the extent that the necessity for it is positively demonstrated, certainly seems to me to be conceptually and intellectually more satisfying than the epithet-studded circularity of what Thomas J has characterised as the "super-*Wednesbury* test" of cases such as *Woolworths*.

Has then the pendulum swung back? With the post-Cooke Court of Appeal, my impression is that to some extent, it has. Without it having been expressly articulated, one can perhaps discern something of a judicial reaction, now filtered down to High Court level, against the perceived liberalism of the leading 1980s judicial review cases. In fairness, the change if it be such reflects in turn profound changes in the economic and social order as between then and now.

Furthermore, although the law has shifted quite significantly over the course of the last decade, and the odds against a successful judicial review challenge seem overall to be higher, in terms of future development of the law nothing has been foreclosed. Indeed, ongoing development of the law of substantive judicial review, at least at the level of the continuous ferment which has surrounded it for much of the second half of this century, seems inevitable. Not only is there the likelihood of continuing exploration of the Bill of Rights as providing independent grounds of judicial review. There is also the potential impact of the major changes which will be seen in English administrative law, now that the United Kingdom has passed the Human Rights Act 1998, which constitutionally entrenches the provisions of the European Convention on Human Rights and Fundamental Freedoms.

For practitioners advising clients in this field, there is now more than ever a need for a tightly analytical and cautious, indeed conservative, approach in assessing the prospects of success of judicial review proceedings. Regard must be paid to the fact that, both in terms of the legal principles and (apparently) judicial inclination, the tide has receded somewhat, compared with what may turn out to have been the heyday of judicial review in this country, at least as regards merits-based challenge. While realism on the part of litigators is clearly requisite in the current climate, complete acquiescence is not. The use of the pendulum metaphor in this article is by no means original; but its repetition does remind us of the essentially cyclic nature of public law. As professionals, we owe it to our clients (and indeed to ourselves) to push against the flow of the tide in appropriate cases. ❑

TRANSACTIONS

INNOCENT PARTNERS AND TRUST ACCOUNT AUDITS

with

Brian Keene

Stringer v Peat Marwick Mitchell & Co

(CP 71/91 High Court Christchurch Chisholm J: 1 July 1999)

In the *Transactions* section of this *Journal* of February 1999 [1999 NZLJ 19-20] the decision in this case delivered by Master Venning was commented on. In that decision the claim by innocent partners of a law firm against its auditors for breach of duty permitting defalcations from its nominee company by a guilty partner was struck out for want of any relevant duty. The auditors' attempt to rely upon s 189 of the Law Practitioners Act which gave immunity to suit to (inter alia) "other persons appointed under the Act to perform any function in respect of anything done in pursuance of [the] Act" was rejected. The present judgment was a review of the Master's decision.

Chisholm J upheld his findings under s 189 but reversed the strike out order holding that pleadings if proven established a relevant duty of care owed by the auditors to the firm.

Section 189

> **Protection of councils of New Zealand and District Law Societies** – Without limiting s 137 of this Act, no criminal or civil proceedings shall be taken against the council of the New Zealand Law Society or of any District Law Society, or any committee appointed by any such council, or any member or employee of any such council or committee, or any other persons appointed under this Act to perform any function, in respect of anything done in pursuance of this Act.

On its face the section provides broad and sweeping immunities from suits. Wallace J in *McCutcheon v New Zealand Law Society* (CP 543/92, HC Auckland, 23 November 1992) in a decision subsequently endorsed by the Court of Appeal held that the clear purpose of s 189 was to protect councils' committees and individuals who in many instances were acting on a voluntary basis from suit. Significantly he noted:

> The New Zealand Law Society and the District Law Societies are not given protection from liability for everything done in the pursuance of the Act and remain subject to the control of the Courts (p 10).

He confessed the section did not seem particularly well drafted. At first instance Master Venning also struggled with the wording as would Chisholm J later. The reason for this is quite plain. The section can only be read as giving a full immunity for the persons referred to in it. As counsel for the defendants submitted, any other interpretation simply does violence to its language. The Court in interpreting s 189 has been influenced by s 91(1)(b) which permits a District Council to require as a condition of appointment as auditor the maintenance by the auditor of adequate professional indemnity insurance. Why should there be such a stipulation when, were the indemnity to extend to the auditor, there is no possibility of a civil claim and therefore no need for such insurance? Thus, it is argued, that s 91(1)(b) requires a reworking and re-interpretation of s 189 which will permit a suit against the auditor and therefore give meaning to the right to require insurance.

One may wonder whether the perceived contradiction between s 189 and s 91 really exists. The Law Society's ability to require insurance does not necessarily have to be directed at potential claims against the auditors by solicitors, their clients or the Society itself relating to audit functions to be performed under the Act. It is explicable for example on the basis that accountants with such insurance are less likely to succumb to other claims from their broader client base and thus go out of existence. Continuity of auditor is important and specifically covered by the regulations. Their retirements can occur only in a controlled way. Again, the existence of insurance may be seen to cover any auditing functions outside of the statutory scheme of the Act whether requested by the solicitor or indeed, no doubt in rare cases, the Society.

The most compelling point is that s 189 explicitly grants immunity to "any other persons appointed under this Act to perform any function in respect of anything done in pursuance of the Act". There is a finding that the auditors are independent professionals who are paid to perform a specialised function under the Act. Their role is therefore clearly within the section. Although the Courts may instinctively wish to impose a liability, in the end it is their function to give effect to the intention of the legislature as expressed by the statute.

Auditor's duty of care to innocent principals

Master Venning at first instance held that no such duty existed. His rationale was based on an assumption that the principal intended beneficiary of the statutory scheme was the solicitors' client. Given such an assumption, to find that the auditor owed a duty of care to the firm generally seemed to him to be contrary to the statutory scheme.

Chisholm J analysed the scheme of the legislation and found a number of factors which suggested a secondary purpose of the legislative intent could include protecting innocent principals of law firms. He found no basis to dismiss the prospect of the co-existing duties to both the clients and the firms

and referred to an Australian decision as well as the judgment of Young J in *Sievwright James & Co* (see accompanying case note).

After reviewing a number of other factors examined by Master Venning, Chisholm J concluded that any policy factors which may weigh against the recognition of a duty by the auditor to the solicitor were not sufficiently compelling to entitle the Court to refuse to recognise such a duty of care – certainly at the interlocutory stage. He therefore allowed the review application and reinstated the cause of action by the solicitor against the auditor.

Important questions are at stake in the outcome of these proceedings, both for auditors and the legal profession. For the former they should understandably resist an imposition of tort liability in favour of the class of solicitors' clients who see and therefore do not rely upon their audit report. They also deserve another critical answer to why, when s 189 on its face seems to provide immunity it should be withheld. For the legal profession, it needs to know whether members may rely upon the auditors' opinion given pursuant to the statutory scheme. Does a duty of care exist and does s 189 provide the auditor with immunity? If no then the legislation should be changed to put the matter beyond doubt rather than leave the Judges to strain to achieve a result that is difficult to reconcile with the plain wording of the Act.

THE SCOPE OF DUTY AND CAUSATION

Jane Anderson

On 23 March 1990, Martin Lynch hanged himself in a cell at Kentish Town police station in England while remanded in custody on fraud charges. Mr Lynch's death, or more properly the views of the House of Lords as to its cause, provides considerable food for thought on causation in law (*Commissioner of Police for the Metropolis v Reeves* 15 July 1999).

Mr Lynch's administratrix sued the police under the Fatal Accidents Act 1976 for negligently causing his death. The action in such a case is effectively that of the deceased. The morbid facts were that Mr Lynch hanged himself by fastening his shirt through an open hatch in the door and tying the other end around his neck. The police had been issued with standing instructions to take care that people in their custody do not commit suicide, which included specific instructions not to leave the hatch of the cell open. In this instance, the police knew that Mr Lynch was a suicide risk – he had tried to strangle himself that morning.

In the circumstances the police conceded that they owed Mr Lynch a duty to take reasonable care to prevent him from committing suicide while in custody. However, they said that they did not cause his death.

The trial Judge agreed with the police but the majority of the Court Appeal did not. They said that since the police did not deny they owed the duty, or that breach enabled Mr Lynch to commit suicide, they could not say that their breach was not a cause of death. That would be to deprive the duty of any meaningful content. Morritt J dissented on the basis that a deliberate act by a person of sound mind negatived any causal connection between acts which merely created the opportunity and their consequence.

> ***Where a duty is directed at the prevention of the occurrence of a certain event, the occurrence of that event cannot be said to negative the causal connection between the breach and loss***

The House of Lords, by a majority, held that the police caused Mr Lynch's death. The man did the very thing that the police had a duty to take care to prevent. Where a duty is directed at the prevention of the occurrence of a certain event, the occurrence of that event cannot be said to negative the causal connection between the breach and loss. Lord Hobhouse's dissent focused on the principle of human autonomy. He reasoned that Mr Lynch had a right to choose his own fate. But the corollary of that principle was that he must be responsible for the consequence of his choice.

Intuitively, the suggestion that the police caused Mr Lynch's death by suicide is disquieting. It offends our perception of the ordinary usage of the word "cause". Most would view Mr Lynch as having caused his own death. This conclusion was drawn by Lord Hobhouse who considered that as a matter of the ordinary use of language it was correct to say that Mr Lynch's voluntary choice was the cause of his death.

Yet, the statement that the police caused the death becomes less disturbing once we see their action in the context of the concession that they owed duty to take care to ensure that he did not kill himself. Why is that? The reason is that when we come to ask the "causation" question, we have already attributed responsibility to the police for the death in the formulation of their duty. Once that is done, the causation question falls away to finding a trivial connection between the conduct of the police and the death. The opportunity the police gave Mr Lynch to commit suicide is sufficient. The case raised this attribution issue starkly because the duty as formulated is directed to the one consequence rather than a range of consequences.

Now what has all this got to do with commercial law in New Zealand? A great deal actually. For the case demonstrates something of a danger in the "scope of duty" approach which is finding favour as the proper way to analyse issues of causation and remoteness. Under this approach the inquiry as to whether a particular consequence or kind of loss was caused by the defendant is answered by whether the loss claimed is within the "scope of the duty" owed (see *SAAMCO v York* Montague Ltd [1997] AC 191). This is sometimes described in terms of risk: what is the kind of risk against which the duty was to protect? The approach was applied recently by the Court of Appeal in *BNZ v Guardian Trust* [1999] one NZLR 664 at 684 in the context of duties owed to debenture holders by a trustee under a debenture deed (and see note of the High Court decision in (1998) NZLJ 176).

Lynch demonstrates that driving the causation inquiry off the formulation

of duty in this way makes causation primarily a question of law. The only factual issue is establishing that the loss would not have occurred "but for" the breach. It leaves little scope for appealing to the "ordinary person's" notion of causation. That is not necessarily a bad thing. However, if the approach is to be applied here, it is important to be aware that this is its effect. It is fair to say that traditionally the New Zealand Courts have seen causation as primarily a question of fact to be assessed by applying common sense (*McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39, 41; *Fleming v Securities Commission* [1995] 2 NZLR 514).

Of more concern is the circularity of reasoning involved in the scope of duty approach. Asking whether the loss is within the scope of duty is simply to "restate the question asking what losses it is reasonable that the law should require the wrongdoer to compensate" (*Guardian Trust* at 683). The issue was not live in *Lynch* because the duty to avoid the particular loss suffered was conceded. However, that will be rare. For example, the losses for which an auditor is liable as within the scope of the duty to audit accounts without negligence depend entirely on how the duty is formulated. But the formulation itself cannot be derived in any mechanical way. It depends on a whole range of value judgments about how far auditors' liability should extend and to whom.

The principal danger of the scope of duty approach is that levelled by critics of a "commonsense" approach to causation. That is that it conceals the value judgments at play. We are further ahead on one front because the scope of duty approach directs the inquiry at the purposes of the rule imposing liability, which helps to focus on why the law should impose liability. Yet the approach is in one sense more dangerous. It more readily lends itself to being applied as a mechanical formula so is more insidious in foreclosing express consideration of the true policy factors.

Admittedly, it is nigh on impossible to avoid hidden value judgments whatever approach is applied. This is largely inherent in the imprecision of our language. "Scope of duty", "common sense", along with "proximity", "foreseeability", and "negligence" for that matter, all rely on what content they are given and how they are applied. That is not to say that these concepts ought to be abandoned. However what it does mean is that they should not be elevated from relevant considerations to formulae. It also means that the motivating policy considerations that mould the legal determinations ought to be articulated so far as is practicable.

Mr Lynch would no doubt be surprised that he made legal news on the other side of the world almost ten years after he died. Those who disagree with the result on the liability issue can take heart in the fact that the House of Lords reduced the damages recoverable by 50 per cent on the ground of contributory negligence. The contributory negligence issue raises its own difficulties which must be left for another day.

SOLICITORS' NOMINEE COMPANIES AND THE DUTY OF AUDITORS

Sievwright James v Borick

(21 December 1998 CP 20/94 HC Dunedin, Young J)

The plaintiff was the solicitors' nominee company of Sievwright James & Co, a long established firm of Dunedin solicitors. It sued, on behalf of its contributories, the defendants Borick & Fraser, the two principals of the firm. Advances were made by the nominee company to Mr and Mrs Inglis, clients of the firm. The initial security appeared adequate but instead of the advance being repaid when one of the two securities was sold, it was on-lent to Mr and Mrs Inglis by another transaction. Ultimately they became insolvent and after realisation of the securities, the nominee investors lost $200,000 of the principal. They sued the solicitors for that loss together with interest and the firm's auditors claiming breach of duty, pleaded to be fiduciary, tortious and under statute.

The solicitors joined their insurers who had declined indemnity. In pretrial manoeuvrings there was a partial settlement whereby the plaintiff undertook not to pursue the solicitors who in turn settled their claim against the underwriters. The settlement provided that should the auditors, as remaining defendants, join the solicitors back into the proceedings, the nominee company would indemnify the solicitors against any finding of liability. Unsurprisingly, when the auditors discovered the partial settlement, they applied to strike out the nominee company's claim against them; and in the alternative, to join the solicitors as third parties claiming indemnity and contribution from them.

Justice Young's decision was therefore interlocutory only. It is however of general interest on the subjects of the existence of a duty to nominee company contributories, causation and circuity of liability.

Duty

Care is always needed in reading too much into interlocutory judgments arising from strike out applications. The Court is bound to accept, for the purpose of the strike out, the plaintiffs' facts as pleaded. That creates a sufficient air of unreality about the application to make a successful strike out a rare occurrence indeed. That said, judgment is a useful if preliminary appraisal of the principles.

The judgment first dealt with s 189 of the Law Practitioners Act which provided immunity from suit to the New Zealand Law Society, its committees, members, or employees or any other person appointed under the Act to perform any function. The judgment noted that the immunity point was not argued by counsel for the auditors albeit it had been raised a few months earlier in the decision of Master Venning in *Stringer v Peat Marwick Mitchell & Co* (unreported CP 79/91 HC Christchurch, 17 August 1998). In a case note reported on *Stringer* [1999] NZLJ 19-20 the correctness of Venning J's dismissal of this defence on a plain interpretation of the section was raised. However the issue not being argued should probably be treated as obiter in *Sievwright*. (See also the accompanying case note on the High Court review of *Stringer*.)

The auditors' counsel argued that the auditors' duties extended only to the firm and not its clients. He argued, and the judgment accepted, that the starting point was that a professional person, when acting for a client (the firm), does not owe a duty to a third party (its clients). Young J referred

however to Master Vennings' decision in *Stringer* which held that the auditors owed no duty to the solicitors themselves. Whilst not explicitly adopting that conclusion, the learned Judge commented, on the assumption of its correctness, that if the auditors owed no duty to either the firm or the contributories that either left an alleged duty owed to no one, or the possibility that it was owed only to the Law Society. Again without formal finding, he observed:

> At this point I should note ... that the auditors might be thought to owe duties to the New Zealand Law Society ... The New Zealand Law Society has Fidelity Fund obligations in respect of which the functions of a trust account auditor are plainly relevant. As well, auditors report directly to District Law Societies which have statutory functions in relation to the supervision of trust accounts (p 10).

Young J inclined against the view that the duty was owed to the New Zealand Law Society:

> Leaving aside cases involving defalcation, it is unlikely that negligent trust account auditing would cause any loss to be suffered by those bodies which they could seek to recover (p 13).

One might doubt such a view. If the auditor operates under the Act and Regulations as agent for the New Zealand Law Society and by the negligence of its agent loss is caused then, presuming a duty to the firm's clients, the New Zealand Law Society or District Law Society would seem prima facie liable subject to its right to recover against the auditor.

The Judge addresses the curiosity of a potential duty owed to persons who have not and are never able to call for the audit report. How is a case for reliance to be made out? The answer:

> The issue of reliance may be a factual consideration for the trial Judge. I rather suspect that those who invest money through solicitors' trust accounts and intercontributory mortgage schemes, operated by solicitors' companies, are aware, at least in general terms, that there is an audit system in place which is intended to protect their interests, and that, at least in a broad sense, they do rely on the existence and operation of that system when they invest money in this way (p 13).

Contrast this with the most recent Court of Appeal decision *Boyd Knight v Purdue* (1999) 8 NZCLC 261, 899. In that case investors made deposits with a company after the issue of a prospectus containing a report audited by the defendants. At trial there was no evidence that any of the plaintiffs had read and considered the accounts. Their case was simply but for the audit report there would have been no prospectus and no ability at law for the borrowing company to receive the investments.

presuming a duty to the firm's clients, the New Zealand Law Society or District Law Society would seem prima facie liable subject to its right to recover against the auditor

The Court was unimpressed with the argument that the existence of an audit system would, of itself, give parties who could potentially rely upon it rights.

> It is not enough for the investor to say that, without troubling to look at the account, he or she relied in a general way upon the statutory scheme, making an assumption that an investment is sound or the issuer creditworthy because there was a trustee playing a supervisory role in connection with the prospectus and an auditor had furnished the report required by the regulations.

The divergence between the two decisions may bejustified by the peculiarities of strike out applications. The Court not being apprised of the evidence of reliance must await a substantive hearing. However as investors are never privy to the terms of the audit report, that seems an unlikely explanation.

The second explanation may lie in the difference between the statutory scheme of the Securities Act which is designed to release the accounts and the audit report to the public so they have the opportunity of a more specific reliance, and the Law Practitioners Act which does not. That distinction seems more likely to found the argument that the statutory scheme of protection was intended for the parties who could rely upon the audit report, namely the New Zealand Law Society through its District Society. Their reliance is for the protection of the fidelity fund. Thus the statutory scheme points away from rather than toward a duty of care being owed by the auditors to investors.

Young J held that for the purposes of the strike out application, he was prepared to accept that auditors owed a duty of care to the nominee company and the contributories.

Causation

The plaintiff argued that the auditors played no role in the decision made in February 1986 by the nominee company not to insist on a repayment of the advance from the proceeds of the sale. Nor were they involved with the decision to make a further advance. Therefore, argued the auditors, by the time any further audit obligation arose the money had already been lost.

Young J held that the question of causation in the end was one of fact and degree based upon the evidence. The plaintiff contributories alleged a continuing course of irregular lending. Only an examination of the evidence would reveal an answer. He declined to strike out on this ground.

Circuity of liability

The application by the auditors to rejoin the solicitors as third party was against a background of a full indemnity by the plaintiff contributory to the solicitors under the earlier settlement. Hence should the claim against the auditors succeed, and the auditors prove that the relevant damage was caused or contributed to by the solicitors then, to that extent, the litigation becomes a money-go-round with plaintiffs achieving no net benefits. On these facts two potential situations arise:

(a) by reason of the principle of avoidance of circuity of liability the joinder should not take place; and
(b) if the settlement between the plaintiffs and the solicitors was in full and final satisfaction of the plaintiffs' claim against the solicitors, then as it relates to the same loss claimed against the auditors, it may be irrecoverable.

These issues were alluded to in the judgment but, presumably for want of clear uncontradicted evidence, did not prevent the re-joinder of the solicitors as third parties. Whether circuity applies to defeat the terms of the plaintiff's settlement with the solicitors and whether the loss settled is the same loss now claimed against the auditors will have to be determined at trial giving particular attention to the terms of the settlement reached. ❑

WHAT IS MEDIATION?

ALTERNATIVE DISPUTE RESOLUTION

edited by Carol Powell

THE PROBLEM SOLVING MODEL

Mediation is a consensus based process whereby parties work with an independent third party to endeavour to resolve their differences. There are a variety of models of mediation and the process within those models differs significantly. The majority of New Zealand mediators who practice in the commercial arena are likely to use a model similar to that taught by LEADR, which is a problem solving model. Within this model there are as many variations as there are mediators, however there are some common elements and those elements are broadly discussed in this article.

Introduction mediator's opening

The beginning of the mediation process is often charged with tension as parties who are in dispute sit across a table or room from one anther and will be required to talk about the dispute directly to one another. The mediator has the task of breaking the ice, setting the scene and creating an environment where open discussion is safe. Mediators' styles vary considerably at this stage as each individual will have their own way of establishing rapport and credibility with the parties. In most cases the mediator will provide the parties with information about what to expect during the process and will reinforce the fundamental elements of mediation such as confidentiality, whether the parties have authority to settle and commitment to the process. Some mediators will also establish ground rules about behaviour and communication through the process.

Opening statements parties' opening

In contrast to arbitration or Court proceedings, parties are encouraged to speak for themselves at a mediation even when they are represented by legal counsel. The rationale behind this is that the parties will often perceive the dispute in terms other than legal issues, will say what is important to them and get the opportunity to explain their view to the other parties.

Parties will be asked to explain in their own words why they have come to mediation and how they view the problem. This is a useful step in the process as it is often the first time that the parties have had the opportunity to sit and listen to the other parties' perspective. It also serves to inform the mediator on the background to the dispute and draws out the important issues for the parties themselves.

Reflecting back – summarising

Most mediators will reflect back to each party a summarised version of their opening statement. According to individual style this will occur either after each party has given the opening statement or at the conclusion of all openings.

When people are in dispute it is often difficult for them to listen fully and with an open mind to what the other party has to say. For this reason one of the purposes of this part of the process is to serve as a repetition of each party's perspective coming from a neutral source. It also serves to ensure that the mediator has heard and understood what each party has said, particularly the important issues for each party.

Issues list

A phenomena which often occurs in unstructured argument is a tendency for arguments or points of view to be repeated in a circular fashion. This prevents people from being able to listen to other points of view and adapting their view point. It therefore creates position taking. The mediator's task is to change the way in which the parties communicate to enable them to listen and to alter their "position".

The next step in this process is to break down the dispute into bite-sized areas of discussion. This is commonly called establishing an issues list or an agenda. The mediator's skill will be reflected in their ability to break down the disagreement into many small discussion areas, to express those issues in a neutral and mutual way – which is acceptable to all parties, and to ensure that all issues, which are able to be openly identified, are captured on the list. The agenda is flexible so that issues can be added later on in the process or removed as the mediation unfolds.

Issues exploration

Once an issues list has been identified, the parties embark on an in depth discussion of each issue in turn. The objective of this part of the process is to enable as much information as possible to be exchanged. Parties are encouraged to communicate directly with one another and to express any emotions.

The mediator's role in this part of the process is to encourage direct communication between the parties, to identify and record common ground and areas of agreement and to facilitate progress in the discussions.

The mediator works with the parties to move them away from entrenched positions and to help parties

understand the background to the dispute and the other parties' perspective of that dispute. The focus of the mediator will be on identifying each parties' needs and interests and enabling these to be identified by the parties themselves.

The information and communication rapport established during this stage of the process will pave the way to successful negotiations later on.

Private sessions – use of private sessions

Mediators vary significantly in their use of caucus or private sessions, which are meetings with each of the parties in private. These sessions attract an additional layer of confidentiality which requires the mediator to keep confidential the content of these sessions from all others who are participating in the mediation as well as the general confidentiality requirement which applies to the mediation as a whole.

Some mediators do not hold private sessions, while others use them extensively, most fall into a middle ground of using caucus after extensive joint discussion for specific reasons within the process.

The purposes of private sessions include:

- providing a forum to parties to raise issues with the mediator which they do not want to reveal to the other parties;
- giving some time out for the parties to discuss the issues with the mediator and ensure that all issues they need to discuss have been raised;
- to allow the mediator to reality test any entrenched positions;
- to allow the mediator to work with the parties to break any impasse;
- to allow the mediator and party to explore the party's best alternative to a negotiated agreement (BATNA) and realistically to evaluate alternatives;
- to encourage option generation and to test any existing options raised in a joint session; and
- to assist the party to prepare for the negotiation, covering matters such as the party's bottom line, the framing of any offer so that it best reflects the other party's needs and interests and rehearsing settlement negotiations where appropriate.

There will often be several private sessions following subsequent joint sessions to allow these objectives to be undertaken at an appropriate time in the process.

(For discussion of the concept of BATNA see *Getting to Yes* Roger Fisher William Ury and Bruce Patton Business Books Ltd 1992.)

Option generation

"Options" are potential settlement terms which would have the effect of meeting any one or more need or interest of either party and could form part of a final agreement. They can be generated at any time in the mediation process although most mediators will do no more than record the possibility of an option if it raised too early in the process.

Many mediators will encourage the parties to work through an active option generation stage once the parties have exchanged sufficient information and a communication rapport has been established. This can be a brain-storming process. The technique adopted by the mediator will depend upon that individual style, the nature of the dispute and the needs of the particular parties. Ultimately the mediator will endeavour to get the parties to create an extensive list of options which has been contributed to by all the parties to the dispute and may also have had input from the parties' advisers and support persons. In some cases the mediator may also suggest possible options which the parties may chose to include in the final list.

This stage is effectively "increasing the pie" and parties are encouraged to put forward any idea they have which would have the effect of meeting any party's needs or interests without being committed to agreeing to that option in a final agreement.

At the end of the process the parties can then evaluate the options and begin a negotiation process using the most acceptable options as a starting point for discussions.

Closure and agreement

By this stage in the process the parties will usually be communicating directly with one another and the mediator will track the negotiations clarifying and noting points of agreement as they are reached, ensuring that the negotiations remain on track, ensuring that all the needs and interests of the parties have been addressed in the final agreement and reality testing the agreement to ensure that it will be capable of being performed and that the parties will be able to live with it.

Throughout the process the mediator will work to encourage direct communication between the parties and to assist the parties to focus on the future.

SEMINAR – ARBITRATION PROCEDURES UNDER THE NEW ACT

Judge Willy and Dr Wylie will present a seminar on arbitration procedures under the new Act at Rydges, Christchurch in September.

Judge Anthony Willy has been involved in dispute resolution since 1964 variously as a lawyer, arbitrator and Judge. His experience includes most classes of civil work and he has sat as a Judge in the District Courts (mainly civil in later years), the Environment Court, and the Taxation Review Authority. He is currently warranted to implement procedures for or the reduction of arrears of civil work in District Courts.

Judge Willy is the author of Butterworths' *Arbitration Law and Practice in New Zealand* and Butterworths' *District Court Practice*. He was co-author with Justice Penlington of Butterworths' *High Court Forms*, and has served on the Council of Legal Education, and the District Court Rules Committee. He was Chairman of the New Zealand Law Society Legal Education Committee.

Dr Edwin Wylie graduated with an LLB (First Class Honours) from the University of Canterbury and has a PhD in Administrative Law from the University of Cambridge. He was formerly a partner in Ronaldson Averill & Co, and then in Lane Neave Ronaldson until 1990. He commenced practice as a barrister sole in January 1991.

Dr Wylie practises principally in the areas of environmental law, administrative law, and civil litigation and he has acted as a Commissioner on behalf of a number of local and regional authorities. He has been involved in a number of arbitrations – either as counsel, or as arbitrator, under both the Arbitration Act 1908, and the Arbitration Act 1996.

The speakers will place emphasis upon navigating three important areas of arbitration:

1. The reference to arbitration
2. The conduct of the arbitration
3. The enforcement of the award.

THE REFERENCE TO ARBITRATION

This will be a discussion of the significance of the agreement submission to arbitrate, matters agreed to be referred, relationship with the right to litigate, appointment of the arbitrator, and qualifications of the arbitrator.

THE CONDUCT OF THE ARBITRATION

The presenters will deal with such matters as; the place of interlocutory applications, the form of arbitration, admission of evidence, obligations of arbitrators, consequence of default by a party, interest, costs and interim awards.

THE ENFORCEMENT OF THE AWARD

This will deal with some of the practical difficulties experienced in enforcement of awards through the High Court, and possible pending rule changes which may assist.

The number of participants will be limited. To ensure your place, fax your registration now to the Institute (04-385-7224) and post in the completed form and your cheque before the closing date – 13 August 1999.

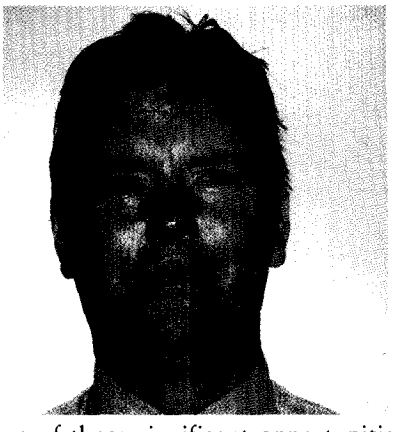
MEDIATOR PROFILE PAUL HUTCHESON

Paul Hutcheson practises as a private mediator and dispute resolution consultant throughout New Zealand.

Mediation is often seen as embodying a wide variety of forms of practice and styles of operation. With his unique background Paul Hutcheson captures much of this type of diversity being legally trained with a wide experience of mediating in a variety of areas and having an academic education in mediation.

Paul believes that mediators must be able to offer users a high level of skill and consistency of professional service. However, within this framework advantage must also be taken of the characteristic flexibility and appropriate informality of mediation. With his particular experience he feels at ease being able to "fit mediating approaches and techniques to differing types of conflicts".

Paul's earlier career positions included university lecturing in mediation, manager of human resources and work as a probation officer. After mediating workplace disputes for several years he describes being presented with



one of those significant opportunities that we sometimes encounter in our lives. This was a Rotary Foundation's Ambassadorial Scholarship to Colorado USA, to study mediation at Denver University. Prior to leaving Paul says that he had no idea of the visibility dispute resolution enjoyed in the States with its wide public awareness. This contrasts with New Zealand where Paul comments that any practising mediator needs to spend substantial time explaining to potential users that mediators will not be making decisions for the parties.

Paul's overseas experience culminated in him spending an invaluable twelve months interning with the prestigious CDR Associates of Boulder and mediating as part of three other schemes, including victim/offender, community and Court annexed mediation.

Paul reflects, "I know I am very lucky given my exposure to some of the best learning and mentors in this field. It's been an excellent education and training. However, perhaps the most salient point for me is that all disputes involve differing variables and I can help parties the most when I do not enter mediation with a mind-set to respond like some prescription out of a textbook. In other words, I try to ensure that I will remain open to using any one of many approaches".

Paul has an LLB and a postgraduate diploma in human resource management from Auckland University, an MA and Postgraduate Certificate from Denver University, and is a member of LEADR's Advanced Panel of Mediators and a serving member of its board.

LEADR NEW ZEALAND UPDATE

LEADR held its second 4-day mediation training workshop for the year in June. This time, the workshop was held in Wellington and run by a combination of New Zealand and Australian trainers. Five New Zealand trainers are now accredited to provide 4-day workshop training, along with our Australian "4-day" team, Sue Duncombe and Jo Kalowski. This workshop was run by Sue Duncombe, together with local Wellingtonians, Geoff Sharp and Roger Chapman. It was an action packed few days for the 20 participants.

The 4-day workshop scheduled for Auckland in October is filling fast. Just six spaces remain.

To reserve your place, please contact the LEADR office on
09-373 5020
as soon as possible.

TAKING THE "BUG" OUT OF THE MILLENNIUM

THE MILLENNIUM ACCORD

It is impossible to anticipate how the "millennium bug" will affect our lives and businesses. What we can predict is that if the doom-mongers are even partly right, businesses will find themselves locked in an explosion of litigation and business disputes.

The Millennium Accord seeks to map a way through this potential disruption and destruction. The Millennium Accord is a global alliance of mediation service providers. It includes LEADR (New Zealand and Australia), CEDR (Europe), JAMS/Endispute (United States), Hong Kong International Arbitration Centre and Singapore Mediation Centre. These providers have joined together to offer businesses and organisations the opportunity to manage the millennium bug risk by ensuring a mediated approach to potential disputes.

Signing up to the Millennium Accord costs nothing. However, it enables signatories to manage the millennium bug risk so their businesses, and the businesses of their clients and suppliers are not exposed to the costly, stressful and time consuming gauntlet of litigation.

LEADR NZ (the Australasian "arm" of the Millennium Accord alliance) is inviting all New Zealand businesses, government departments and other organisations to become Accord Signatories. While the Accord is not legally binding, signatories commit to the principle of attempting to resolve differences with suppliers or customers through mediation, before resorting to litigation. Signatories are making a public statement of their commitment to problem-solving rather than problem-escalation. They are also recognising that technology systems are not stand-alone, but linked to networks stretching beyond organisational or even national borders.

For more information about the Accord, or to receive copies of the Accord agreement, please call the LEADR NZ office on 09-373-5020. ❑

WHAT'S HAPPENING

1999

August 9-10
LEADR advisers in mediation workshop
Perth

August 10
AMINZ breakfast seminar

August 12
Mediation Training Centre workshop
Fundamentals of mediation
Auckland

August 19
New Zealand Law Society
Challenging negotiations for legal executives, Jane Chart
Wellington

August 30-31
LEADR advisers in mediation workshop
Darwin

September 3
New Zealand Law Society
Challenging negotiations for legal executives, Jane Chart
Christchurch

September 6-7
LEADR advisers in mediation workshop, Perth

September 13
LEADR mediation micro skills Update 1
Canberra

September 13
New Zealand Law Society
Challenging negotiations for legal executives, Jane Chart
Auckland

September 14
AMINZ breakfast seminar

September 22
Mediation Training Centre workshop
Fundamentals of mediation
Hamilton

September 30
AMINZ seminar
Mediation ethics

October 6-9
LEADR four day workshop
Auckland

October 10
LEADR refresher/ accreditation day
Auckland

October 12
AMINZ breakfast seminar

October 19
Mediation training centre workshop
Advanced skill development workshop
Auckland

November 9
AMINZ breakfast seminar

November 13
AMINZ seminar
Advanced arbitration

November 15-16
LEADR advanced workshop
Melbourne

2000

Easter Peace Conference
"Just peace – peace building and peace making in the new millennium"
Massey University – Albany Campus Auckland

July 28 – 30
LEADR 7th International Conference
Regent Hotel, Sydney

RETRACTIONS

CRIMINAL PRACTICE

with Robert Lithgow
research by
Aroha Puata

R v K CA32/99 6 May 1999, Blanchard, Anderson, Robertson JJ.

An 8-9 year old girl made detailed allegations of sexual abuse against her cousin, aged 19, who lived in the house. The Crown relied on the submission that "the complainant knew too much about sexual matters and sexual experiences not to be recounting something that had actually happened to her". There was no other evidence. The jury took one hour and ten minutes (including lunch) to convict.

That was November 1998. By December 1998 the complainant, now ten had totally recanted both to her mother and to police including a note:

> I feel bad about what I said I didn't know it would go to Court. It was only supposed to be a tiny joke....

No case in our Court of Appeal more starkly demonstrates the workings and the failings of the appeal system and the dangers in child sexual abuse allegations than this case. Firstly though the girl asked to "speak to the video lady" – the interviewer who did the original disclosure – the interviewer refused to record the retraction citing her own misgivings about "the appropriateness of another evidential video process being used in this instance for the purpose of taking a valid retraction".

The Court of Appeal then appointed a QC to make inquiries. She studied the background and considered the evidence at trial, the transcript of the evidential video and the video itself (something the Court rarely if ever does) and interviewed the child at length. The appointed counsel's expertise in this area is not stated. Large passages of her report are set out in the judgment. She found (summarised):

- She had made the complaint because she felt scared of R and she was afraid of being growled at.

  Counsel could not see why she might be scared if R had not done the acts complained of nor why she might think she would be growled at "there was no reason for her to feel scared of her own joke".

> In this issue, all cases will be examined against the standard referred to by the Chief Justice at her swearing in: "nothing rankles like a judgment that does not convince".

- She was apprehensive about R returning to the house. "I cannot see why she would react this way if R had not harmed her" and "If the accusations were made up and were not more than a joke I can see no reason for her to react this way".
- The family missed R and things had not been happy since he had gone.
- She refused to explain how she knew about sexual acts in detail. "Also, although she described the original accusations as a joke, they did not fit her definition as a joke .... Nor did she generally think that to say falsely that someone had hit someone else was a joke .... She could not say that the joke about R was supposed to be funny".

  Counsel concluded that "faced with the choice of which evidence to give the most weight to I would choose her original evidence".

The Court referred to *R v Harding* (CA 442/99, 15 March 1994) and, in particular, the following passage:

> Of course, as pointed out in *R v K*, after there has been a conviction a key witness may come to regret the consequences of giving truthful evidence. That may occur particularly in cases which have led to divisions in a family. Retractions generally need to be approached with caution and the Court must be alert to the risk that the criminal justice system is being manipulated.

Having done that the Court observed that, in cases where the convictions were quashed, Court appointed individuals expressed reservation about the original testimony. I suggest that the concepts put to the complainant were demonstrably misunderstood. Who could, at a later date, once it had all gone wrong, explain why something had seemed funny at the time. The world's greatest philosophers have failed to analyse humour. Anyway, that generation of kiwi kids use "joke" to cover a myriad of concepts from "I had no idea it was going to be acted upon" through to "an unsatisfactory situation that has got out of control" – or "something that seemed funny at the time but which now attracts only questions and disapproval".

For those who harbour the fond hope that the Court of Appeal will examine convictions involving serious consequences with a desire to ensure all aspects of the case remain as sure and certain as the human condition can allow, this case is a frightening decision. In the event, it gives the impression that the Court has abdicated its decision to a single lawyer. Even then, the QC says only that she prefers the original evidence. The complainant said she was raped and violated in various ways and that R did it. There was literally only her word for that. Now she is adamant that R did not do those things. Surely the question is, if the jury knew both that she said these things and that she would absolutely recant these allegations two months later; could they, would they, should they have found R guilty beyond reasonable doubt?

TRIAL – BY RIGHT OR BY LEAVE?

De Montalk v Police (unreported) AP 109/98 HC Auckland, 24 September 1998, Cartwright J.

De Montalk was a defendant in person. He faced charges of breach of a protection order, injuring with intent to injure and burglary. There had been some delay in the progression to a hearing, partly or largely because of arguments over discovery from the Police. There was a pre-trial conference on the issue of discovery and also on the complex question of the overlap between general criminal charges and breach of protection orders where the breach relied upon is the criminal offence also charged. In this case it was relatively easy to determine as injuring with intent to injure has ingredients and intents beyond that needed for a simple assault or, as the protection order forbids, "physically abused the protected person" and so there could truly be said to be two separate offences committed by one act. [Nevertheless autre fois principles will in some more appropriate case test this issue and this case gives a good working insight into the principles and authorities.]

Originally de Montalk had pleaded guilty to the Domestic Violence Act charge of breach of a protection order and elected trial on the burglary and injuring with intent charges. After sentence on the DVA charge he changed his election on the other charges to summary jurisdiction (Judge alone). At the hearing on discovery and autre fois he again asserted the right to elect trial but the Judge required an affidavit in support (authority of such requirement unstated). In oral submissions de Montalk expressed concern about the impartiality of the Court and therefore, presumably, thought a jury would give him a better go. He also submitted that depositions would provide the disclosure he needed. Both would appear to be lucid and familiar reasons, if reasons be needed, for preferring a jury. The District Court Judge indicated that he would allow the change and would give his reasons after lunch. He evidently changed his mind over lunch as he held:

> I am therefore of the view that once an election of trial by jury as of right has been made then change[d] to election of summary jurisdiction, a right to change back to trial by jury before the summary trial is gone into still exists but is subject to the discretionary control by the Court over its process to ensure that an abuse of process does not occur by the manipulation of these rights.

Judicially reviewing the District Court Judge's decisions, Cartwright J upheld the view that it was up to the Court after the first change of mind. Nowhere in the decision does Her Honour set out the text of the apparently unqualified right of election in s 66(1) of the Summary Proceedings Act 1957. Further, neither Court even refers to s 24 of the New Zealand Bill of Rights Act (right to trial by jury).

The right to elect trial by members of the community in preference to the professional judiciary is a right unqualified by statutory discretion. This proposition of judicial discretion (putting aside the fact that the Judge told him he could and then changed his mind) needs to be challenged.

SENTENCING

Drug tariffs

Rationalisation in sentencing is a relatively recent affair. Increasingly the trend is toward structured sentencing based on clear tariffs and approved precedents. Sentencing schedules attached to judgments are a good example of this one-stop sentence shopping. *R v Terewi & Hutchings* and *R v Wallace & Christie* are examples of this with respect to drug offending; cannabis and speed respectively. At the most general level these cases are authority for the proposition that, regardless of the class of drug, any commercial element will result in imprisonment, except in the rarest of cases. Both cases identify commercial gain or street value as the determining factor. They reflect a realisation that the Court of Appeal must keep pace with the increasing sophistication of the drug industry. Indoor urban hydroponics, hybridisation of cannabis, and the sheer scale of modern operations have greatly increased the potential gains. Both cases stress that general deterrence is the overriding goal. Therefore, the Court of Appeal reasons, the stick needs to be bigger than the carrot.

Cultivation of cannabis

R v Terewi & Hutchings, CA 113/99, 439/98, 25 May 1999; Blanchard, Anderson, Robertson JJ (19 pp).

Reviewing the previous tariff case *R v Dutch* [1981] 1 NZLR 304. The Court maintained the three categories established in *Dutch*, but moved away from the practice of "counting plants" to determine which category particular offending fell into; the emphasis shifts to turnover or profit as this more accurately reflects the scale of an operation.

Annual turnovers of more than $100,000 will place an operation clearly within category 3, which has a starting point of four years or more imprisonment. Category 2 – commercial purpose but on a smaller scale – will start anywhere between two and four years. Category 1, which relates to personal use, will still generally meet with a non-custodial sentence. The Court clearly indicated that District Court Judges were resorting too readily to suspended sentences. The Court stressed that a suspended sentence is directed at specific deterrence and general deterrence is the crux of drug sentencing.

Applying these principles to Terewi the Court upheld the effective sentence of two years' imprisonment on charges of cultivation and possession of cannabis for supply where she had been an active, albeit lesser party, to an operation which was estimated by the Crown to be worth between $52,000 and $74,000. The Court was not persuaded that Hutchings' effective sentence of seven years was out of range. He was convicted on 11 counts of dealing in cannabis and cannabis oil (class B) falling clearly within the third category. He was sentenced to an effective two years for manufacture and sale of cannabis oil and, cumulative upon that an effective five years for cultivation, sale and possession for sale of cannabis.

Manufacture of Class B drugs

R v Wallace & Christie CA432/98 and 451/98, 20 May 1999, Eichelbaum CJ, Gault and Robertson JJ (22 pp).

Wallace set up three laboratories to manufacture methamphetamine (a class B drug) – more commonly called "speed". He recruited Christie to help with the distribution. The police seized large amounts of speed and the chemicals required to manufacture it. Financial records showed at least $1.3m had passed through their hands. Wallace was sentenced to ten years inprisonment, Christie seven years for manufacture, supply, possession for supply and money laundering; they appealed.

The Court of Appeal noted that the maximum penalty of 14 years applied to each of these offences suggesting

that, in very bad cases, little or no distinction would be justified as between offences. However, as general principles, the Court stressed that street value gives an indication of relative criminality because it can be expected to take account of the potency and purity of the particular Class B drug in issue. Account must also be taken of the offender's role in the offending whether actual manufacture, importation or distribution but there is little difference at the top levels.

The Court identified three classes of offending differentiated by the scale of the offending: commercial gain being the primary indicator. The starting point for commercial activity on a major scale will be between eight and 12 years imprisonment. If the offending reflects sophistication and organisation with operations extending over a period of time but the quantities involved are lower, the starting point will be between five and eight years. Smaller operations, but still representing commercial dealing will have a starting point under five years.

On the facts, Wallace was squarely within the top category and a sentence of ten years was viewed as unremarkable and upheld. However, Christie was not as heavily involved and did not receive a high level of personal gain so his sentence was reduced to six years.

This case is also interesting when held up against *R v Wallace* CA415/98, 16 December 1998, Richardson P, Salmon and Blanchard JJ (9 pp) noted in our February edition at p 28 where Mrs Wallace was being sentenced for money laundering. The Court approved the English Court of Appeal dicta to the effect that those who launder drug proceeds are "nearly as bad" as those who do the actual dealing. Mrs Wallace was involved in unexplained family income and spending of over $1m over two years. Her sentence was upheld at two years three months.

ROAD CRIME

Transport offences have, provided alcohol is not involved, traditionally been treated relatively leniently when the death and injuries are considered. The public mood is to be tougher on those who choose to drive dangerously under whatever circumstances. The Courts and the legislature are responding to this mood.

Brodie represents a judicial determination that there is no reason in principle to treat driving offences as "minor", or different from other types of high risk behaviour. *Eteveneaux* illustrates the bluntness and rigidity of statutory minimum penalties.

S 5 CJA (serious danger)

Brodie v R, CA151/99, 10 May 1999, Tipping, Doogue and Robertson JJ, Court of Appeal (8 pp).

Brodie overtook a car on his motorcycle on a blind corner and collided with an oncoming motorcycle. The rider and pillion of the other bike were seriously and permanently injured. Brodie pleaded guilty to two charges of causing bodily injury by carelessly using a motor vehicle pursuant to s 56(1A)(c) Transport Act 1962. The sentencing Judge erroneously thought the maximum penalty available to him was three months' imprisonment rather than three years' imprisonment and ordered periodic detention, disqualification and reparation. The Crown appealed to the High Court on the Judge's legal error. The High Court turned to s 5 Criminal Justice Act which creates a statutory presumption of imprisonment for offending that involves "serious violence" or "serious danger" to others if the maximum penalty is two years' imprisonment or more. The High Court held that s 5 applies to offences against s 56(1A) and substituted six months' imprisonment for the periodic detention. The question before the Court of Appeal was whether s 5 applies to offences under s 56(1A).

The Court of Appeal considered the words of the section clear and unambiguous and found no reason to limit its application to any particular class of offending: it depends on the facts of the particular case. Thus, s 5 may apply to s 56(1A) offences but it will not necessarily do so. In this case it did apply and the Court observed that, on the facts, six months' imprisonment was merciful.

The Court traversed the cases related to extending s 5 to cases outside the core assault variations. The paucity of precedent spoke volumes for the general reluctance to identify s 5 as a sentencing factor in negligence and high risk activities leading to injury, death and mayhem such as adventure tourism, industrial accident, death under medical care and road crime.

It is clear that in Brodie's case there was no need to use s 5 to justify a prison sentence. His lawyer had skilfully had the charges reduced from dangerous driving causing injury to careless use causing injury. The maximum sentence available was three years' imprisonment. The driving was still atrocious and demonstrated to have been a course of conduct rather than a brief moment of madness. But what the Court of Appeal has done is to say that in all cases of criminality attracting a sanction of two years or more where the expression "serious violence ... or ... serious danger" fits (obviously the vast majority of road "accidents" with injury) s 5 must be considered.

Section 5 is a presumptive section. You go to jail unless there are so-called "special circumstances". It is hard to accept, and the Court of Appeal identifies no clue beyond the plain words back in 1985 and largely ignored in driving cases since, that Parliament intended careless drivers, ie all of us at some time, who cause or partly cause a crash, cars being what they are always thereby creating danger, would face a presumption of imprisonment.

The Court, with the typical robustness of the particular combination, holds that s 5 may apply because of the so-called "plain wording". But if it is plain wording we are looking at, what could be plainer than that careless driving of cars causes that very danger. Having concreted the barrier into place the Court says not everybody will have to get over it, but offers no clues as to who, when and how.

I say the Court is wrong. Section 5 obviously targets intentional crimes. It is headed "violent offenders to be imprisoned except in special circumstances". Some negligence crimes will result in jail but not because of any presumption. We should return to that as soon as possible, but only Parliament can fix it now.

One boy's motorbike

R v Eteveneaux, CA 466/99, 12 May 1999; Tipping, Doogue, Robertson JJ (6 pp).

Eteveneaux was a disqualified teenage driver who did a doughnut on the grass berm outside his home. A passing police officer saw it. The driver did not know a berm is legally a road – who does except police, Judges and lawyers. The sentencing Judge declined to discharge him without conviction because confiscation of the motorbike under s 84(2A) Criminal Justice Act 1985 was appropriate. Section 19 CJA provides that the Judge may discharge with out conviction – and that discharge

shall be deemed to be an acquittal – provided the offence does not carry a minimum penalty.

On appeal in the High Court, McGechan J was sympathetic to the argument that confiscation was disproportionate to the seriousness of the offence, but found that s 84(2A) has effect as a minimum penalty of compulsory confiscation and thus a s 19 discharge was not available in any event. Previous cases distinguished between a minimum penalty imposed by law and inevitable penalties that result from being convicted, eg ministerial forfeiture of boats.

In the Court of Appeal, the appellant advanced two arguments as to why s 84(2A) was not a minimum penalty for the purposes of s 19. The appellant contended that:

- s 84(2A) is not "an enactment applicable to" the offence of disqualified driving, but rather applies to a type of offender (ie second or subsequent); and
- it is not a minimum penalty which obliges the Court to impose a conviction.

The Court of Appeal interpreted s 19 as referring to the specific offence which had been committed, which in this case was driving while disqualified in circumstances covered by s 84(2A), as opposed to the general offence of driving while disqualified. On this basis, the actual offence committed by the appellant had the mandatory consequence of confiscation flowing from it, whereas the offence of driving while disqualified does not of itself necessarily involve confiscation.

The Court also dismissed the appellant's second argument that as a conviction for a second offence was a pre-condition to confiscation the Court could avoid confiscation by declining to enter a conviction. The first step is to ask whether the provision takes effect as a minimum penalty. If so, and if the offence has been proven, the Court cannot circumvent the consequences of that penalty by not entering a conviction. In such circumstances that Court has a duty to enter a conviction and impose, at least, the applicable minimum penalty.

Parliament has chosen to enforce a particular message: qualifying repeat offenders will suffer confiscation save in cases of extreme hardship and there is no escape from this outcome. The case illustrates the inherent rigidity of minimum penalties – inevitably they are no respecter of persons, at least not of their particular circumstances.

BOOKS AND BOOK REVIEWS

Principles of the Criminal Law by Simester and Brookbanks (Brookers, 1998) 686 pp RPR $89.10.

This is a good book and I paid for it myself. It is not a working handbook like the old *Garrow and Caldwell* and it cannot begin to substitute for loose leafs like *Adams* and *Garrow and Turkington*. It is a textbook, an academic work – something that you go to to try and understand the development and principal concepts of criminal law that New Zealand has inherited.

But are there such things as principles of criminal law? I started reading this book on the Cook Strait ferry at Christmas under circumstances of derision. We passed the place where Milton Windsor Harris faked his death to avoid his family and allow them to claim his life insurance but there was nothing in the index about insurance or telling lies. There is, however, a heading under Laundering that discloses that one who launders the proceeds of an illegal drug deal may be guilty of receiving under s 258 Crimes Act 1961 because of the wide wording of the section (*Stevens v Police* (1988) 4 CRNZ 69). So it does have quite a bit of detail for the oddments of NZ law.

On the other hand, there is a major attempt to wrestle with the big issues. What is the basis of punishment imposed by the state. What does criminalisation and conviction mean? What is the conceptual structure of a criminal offence? There are 20 good pages on conspiracy, that vague and dainty but pernicious charge currently so fashionable in New Zealand. Why bother with charging as party, a concept requiring focused evidence, when conspiracy is so much easier and when previous judicial wisdom that the charge should not be used when the substantive offence is available is ignored? Professor Orchard has provided a great chapter on homicide, bringing together his many articles on the topic.

The book is not easy to read. Topic headings such as *criminalisation ex ante* and *alternative theftous intents* remind us that we do not all speak the same language in the law. Not nearly enough on wilful blindness and a myriad of other little topics. Nevertheless, it is sufficiently inspiring and infuriating to get the reader who wants to dig a bit deeper, off on the track to cases, books and journals to try, however imperfectly, to discover where the law is up to on precise topics.

Disclosure in Criminal Cases by Janet November (Butterworths Procedure Series), 1999 175 pp RRP $47.25.

Earlier this year I was bribed and flattered to give a lecture on criminal discovery to a crimes class at VUW. After hours of preparation and asking around I assured the students that Criminal Discovery was a complete mess and there was no single place where the information could be found. Embarrassment, surprise and delight followed about two weeks later when I saw an advance copy of this book at WDLS law library.

Janet November has been a Judges' clerk based at Wellington for years and has accumulated in a methodical way all the threads that make up the imperfect battle-scene tapestry that is criminal discovery. The prosecution have the information, the defence want it. How much, how far, what for: all covered here. At the book launch, Judge Watson said that the book at last created a "level playing field". For once that overworked expression is correctly applied because the book is so detailed, exhaustive and with so many references to further material that every lawyer in every Court in the country can request the same stuff, make the same challenges and rebuff the same objections from police and Crown alike.

I cannot recommend this book highly enough. It is a remarkable piece of readable scholarship that every criminal lawyer should own.

Child Offenders Manual: A practical guide to successful intervention with child offenders. Edited by Judge Peter Boshier, Judy Moore and Siobhan Hale (Chief Judges Chambers, 1999) 67 pp, Free whilst stocks last – contact siobhan.hale@Courts.govt.nz.

Not exactly a manual but it does provide a road map for youth advocates and others who need to both follow the labyrinth that is the Children, Young Persons, and Their Families Act 1989 and the Youth Court procedures and also require prompts as to the roles of the agencies that underpin what the industry calls "Youth Justice". There is nothing in the manual that a competent youth advocate or other regular professional participant shouldn't already know but the editors have taken the trouble to set out the familiar inputs in a logical and useful set of short topics cross-referenced to the legislation and low charts. Neither inspirational nor theoretical, it is exactly what the subtitle proclaims – a practical guide. ❑

WORLD TRADE BULLETIN

Gavin McFarlane of Titmuss Sainer Dechert and London Guildhall University

gives two cheers for the end of the WTO leadership charade

LEADERSHIP DEADLOCK BROKEN

The impasse which had bedevilled the operations of the World Trade Organisation since the retirement of its previous Director-General Renato Ruggiero in April has finally been broken. On 22 July the WTO members agreed that New Zealand's Mike Moore would be appointed to the post as the new D-G for a term of three years. This will take place at the start of 1 September 1999, and will therefore allow him to get into the saddle at a crucial time. The next WTO ministerial conference is to be held in Seattle at the end of November, and it is confidently expected that President Clinton will then announce the establishment of the next round of GATT negotiations, to be called "The Millennium Round". The tradition of the WTO of invariably making decisions of this nature unanimously has therefore been upheld, but it was a close run thing, given the considerable heat which has been generated during the tortuous months of negotiations. This satisfactory outcome has only been achieved by compromise, for the rival candidate, Supachai Panitchpakdi of Thailand, has been endorsed as the successor to Mr Moore, and the Thai will then succeed the New Zealander for his own three year term which will commence in September 2002.

Thus a deadlock which could have proved terminal for the WTO has been averted, though whether there will be a cost has yet to be seen. During the skirmishing over recent months, there were indications that while the developed countries were largely stacking up behind Mr Moore, there was a large measure of support for Dr Supachai among the third world members of the WTO. One of the most important issues to be resolved when the Millennium Round gets under way will be the relationship between the developed and the developing member states. It is very clear from the decisions which have emerged from the WTO dispute resolution panel so far that the interests of these two sectors are very far from identical; there will be considerable pressure from the third world for exemptions and exceptions if any progress is to be made towards further trade liberalisation, particularly in trade in services and intellectual property. But Mike Moore's endorsement has undoubtedly saved the WTO from collapse; it is to be hoped that it can now go forward on a broad front to ensure prosperity for all its member states.

GENETICALLY MODIFIED SEED:

Monsanto v Schmeiser

While politicians in Britain who initially embraced the GM cause now seem rather surprised to learn that issues of cross-pollination are involved which could be disastrous to native wildlife, a dispute about the consequences of the natural actions of the wind seems set to bring to the fore principles which any schoolchild should have acquired in their earliest botany classes. This is an action involving alleged patent infringement which is due to come before the Canadian Courts shortly. It goes to the heart of international trading issues, as it is about genetically modified seeds and crops.

The plaintiff is inevitably Monsanto, which holds the patent rights to a genetically modified variety of rapeseed. The defendant is a Canadian farmer in whose field the GM variety was found to be growing. His defence is that he planted normal unmodified rapeseed, and that any GM seed which came to grow on his property must have been blown there accidentally by the forces of the wind. In those circumstances he claims that he should not have any liability to Monsanto, as neither he nor they can control the elements. Monsanto claims that the fact that the seed has germinated is on its own a ground for the infringement of its patent rights. It says that it is bringing the action against Mr Schmeiser in order to protect its own customers who have entered into contractual relations with it when they purchase the GM seed from dealers who had been licensed by Monsanto. The agreement obviously involves the payment of a royalty for the use of the seed, which is calculated according to the amount of acres which the farmer has sown. But the purchaser of the seed must also agree not to save seed in order to have his own seedcorn for the following year. He also agrees that Monsanto's investigators have the right to enter his fields and take samples in order to keep a check on possible infringement. Monsanto alleges that the defendant actually obtained GM seed from an unauthorised source. The defendant claims that Monsanto trespassed illegally on his property in order to obtain samples

There are ramifications going far beyond the simple intellectual property question of patent infringement. One of the key issues in international trade at present is the extent to which manufacturers can protect their goods against the operations of parallel traders and the grey market. It is

instructive to witness a dispute of this nature being played out in North America, which traditionally views its agricultural sector as essentially a part of its industrial infrastructure. This attitude grates harshly against the attitudes of populations in the countries of Western Europe, who are much more prone to question the damage to the environment caused by new farming techniques. Political leaders in the EU states have already learnt that extreme caution is required when handling these matters, which could otherwise have a damaging effect on their careers. There is no doubt that the investment in genetic modification by the American seed industry is immense, and that its reaction to any attempts by the EU members to impose prohibitions will be extremely sharp, and supported to the hilt by American governments of any colour. There are however increasing calls in Europe for an outright ban on the planting of genetically modified crops, which has not so far been supported by the British government. But an all party committee of both Houses of Parliament has been very critical of new regulations which have failed to give sufficient protection to consumers through the labelling on GM products.

In India civil disorder has broken out wherever trial crops of GM varieties have been sown.

India's farming sector simply could not afford to pay any form of royalty for seed

Outside the advanced economies of the G7 countries, the practice of saving seed from the current year's harvest in order to provide the seed corn for next year is almost universal. In India civil disorder has broken out wherever trial crops of GM varieties have been sown. The Congress party was strikingly successful in the recent elections because it included in its platform an acknowledgment that India's farming sector simply could not afford to pay any form of royalty for seed; still less would the farming sector there accept the introduction of the so-called "suicide seeds", a form of genetical modification which hybridises the seed so that it cannot be used for further reproduction after the initial harvest. Which all brings us back to the original question about the leadership of the WTO. The reported decisions given by the WTO under its dispute resolution process over the last four years are very well known, and most have made headline news. They have drawn attention to the impact of globalisation on all types of national economy, from the most developed to the least developed. Many have shown the increasing weakness of domestic governments in the face of pressure from lobbying by multinational corporations. Some have highlighted the plight of states who are dependent on only a single primary product, the price of which is controlled by the vagaries of world markets.

SANCTIONS AND MORE SANCTIONS

The first part of the year was taken up with the question of whether the United States was entitled to impose sanctions in consequence of the failure to resolve the great banana dispute. Ultimately the WTO ruled that sanctions were justified, but in a lower sum than Washington had originally applied unilaterally. The second half of the year is going is witnessing a rerun of the sanctions scenario, as a result of the failure to come to terms over the issue of imports of American and Canadian beef which has been treated with hormones. Despite a judgment of the WTO that the beef should not be prohibited, as there is no scientific evidence that the hormone treatment is dangerous, the EU continues to maintain its ban. The contention is that ongoing scientific research is likely to produce a positive verdict that hormones do indeed constitute a health hazard. The time limit for EU compliance with the WTO ruling having expired, once again Washington applied trade sanctions to goods exported to that destination from the EU. Canada and the United States together had claimed around $250 million annually in compensation, but although a WTO arbitration panel is bound to agree that sanctions are justified in order to compensate for non-compliance by continuing the prohibition on beef importation, it will only endorse those sanctions up to the value of $128 million. Brussels will not acknowledge that the prohibition is wrong while it waits for the new science to emerge, but it has indicated that it would prefer to compensate the aggrieved North Americans by way of better market access to the EU for their products. The final list of goods which will have to suffer these sanctions in the form of increased import duty has not yet been announced; a provisional list released by Washington earlier this year contained such items as motor cycles, cheese, and pig and poultry meats. How will Mike Moore deal with these issues in his shortened and non-renewable term of office? ❑

ERRATA

ACCIDENT COMPENSATION

Two paragraphs in Professor Stephen Todd's article in the June NZLJ have been transposed. The para on p 217, 2nd column, starting "Possibly" and ending "reasoning" should change places with the para on p 220, bottom of 1st column, starting "Accordingly" and ending "in s 39(2)".

JUDICIAL REVIEW–RECENT TRENDS

The reference at [1999] NZLJ 264 to *Morrison v Lower Hutt City Council* [1998] 2 NZLR 331 should read *Morrison v Upper Hutt City Council.* ❑

SECTION 27B MEMORIALS

P D Green, Barrister, Wellington

asks whom the TOWSE Act is meant to protect

New Zealand Maori Council v A-G [1987] 1 NZLR 641 (the *Lands* case) is set against the backdrop of turbulent times. This was the year in which share prices plummeted by 59 per cent in four months, Labour won the General Election, the Maori Language Act was passed making Maori "an official language of New Zealand", anti-nuclear legislation was enacted, and New Zealand won the Rugby World Cup. It was also the year of the Bay of Plenty-Edgecumbe earthquake.

Part of the recipe for economic salvation as promoted by Sir Roger Douglas and continued by the National Government, required the privatisation of assets managed as State-Owned Enterprises (SOEs).

It must be remembered that prior to the enactment of the SOE Act 1986, the Department of Lands and Survey, as it was, together with the Forest Service, administered approximately 14 million hectares of land or, 52 per cent of the land surface of New Zealand.

By stark contrast, it is estimated that in 1986 there remained but 1.18 million hectares of Maori freehold land representing "the remnants of the tribal estates". This figure did not take account of general land in Maori ownership. (*Lands* case per Cooke P p 653.)

These figures stand somewhat in contrast to the English Treaty text guaranteeing to Maori "... the full exclusive and undisturbed possession of their Lands ... so long as it is their wish and desire to retain the same in their possession ...". New Zealand occupies some 27 million hectares. "Whatever the precise figures of present-day holdings, it is certainly striking to note what a small proportion remains in communal ownership." (*Lands* case per Cooke P p 654.)

This SOE Act established 14 state enterprises, nine of them new. Approximately ten million hectares of land owned by the Crown were transferred to these enterprises.

The Bill was introduced into the House on 30 September 1986. The level of anxiety generated through Maoridom was immense. Large claims were barely under way before the Waitangi Tribunal. Much of the land subject to the SOE Act was the very land at issue before the Waitangi Tribunal or included land which could be available for redress where other lands were out of reach of Waitangi claimants.

The Waitangi Tribunal issued an interim report addressed to the Minister of Maori Affairs dated 8 December 1986. It referred to the fact that it was currently inquiring into a series of claims by the five most northern Iwi. The report expressed a fear that the Bill, as it presently stood, would move land out of Crown ownership and so put it beyond the power of the Crown to return land to Maori in accordance with any subsequent Tribunal recommendation.

There were two concerns. The first was that the Crown might be unwilling or unable to negotiate a purchase back from the state enterprise at a full price. In addition, the state enterprise might have disposed of the land to private ownership in the meantime in the course of its operation. (See *Lands* case per Cooke P at 653.)

Representations from the Tribunal and Maori generally, did not fall on deaf ears. In response, Parliament before passing the SOE Act inserted:

> 9. Treaty of Waitangi –
>
> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

Also inserted was:

> 27. Maori land claims –
>
> (1) Where land is transferred to a State enterprise pursuant to this Act and, before the day on which this Act receives the Governor-General's assent, a claim has been submitted in respect of that land under s 6 of the Treaty of Waitangi Act 1975, the following provisions shall apply:
>
> (a) The land shall continue to be subject to that claim:
>
> (b) Subject to subsection (2) of this section, the State enterprise shall not transfer that land or any interest therein to any person other than the Crown:
>
> (c) Subject to subsection (2) of this section, no District Land Registrar shall register the State enterprise as proprietor of the land or issue a certificate of title in respect of the land.
>
> (2) Where findings have been made pursuant to section 6 of the Treaty of Waitangi Act 1975 in respect of land which is held by a State enterprise pursuant to a transfer made under this Act (whether or not subsection (1) of this section applies to that land), the Governor-General may, by Order in Council, –
>
> (a) Declare that all or any part of the land shall be resumed by the Crown on a date specified in the Order in Council; or
>
> (b) In the case of land to which subsection (1) of this section applies, waive the application of paragraphs (b) and (c) of that subsection to all or any part of the land.
>
> (3) (Note: subs (3) omitted.)

The wording of s 27 survived just short of a year. As so often, the words used meant different things to different people.

The real question was whether the conflicting agendas between government and Maori could be negotiated as a result of ss 9 and 27. At the heart of this question are moral issues about the balancing of "people" obligations with

economic goals and ideologies set by government and its administrators. And the stakes in the conflict could not have been higher. For "values" perceived obligations not met are often more damaging upon the long-term effects of relationships than the simple breach of contractual rights.

I need then to rush forward in time noting that Cooke P, in commencing delivery of his judgment in the *Lands* case, stated that "This case is perhaps as important for the future of our country as any that has come before a New Zealand Court." (p 651.)

As is well known, in the *Lands* case our Court of Appeal held that s 9 of the SOE Act required that protection be afforded land and other assets not already subject to a claim before the Tribunal, to ensure that the Crown acted in a manner consistent with the principles of the Treaty.

> The Court encouraged the Crown to propose a scheme of protection and to seek agreement with the New Zealand Maori Council about appropriate safeguards in respect of state assets which were affected by claims made after 18 December 1986 when the SOE Act came into force. (per Robertson J *Te Heu Heu v A-G* [1999] 1 NZLR 98, 105.)

Negotiations between Crown and the Maori Council were intense. They took place over several months and culminated in the Treaty of Waitangi (State Enterprises) Act 1988. (the TOWSE Act.)

This Act set out not just to define the Crown's management of future SOEs land dispositions, but to respond to feelings of fear, anxiety, and even mistrust that reflected Maori concerns. The preamble expressly records that it is –

> An Act –
>
> (a) To give effect to an agreement entered into between the New Zealand Maori Council and Graham Stanley Latimer and the Crown in settlement of an application for judicial review made by the New Zealand Maori Council and Graham Stanley Latimer, and
>
> (b) To make to the Treaty of Waitangi Act 1975, the State-Owned Enterprises Act 1986, and the Legal Aid Act 1969 the amendments proposed in that agreement; and
>
> (c) To protect existing and likely future claims before the Waitangi Tribunal relating to land presently in Crown ownership; and
>
> (d) To give better effect to the objects of the State-Owned Enterprises Act 1986, and to ensure compliance with s 9 of that Act.

The TOWSE Act ss 27A-27D inserted into the SOE Act was supposed to give Maori a sufficient level of protection in relation to SOE land devolution such as to support the agreement reached:

> 27B. Resumption of land on recommendation of Waitangi Tribunal –
>
> (1) Where the Waitangi Tribunal has, under section 8A(2)(a) of the Treaty of Waitangi Act 1975, recommended the return to Maori ownership of any land or interest in land transferred to a State enterprise under section 23 of this Act or vested in a State enterprise [[by a notice in the *Gazette* under section 24 of this Act]] or by an Order in Council made under section 28 of this Act, that land or interest in land shall, if the recommendation has been confirmed with or without modifications under section 8B of that Act, be resumed by the Crown in accordance with section 27C of this Act and returned to Maori ownership.
>
> (2) This section shall not apply in relation to any piece of land that, at the date of its transfer to a State enterprise under section 23 of this Act or the date of its vesting in a State enterprise [[by a notice in the *Gazette* under section 24 of this Act]] or by an Order in Council made under section 28 of this Act, was subject to –
>
> (a) A deferred payment licence issued under the Land Act 1948; or
>
> (b) A lease under which the lessee had the right of acquiring the fee simple.

This paper draws on two recent cases, *Te Heu Heu v A-G* and the Decision of the Waitangi Tribunal in WAI 145 (#2.185) 27 July 1998 "On an Application Concerning the Proposed Government Property Services Ltd Share Float" to explore the workings of s 9 and ss 27-27D, and considers who receives the best protection under these provisions.

In 1999, I suspect the unanimous view of Maori claimants would be that the insertion of ss 27-27D into the SOE Act has not served Maori well. On the other hand, the Crown would no doubt argue that it has honoured its statutory requirements and would point to the outcome of litigation as demonstration of this.

The scheme of the inserted legislation was quite straightforward. Any land or interest in land transferred to a state enterprise now had to have a memorial put on the title of that land noting it to be "subject to s 27B" of the SOE Act. Section 27B, for its part, provided for resumption of that land on the recommendation of the Waitangi Tribunal. It also denies the owner of the land from having a right to be heard in relation to that recommendation.

The Tribunal, for its part, was then empowered to make a recommendation for the return of land and ultimately could make a binding resumption order.

TE HEU HEU

There were, in fact, five defendants. They included the Attorney-General sued on behalf of the Crown, the Minister of Finance and the Minister for State-Owned Enterprises (second defendants), LandCorp and LandCorp Farming Ltd and the Taupo District Council.

For at least 35 years, the various Taupo territorial authorities had planned for some form of eastern arterial bypass. This would be a road which would run from the very southern edge of Taupo township (as it now stands) taking traffic up and behind the township and coming out somewhere in the vicinity of Wairakei heading north. The idea behind it was to take the heavy trucks off the Lake Terrace front. With the 1980s rail deregulation the volume of trucks significantly increased.

In 1984 the then Taupo Borough Council District Plan designated an eastern arterial route. Interestingly, the Judge found that the various arguments for a bypass had such force that the local citizens and their elected representatives "perceived a bypass as essential". (p 121).

In January 1990, a body known as "Foundation 21" was formed and one of its purposes was promotion of the eastern arterial bypass. This body included representatives of many interests including the plaintiff.

It was said that a heavy truck would rumble across the Lake Terrace front almost every minute or two through the hours of 11 at night and down to six in the morning. The

Lake Terrace front is also the most densely populated tourist accommodating area. The council had always hoped that the National Roads Board, as it then was, would take responsibility for this development. By the mid-90s it was self-evident that the council would have to initiate the project and its funding because no one else was interested in the task. User pays was biting. No road, meant no users of the road and therefore no one to pay for it!

In February 1993, a local newspaper ran a survey asking its readers to respond to a questionnaire in support of the bypass. Of the 1427 people who responded, more than 90 per cent supported the bypass.

In December 1994, the public and Local Government authorities learned of plans to sell land close to the airport to overseas interests. It was known as the "Pidemco purchase". When the purchase fell through, this became the catalyst for the council to take action to secure land for the bypass. Council's intentions to secure the land had variously been referred to in the 1995 Annual Plan and in the 1996/1997 Draft Annual Plan.

It negotiated with Landcorp for the purchase of land variously for an airport extension, housing development and a proposed eastern arterial bypass. The plaintiffs injuncted the defendant in an effort to stop the sale.

Meanwhile dating back to the 1980s, and running in tandem with the growing concern about the heavy road traffic, was also an awareness of the need to intensify and build a good relationship with the tangata whenua. The council, reformed under Local Government consolidation, approached the Tuwharetoa Maori Trust Board to establish direct links between the council and board in 1988. A series of meetings was held discussing a wide range of issues and these continued over the years. When the Resource Management Act 1991 came into force, council was working on developing a more extensive relationship than that required under the Resource Management Act.

However, at least initially, it wanted to use that Act as a framework on which to hang a consultative process and to see how that worked out.

Further meetings occurred through 1994 and into the earlier part of 1995. Some of those meetings were concerned with establishing a Treaty of Waitangi consultation protocol as between Tuwharetoa and the council.

Meanwhile, the commercial arm of the council was negotiating with Landcorp for the purchase of land at the back of Taupo township which could lead off the southern end of the proposed eastern arterial route. Commercial sensitivity ensured detail of the negotiation was kept out of the media. The terms were agreed in May 1996.

On 20 June 1996, there was a further "Treaty Principles" meeting between Tuwharetoa and council. No mention was made of the purchase.

In mid July 1996 the purchase was given publicity. Tuwharetoa read about the purchase and the relationship between the board and council fell apart.

Landcorp, of course, is a SOE. For that reason, the land in question had s 27B memorials placed on its titles. Some could be used to access the Tauhara geothermal steam field and some of which skirted the foot of the Tauhara mountain and its nearby geothermal taonga.

Plaintiffs' case

Plaintiffs' first challenge to the land purchase was mounted against the Crown and founded on arguments around the effect of s 9 of the SOE Act. It was argued that this section constituted an over-arching limitation on the ongoing administration of the SOE Act, including the operations of state enterprises. That is to say, ss 27-27D could not be viewed as an absolute code.

The Court held that there may well be room to argue that ss 27-27D:

> might not always be sufficient to discharge the Crown's obligations under s 9 ... however that ss 27-27B will be the starting point in all cases .... Where those provisions do apply there will usually be very little room to argue that s 9 demands something more. Such circumstances will be rare. It will need to be demonstrated, for example, that the Crown was acting in bad faith or contrary to the terms of the settlement which is encapsulated in the TOWSE Act (p 107).

The plaintiffs advanced a series of arguments in support of the primary position that s 9 in this instance would not allow for the land purchase to proceed. Those arguments may be summarised as follows:

Whether ss 27-27D were adequate to prevent the Crown from breaching s 9: it was said that the Court was required to determine what s 9 demanded of the Crown in particular cases of asset transfer. The argument ran that it was important for the Courts to look not only at what occurred in December 1987 (when the agreement was reached) but at whether the statutory protection regime had turned out to be adequate to provide the protection to which the plaintiffs were entitled under s 9. A number of factors were highlighted to demonstrate the inadequacy of ss 27-27D. They included:

1. Plaintiffs were awaiting the Waitangi Tribunal's consideration of the validity of their Treaty claim;
2. The Court should have regard to the fact that some of the land was of particular importance as traditional Tuwharetoa land;
3. Some of the land involved significant taonga and waahi tapu;
4. The plaintiffs, along with other claimants, were facing obstacles not contemplated at the time of the settlement more than a decade ago. In particular, the proliferation of Treaty claims and the major delays resulting from the research and preparation of claims was not anticipated (p 107);
5. The Waitangi Tribunal was under-resourced and this was causing additional delays;
6. The ongoing transfer of strategic Crown and state enterprise land to private ownership was resulting in a constantly diminishing pool of land available for return to successful Treaty claimants;
7. The protection afforded by the power of resumption was somewhat illusory;
8. As at the date of the hearing there was no example of resumption orders being made in circumstances where land had gone into a multitude of private hands;
9. By reference to all of the points raised above, ss 27-27D did not preserve the s 9 rights;
10. The land which the council had purchased was essential for the proper settlement of the grievances of one of the hapu because of its traditional significance and because it accommodated the taonga of that hapu;
11. The land in question was strategically important to the plaintiffs for any further settlement of their grievances given its potential to provide a base for future tribal economic development;

12. While noting that s 8A(3) of the Treaty of Waitangi Act 1975 prohibits the Tribunal from taking into account the current condition of the land in assessing whether or not to order resumption, as a matter of practical reality the Tribunal would balk at the prospect of dispossessing hundreds, if not thousands, of New Zealanders from their homes. In this support was taken from obiter of Doogue J in *Te Runanga o Ngai Tahu Ltd v A-G* HC, Wellington, CP 119/95 3 October 1995;
13. The Crown responded arguing that the transactions in question fell plainly within the scope of ss 27-27D. It was therefore submitted that the plaintiffs were simply endeavouring to revive arguments that had been advanced and disposed of a decade earlier (p 110).

Crown counsel noted that there had been no suggestion in any of the cases heard by the Court of Appeal that the TOWSE Act model was inadequate or inappropriate. It was further submitted that the Waitangi Tribunal itself had accepted "... the general thesis that ss 27-27B met the obligation imposed by cases to which it applied". (p 111.)

Robertson J concluded:

> The evidence before me indicates that the compromise adopted was that third parties would have the right to compensation from the Crown if their assets were ordered to be resumed, but would have no right to be heard by the Tribunal which would be required not to take into account any development of the assets occurring after their transfer to the particular SOE. Although the Maori Council did not get all it had wanted and some concerns remained, I am satisfied a workable compromise was reached (p 112).

He went on to state:

> The argument advanced by the plaintiffs in this case requires me to accept that the plaintiffs (and others with pending Treaty claims) face obstacles not contemplated or addressed in the course of the negotiations in 1987. Included among these unforeseen obstacles are the length of time it is taking to pursue claims through the Waitangi Tribunal, the consequences of attempts to "settle" successful claims, the decreasing pool of land available to settle claims, and detriment caused by new owners putting the land to different uses (p 114).

The Court however preferred the Crown submission that plaintiffs had not been able to point to any potentially detrimental effect from asset sales such as those presently challenged which was not contemplated in the negotiations which led to the TOWSE Act.

Robertson J expressly noted that:

> all transferees of land once held in Crown ownership (whether SOEs or third parties) take the property with knowledge of the memorial. They may hope that no resumption order will ever be made, but they will not have reasonable cause for complaint if one is made. The existence of a memorial may affect the value of land when it is purchased, but it may not affect its value if it is ordered to be resumed. Secondly the Tribunal may not take into account the interests of any current owner of land subject to a memorial; nor is that owner entitled to be heard by the Tribunal. Thirdly, if the Tribunal requires the land to be resumed the Crown is under a statutory duty to implement that finding. (p 115.)

The Judge referred to a passage from Cooke P in the *Lands* case recognising that legitimate Maori concerns must be weighed against other legitimate interests and priorities of the Crown. There, Cooke P stated:

> A reasonably effective and workable safeguard machinery is what is required. Further than that the Crown should not be obliged to go. Any major grievances are likely to have come to the surface in some form by now. The principles of the treaty do not authorise unreasonable restrictions on the right of a duly elected government to follow its chosen policy. Indeed to try to shackle the government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other cooperation (p 115).

The Crown submitted that the plaintiffs sought what amounted to an absolute protection of their potential interests by freezing any development of the land until it passed into their hands. It was said that plaintiffs' submissions asked the Court to place great weight upon grievances of unknown merit and unknown relevance to this particular parcel of land while diminishing some tangible public interests: "road safety, the orderly expansion of Taupo, improvement of communications and enhancement of the town environment" (p 115).

The Court concluded as follows:

(1) in all but the rarest of cases ss 27-27D are sufficient to discharge the Crown's obligations under s 9 in cases to which those sections apply;
(2) there is a residual discretion under s 9 to require more of the Crown but it will be invoked only in the most exceptional cases, usually only where there is evidence that the Crown was acting in bad faith; and
(3) There is no justification in this case for a finding that s 9 imposes obligations on the Crown over and above what is provided for in ss 27-27D (p 116).

Was such an outcome a surprise? I rather think not. The important matters of fact which undoubtedly weighed against a contrary finding included the fact that the claim was, even at date of hearing, still in the process of being researched, and hearing date before the Waitangi Tribunal was not even in view. On the other hand, there was evidence of pressing need to secure this land for the bypass. The Pidemco purchase had been a clear warning that failure to secure the land could mean it would be lost to other interests. The fact that the bypass had a high public profile in Taupo and that community leaders had supported it, including the first plaintiff, undermined "a taking by stealth" type argument. The "public good" element behind the land purchase was seen as significant. Progress of the development would be halted for an indeterminate period and in relation to an indeterminate outcome.

For all that, the Court made a number of important statements in relation to state enterprise land sales and Treaty issues. Most importantly, that ss 27-27D could not be viewed as a code and that s 9, albeit in rare circumstances, demanded of the Crown something more than simple reliance on the ss 27-27D provisions. The yardstick for such an intervention was the need to show that the "Crown was acting in bad faith or contrary to the terms of the settlement which is encapsulated in the TOWSE Act" (p 107).

Despite the principles enunciated by Robertson J the factual situation in *Te Heu Heu* did not support an intervention in terms of s 9. ❑

Phillip Green continues by reviewing the GPS share float case in the next issue.

JUDICIAL RIGHTS AND RESPONSIBILITIES

Peter Jenkin QC

discussed the judicial role at the 1999 AIC Administrative Law Conference

At first glance, a section of an administrative law conference devoted to the role of Judges and their Courts may seem a little out of place. It is far from that, because so much of administrative law is, and traditionally has been, Judge-made. Judicial review, with the availability of any relief being discretionary, is the classic example, but there are many more instances where ultimately it is a Judge's view of the propriety of administrative actions which will govern the Court's decision, rather then any rigid application of principle.

Whether judicial decision-making is better described as an art or a science may perhaps be semantic, but the difference is important. We are entitled to ask whether it is appropriate for Judges to apply traditional rules of logic and make precedent-based decisions by analogy, or whether there is a place for a solution-driven approach which allows for lateral thinking. Or can both co-exist?

There is also the need to consider the function of appeals – and particularly final appeals. Is their place simply to settle the dispute immediately before them, or do they have another role in trying to provide signposts for those for who follow into the area of law under consideration? If the latter, then how is the balance to be achieved?

Finally, we must recognise that Judges are human – and cannot be expected to behave like computers, however sophisticated either may be. We expect from them a virtually unreachable standard: great "learning in the law", an encyclopedic knowledge of (and sympathy with) our country, its people and its diverse cultural elements; the wisdom to apply the law justly; fairness and being beyond any personal influence or bias. If we are a litigant, we also expect to receive a carefully reasoned decision expressed in terms we can understand and relate to – and in our favour, of course!

There are few paragons who can fulfil all of these expectations. The task of those who appoint Judges is to try to provide a mix which can bring together the required diversity; and that is a task of real difficulty – particularly under a system which does not allow a Judge to cut his or her teeth in the job before accepting permanent appointment.

This paper considers some of these aspects in a way which, it is hoped, will stimulate discussion.

JUDICIAL APPOINTMENTS

> It used to be said the death knell for an appointment to the judiciary was expressing interest in appointment. Potential appointees were expected to remain coy and disinterested until "that" phone call. (Chief Judge Ron Young.)

The judicial appointment process is an area which has been widely discussed in recent years and in which there has been both change and the prospect of more. For the purposes of this paper, I have drawn on four sources which provide particular insights: Sir Geoffrey Palmer: "Judical Selection and Accountability: Can the New Zealand System Survive?" (*Courts and Policy – Checking the Balance* 1995, NZ Legal Research Foundation p 11), Solicitor-General John McGrath: "Appointing the Judiciary" [1998] NZLJ 314, papers presented by Justice Baragwanath and Chief Judge Young at the 1998 conference of the NZ Bar Association, and finally, but not the least in importance, Sir Douglas Graham's recent announcement of new protocols for the appointment of High Court Judges.

Traditionally, Judges were appointed by the "tap on the shoulder", where suitable candidates were selected and then asked whether they wished to accept the position. No one ever officially applied for judicial office, although there clearly were ways in which an individual could bring his or her availability to the notice of those having influence. The procedure changed for the District Court in the mid-1990s and is now changing for the High Court.

In the District Court the process is commenced by a prospective candidate conveying a confidential expression of interest to the Attorney-General, but this does not exclude an approach to someone else who might be suitable. When a vacancy arises the Chief Judge and the Secretary for Justice short-list candidates; those on the short list are then scrutinised by consultation with the Solicitor-General, members of the judiciary, the NZ Law Society and the referees named by the candidate. At the conclusion of this process, the Chief Judge and the Secretary indicate to the Minister of Justice the candidates recommended as possibilities for appointment; the minister then selects those who will be interviewed and interviews and appointments follow.

Under a new process announced by the Attorney-General last November, High Court appointments are apparently to proceed on a similar basis to the District Court.

Both of these regimes appear designed to achieve a greater degree of transparency as far as the appointment procedure is concerned and have the benefit of starting with a group of candidates who have shown interest in the position for which they are being considered. What will still not be public property, and properly so in this writer's opinion, is the names of those who have reached the various stages of the procedure short of actual appointment. Information of that kind would inevitably lead to attempts by vested interests to try to promote some candidates over others and would place unnecessary pressure on those who make the decisions and on the candidates themselves.

Sir Geoffrey's paper contains an admirable analysis of the way in which government's responsibility to appoint members of the judiciary has effectively been delegated to the minister and Attorney-General in a way which has avoided political influence. However well this has worked

in the past it is, as Sir Geoffrey acknowledges, dependent for its integrity on the way in which those two members of the executive are permitted by Parliament to exercise their powers and the manner in which they do so. Whether that requires the formation of an independent appointments body, such as a judicial commission, is a topic to be debated in a separate part of this conference's program.

QUALITIES REQUIRED OF JUDGES

> For a short period ... he was in partnership ... in Dunedin, but practice never much appealed to his rather lofty nature and he gladly accepted a Judgeship in 1862. of C W Richmond J – in Portrait of a Profession.

There is no magic formula which can be applied to produce the perfect judicial office-holder, but Sir Geoffrey's summary reflects the collective views (with perhaps differing emphases) of virtually all commentators:

- experience both in the law and in the wider community;
- knowledge of the law and professional skills;
- integrity, honesty and uprightness;
- industry;
- impartiality;
- the appropriate age;
- community experience and contacts;
- communication skills;
- collegiality.

There are, of course, other characteristics which draw debate from time to time:

- sensitivity to cultural and gender issues;
- being "representative of society" (whatever that means);
- the ability to cope with the emotional and psychological pressure imposed by some of the more unpleasant judicial tasks, such as presiding over child abuse trials.

Whatever the ideal characteristics, there seems little doubt that the job of Judges is far more demanding now than at any other stage in our history and that those who accept appointment do so in large measure because of their personal commitment to public service, rather than for any reasons of status or financial gain.

QUALITY DECISION-MAKING

> Consider what you think justice requires, and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong. Campbell's *Lives of the Chief Justices*

This topic is intriguing, because any individual's perception of what is "quality" will be the result of both objective and subjective influences.

Clearly, the best start to achieving a high quality decision is to appoint a high "quality" decision-maker. A search for those with the qualities already discussed should assist to do this. Then, there must be in place the administrative and support facilities which allow the decision-maker the practical ability to do the job. More important still, I suspect, is to have the time to be able to give his or her decision the careful consideration it requires – something which itself may vary substantially from Judge to Judge.

However good the administration and support, and however favourable the overt qualities of an appointee may be, the achievement of true "quality" may be elusive for some. Until a Judge is in harness, no one can really know how he or she will perform; and there may be widely differing views on that performance. For some a judgment may be seen as an impeccable example of the Court's function of adherence to precedent and satisfying the need for certainty in the law; others may criticise it for lacking in human understanding and sensitivity to cultural, gender, or other issues. Perhaps true "quality" would result in a judgment which fully accorded with neither view.

Given this likely diversity of view, what is "quality" may necessarily have to depend on quite basic tests such as:

- has there been a careful analysis of evidence and law?
- can there be any suggestion of partiality?
- are there any obvious flaws in the reasoning process?

And if tests such as this were required to be satisfied by the reader of the judgment as well, we may come as close as we can to the answer.

LAW OR MAKING POLICY?

> "I'll be Judge, I'll be jury", said the cunning old Fury;
> "I'll try the whole cause and condemn you to death".
> Alice in Wonderland – Lewis Carroll

Any suggestion that the Judges are above the law and entitled to impose their own policies in place of those reflected by Parliament is likely to draw an emotive response. Separation of these functions is fundamental to our system of government. However, administrative law is all about the control of government power, to ensure that it is exercised within the law. As Professor Wade put it in the 5th edition of his classic work *Administrative Law*:

> The primary purpose of administrative law ... is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse.

Because administrative law is largely Judge-made, consistency has demanded that certain policies be in place – largely clothed in concepts of fairness. That, however, does not mean that there cannot be changes from time to time, as the Courts' approach to discovery of Crown documents illustrates. For example it is not so very long ago that a ministerial objection to production of a document ended the matter as far as the Courts were concerned; but the advent of the Official Information Act and cases such as *EDS v South Pacific Aluminium* [1981] 1 NZLR 153 led to a trend where Judges preferred to view those documents before accepting that they should not be available to a party.

There also are many areas where Parliament has deliberately left wide areas of discretion to the Courts, such as in the sentences to be imposed for criminal offences. There will usually be a broad range settled by Parliament with the Courts setting appropriate "tariffs" within that range. Policy decisions by the appellate Courts will settle appropriate bands within which the lower Courts should operate.

The answer to this question therefore is probably easier to supply in a pragmatic way than some others being considered in this paper: the Courts are entitled to make policy decisions as long they are made within boundaries settled by, and do not attempt to override, the clear intention of Parliament. The more difficult related topic of judicial "legislation" is considered below.

CERTAINTY AND CONSISTENCY

> Every public action which is not customary is a dangerous precedent. It follows that nothing should ever be done for the first time. F M Cornford – 1876-1943.

There can be few more formidable topics for discussion than this and any attempt at comprehensive coverage would be beyond the scope of the present paper. What I will attempt to do, therefore, is to touch on some areas of the law where different approaches to the judicial function have provided some interesting results – and to try to place those actions in perspective.

Before undertaking this exercise, some comment is necessary on the topics of "consistency" and "predictability". Both are often the subject of trumpetings by vested interests, anxious to preserve the status quo in the face of progress. The delightful quotation from Cornford provides the ultimate response, but it would be wrong to ignore the need for consistency of approach in judicial decision-making. As always, it is a question of balance: on the one hand, people should be able to go about their daily life and work in the confidence that the law will not change suddenly and unpredictably; on the other hand, if the law does not move with times, it will lose the respect of the population.

The synthesis of these competing forces is, I believe, alive and well in the way in which our Court of Appeal approaches many of its decisions – and in particular, the way in which Thomas J is using his judgments (sometimes dissenting) to signal alternative ways of approaching difficult areas of the law. Recent examples of this which I personally have found interesting are:

- *Quilter v Attorney-General* [1998] 1 NZLR 523 on same-sex marriages;
- *Wellington District Legal Services Committee v Tangaroa* [1998] 1 NZLR 129 on legal aid for a Human Rights Committee claim;
- *A-G v Prince and Gardner* [1998] 1 NZLR 262 on negligence in adoption cases;
- *UEB Packaging Ltd v QBE Insurance* [1998] 2 NZLR 64 on causes of action under s 9 of the Law Reform Act 1936;
- *Pacific Coilcoaters Ltd v Interpress Associates Ltd* [1998] 2 NZLR 19 on the effect of certain patent rights;
- *Neumegen v Neumegen & Co* [1998] 3 NZLR 310 on the effect of the Fair Trading Act on a dispute as the use of a name for a legal practice;
- *Russell McVeagh v Tower Corporation* [1998] 3 NZLR 641 on solicitor/client conflicts of interest;
- *Wattie v CIR* (1997) 18 NZTC 13,297 on the tax treatment of inducements to enter into a lease.

Thomas J's intentions were made particularly clear in *Neumegen* at 321:

> Lord Steyn recently observed in *Fisher v Minister of Safety and Immigration* ... that a dissenting judgment anchored in the circumstances of today sometimes appeals to the Judges of tomorrow. In that way, the distinguished Law Lord continued, a dissenting judgment can contribute to the continuing development of the law. Possibly, therefore, the thinking which I indicate in this judgment will have some appeal to a future Court.

This kind of approach by members of the Court of Appeal recognises that consistency in the law requires adherence to precedent by the majority, but that there may be other ways of looking at a matter which are worthy of consideration. My view is that this can be nothing but helpful to those who work in the law, and it is not restricted to Judges in the Court of Appeal. High Court Judges may, and properly sometimes do, indicate in their judgments that they have a preferred view of the way in which a particular case should be decided, but defer to precedent which dictates otherwise.

Consistency in terms of fairness creates problems of a rather different kind, because perceptions of what is fair are somewhat personal reactions and may differ markedly depending on the attitude and experience of the Judge. It is here that an approach taken in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948]1 KB 223 has a particular attraction. Glosses such as the doctrine of "substantive fairness" detract from consistency, but increase the ability of the Courts to achieve overall fairness of result.

As Professor Griffiths has demonstrated in his most interesting book *The Politics of the Judiciary* (Fontana 1985, ch 5), the degree to which Courts have felt able to review the substance of administrative decision-making has fluctuated over the years – and there is good reason to think that there will be further fluctuations to come.

JUDICIAL LEGISLATION?

> ... it is accepted today in common-law jurisdictions that the judicial function is not only to apply the law but by interpretation, analogy, and reconsideration to develop it, restate it and, frequently, to create it. Oxford Companion to the Law, p 671

The term "judicial legislation" carries with it overtones of Judges stepping over the lines drawn by the separation of powers. In fact, Judges have always created law by filling in gaps left by the legislation. The emotive element enters when Judges adopt for themselves the right to create law in areas which have deliberately been left untouched by the legislature or where the Court takes on itself to modernise what Parliament has created in the past and, for whatever reason, has not brought up to date.

The area of administrative law is particularly open to "judicial legislation" of a benign character because legislative intervention has been relatively scarce. Parliament has provided the Official Information Act and the Ombudsman jurisdiction, but judicial review of administrative action sits largely within the procedural framework of the Judicature Amendment Act – with the principles for review settled by the common law. Clearly, the way in which these have been developed in the past has depended on judicial creativity or "legislation", and it is equally clear that this is likely to continue in the future.

One of the principal differences between law created by Parliament and that emanating from the Courts is in the timing of their development. For the former there are the established procedures which lead to analysis and debate, before enacting statutes which, it is hoped, will provide at that point in time a definitive statement of the law. By contrast, development by the Courts will usually be a slow and somewhat tentative process, during which there will be periods of uncertainty. Classic examples are the extent to which legitimate expectation has a place in administrative law and, of course, the question of whether substantive unfairness is an appropriate ground for review.

In the area of conflict between what Parliament has said and what the Courts wish to do, a classic example is the treatment of privative clauses. While once upheld to exclude substantial areas of judicial review, modern trends have reduced their effectiveness – see the approach taken by the Court of Appeal in *Bulk Gas Users Group v A-G* [1983] NZLR 129. The tax area is one where the change in approach has been particularly obvious in moving from a conservative stance in *CIR v Lemmington Holdings Ltd* [1982] 1 NZLR 517 to a more liberal one in *Golden Bay Cement Ltd v CIR* [1996] 2 NZLR 665.

I conclude with a personal view, as one who has acted over a number of years for both Crown and subject; it is that the increasing role of the Courts in opening administrative decision-making to the closest possible examination has been beneficial to all. There is no better means of ensuring fair decision-making than the knowledge that what is being done may later enter the public domain under the scrutiny of the Courts. ❑

DEFENDING THE DEFENSIBLE

Karen Clark, Crown Counsel

took the defendant's standpoint at the AIC Administrative Law Conference

Some influential jurists in the first half of the century saw the central government decision-maker as inept, possibly dishonest but in any event, dangerous. At best the government decision-maker was a well-meaning incompetent, at worst a sinister despot, anxious to be freed from the interference of Courts, whose devious dishonesty required the assertion of judicial review to restore the rights to which the despot was indifferent.

Such attitudes influenced the development of administrative law. In particular judicial review became the Judge made phenomenon which could be offered to a public vulnerable to bureaucratic vice. Academic writers on the subject of judicial review proceeded from a critical premise, that of administrative lawlessness, and in so doing favoured plaintiffs by virtue only of their status as plaintiffs. Even today they do not write neutrally of the exercise of discretion "affecting" an individual but rather write of the discretion "harming" the individual and the underlying premise seems to be that without check or challenge the administrative action will be unlawful or, in some other way, wrong.

The image, viewed from within, is quite different. The majority of today's ministers and senior administrators are skilful, thoughtful and responsible in their approach to public functions. They are cognisant of the rule of law and of the potential for policy development and decision-making to impact on the lives and interests of a susceptible public.

The unavoidable reality for many officials is that they have important functions to discharge. The public interest still requires to be served despite the threat of challenge. Furthermore, in the context of governmental imperatives in the late nineties the public has a need of a sophisticated and responsible culture of decision-making. My thesis is that by and large this is being achieved. It is because the modern administrator has absorbed the lessons of decades of judicial instruction and clear articulation of the bases upon which the decision will be reviewed that this paper encourages that same administrator not to retreat into timid inactivity when threatened by the application for review. It is precisely because modern administrators can be confident of the integrity of their decision-making processes (by and large) that they can afford to take, and indeed should take, an assertive and strong-minded approach to the challenge. This paper encourages the view that such an approach is not only warranted but responsible and necessary.

CONTEMPORARY BUREAUCRACY

If, in the early part of the century, the relationship between the judiciary and the bureaucracy seemed to resemble sporadic guerilla warfare, the judiciary and executive enter the next century with an altogether different respect each recognising the forces driving the other and with each increasingly demonstrating a respect for what the other exists to achieve. Despite the inevitable tensions that result from judicial review applications, in today's climate it can fairly be said that the executive recognises that the efficient working of government has been assisted by having the Courts clarify the principles upon which they will intervene. Equally the judicial method and the results demonstrate that the interests of the executive are (for the most part) understood and in some measure protected on review.

In any event, tensions between the executive and the judiciary as a result of the outcome of applications for judicial review should not cause concern to an enlightened government. Lord Woolf had an intimate understanding of government from his experience as Treasury Devil, which has its New Zealand counterpart in the Solicitor-General as senior advocate in the Courts. He recently wrote of these tensions as being no more than that created by

> the unseen chains which, in the absence of a written constitution, hold the three spheres of government in position. If one chain slackens, then another needs to take the strain. However, so long as there is no danger of the chains breaking, the fact that this happens is not a manifestation of weakness but of strength. ("Judicial Review – The Tensions Between the executive and the Judiciary" (1998) LQR 579, 580.)

Sir Gerard Brennan had said much the same when he wrote of the subjection of executive action to judicial review giving rise to tension between those branches of government. ("The Parliament, the Executive and the Courts: Roles and Immunities" (1997) 9 Bond LR 136, 144.)

It is my thesis that the contemporary public service reflects a culture of thoughtful and responsible decision-making and enhanced transparency of process. Instances of impoverished processes have become the true exception to otherwise excellent administration. There is, in other words, an ethos which subscribes to the principles and standards of good administration and to the rule of law. None of this is to say that standards can afford to be relaxed or that there is no longer required a Judge over the shoulder to protect the citizen from unlawfulness. But it is to say that today there is a greater public service recognition of the degree to which individuals can be harmed by unlawful administrative activity and a deeper understanding of the responsibilities and duties which public bodies owe to those affected by their decision making. And if potent powers were once exercised by ignorant bureaucrats accountable to no one for

their mischiefs, the contemporary delegate operates in a complex environment where the "rule of law", accountability and transparency of process are the catch cries. A constructive response to judicial intervention has emerged. Government has itself recognised a need to promote adherence to the value of good administration.

DECISION-MAKING TODAY

Administration in the nineties reflects many influences. Judicial review has had a significant influence but has not been singularly responsible for the way in which government or public bodies conduct themselves.

Code of conduct

The Public Service Code of Conduct, issued by the State Services Commission (SSC), prescribes minimum standards of integrity and conduct that are to apply in the Public Service. It lays down three core principles. The first concerns the way in which employees fulfil their obligations to government and it is the lawfulness of public service activity which is emphasised. In carrying out government policy public servants are expected to act in a manner which will withstand the closest scrutiny. The emphasis on lawfulness is to be found in all guidance material issued to assist public service managers. *The Public Service and the Law* (one of a set of eight papers making up the *Public Service Principles, Conventions and Practice Guidance Issues* SSC, September 1995) reminds public servants that their prime duty to a minister of the Crown is qualified by a higher duty to the law. The paper is described as giving meaning to oft-quoted (but little thought-about) phrases such as the "rule of law" and "principles of natural justice".

The second principle reflects the correlative duty upon public servants to respect the rights of the public when performing their official duties.

Observing these minimum standards as well as those laid down by chief executives is intended to encourage the ideal said to give the public service its greatest strength – "a spirit of service" to the public community. Where a minister proposes to act in a manner thought to be contrary to the law the official has a duty to draw the fact to the attention of the chief executive. Where an opinion is sought from the Crown Law Office it is not the function of that office to merely assist the client to achieve what is proposed but "to ensure that the operations of executive government are conducted lawfully".

The in-house legal adviser

The closer relationship between departmental decision-makers and the in-house lawyers who immediately advise them contributes to a more scrupulous compliance with the letter and spirit of the law. My perception is that the in-house lawyer serves a crucial function. By being part of the department and thus its philosophy he or she is trusted and able to help decision-making through an approach of sympathetic caution in applying legal values. Their expertise in specialist areas is also often valuable and in some departments guidelines are welcomed as a crucial aspect of successful policy development or decision-making.

In short, today's in-house legal advisers are able and, with their detailed knowledge of the legislation affecting their department, can assist officials to provide competent advice to ministers.

"Open government"

Decision-making is influenced not only by the legislative context in which the decision is made but by the accountabilities and mechanisms prescribed in key Acts of Parliament. Of particular account are the Public Finance Act 1989 (establishing control over the financial activity of government), the Ombudsmen Act 1975 (creating the office of the Ombudsman whose function it is to investigate any decision or recommendation relating to a matter of administration and having personal affect), and, of course, the Official Information Act 1982 making official information more freely available in order to facilitate better public participation in the making and administration of laws and policies and to promote executive accountability. The OIA has had a profound impact on executive government.

> ***Time taken to re-decide or even time lost while the defendant defeats the application for review can hamper policy development and implementation. Thus a strong incentive to "get it right" operates to the advantage of all***

Since 1982 there has been a fundamental change in attitudes to the availability of official information. Ministers and officials have learned to live with much greater openness. The assumption that policy advice will eventually be released under the Act has in our view improved the quality and transparency of that advice. (para E18, *Law Commission Report 40 Review of the Official Information Act 1982*, October 1997, Wellington.)

Just as "open government" as an ethos inhibits abuse of power so do publicity and the activities of lobby groups. "Misuse of power flourishes in the dark; it cannot survive the glare of publicity." (Brennan, p 146.)

Judicial review

Almost every exercise of public power affecting the interests of a member of the public is understood to be vulnerable to judicial review. For government, judicial review raises risks that are to be avoided. While Courts must perform their constitutional role and declare and apply the law, where processes have been apparently poor and interim relief is granted to a plaintiff, the results are, for the decision-maker, often difficult to manage. It is not just that "defeat" is potentially embarrassing, the process is costly. It consumes time officials can ill afford. Delay can inconvenience governments often working towards tight timetables with policy reform.Time taken to re-decide or even time lost while the defendant defeats the application for review can hamper policy development and implementation. Thus a strong incentive to "get it right" operates to the advantage of all participants and gives effect to the "rule of law".

In 1964 Lord Reid recognised that we did not have a developed system of administrative law – "perhaps because until fairly recently we did not need it" *Ridge v Baldwin* [1964] AC 40,72. Since that time coherent principles and also techniques to encourage the accountability of official bodies to the interests they serve have been developed. The question is, have these judicial and extra-judicial safeguards on the exercise of public power, achieved a better quality

product? I have attempted to find the answer in statistics for it is unlikely to be found in public opinion.

JUDICIAL REVIEW TODAY

Judicial review is often said to be one of law's great growth industries. In England the increase has been significant. Where there were 491 applications in 1980 in 1996 there were 3,091. (Lord Woolf, p 587.)

In New Zealand it is difficult to gather accurate statistics. Although in the annual reports of the judiciary the number of civil proceedings commenced in any one year is recorded, it is not at present broken down to indicate the number of applications for review. (I understand however that this is to happen for future years.) Nevertheless some attempt has been made to identify trends. They are interesting. There is no doubt that judicial review continues to be a popular and common grievance procedure for those concerned at perceived ministerial or bureaucratic interference with their rights. The figures indicate that for each year over the past decade, judicial review cases comprised between 2.5-4.7 per cent of recorded decisions. There is an indication that the use of judicial review has increased significantly in the last three years. (Table 1.)

today, the application for review of a decision of central government or its agencies is unlikely to succeed. This is as it should be

Despite the apparent increase in the number of applications for judicial review only a relatively small percentage succeed. In 1997 and 1998 relief was granted in only 25.8 per cent of judicial review applications which were maintained to the stage of a substantive hearing and which resulted in a recorded judgment. It seems that today, the application for review of a decision of central government or its agencies is unlikely to succeed.

This is as it should be. Results the other way might suggest an obstinate indifference to the values and principles which are crucial to the way in which we expect government to conduct itself. But that seems not to be the case. In 1994 when the second edition of the English guide, *The Judge over your Shoulder* was issued, the Head of the Home Civil Service observed in the foreword, "... awareness of administrative law has greatly increased amongst civil servants". This reflected a measurable improvement on the position in 1959 when, for example, CH Sisson wrote that for the administrator the law was no more than one of the limiting conditions in which his work was done and that it was a nonsense to pretend that administration could be reduced to a "bit of legal mechanism", with all its duties laid down ... discussed in James: *The Political and Administrative Consequences of Judicial Review* (1996) 74 *Public Administration* 613, 621. The law was of marginal relevance to the practical business of administration.

I am not aware of legal analysis in New Zealand of why applicants for judicial review do not generally "succeed". Subscribers to what Hammond J calls the "tide" theory of administrative law (*Hamilton City Council v Waikato Electricity* [1994] 1 NZLR 741, 758) might suggest it is the consequence of a swing away from judicial activism towards self-restraint. I would suggest that the restricted scope of review which the pendulum or tide theories suggest is off-set by the expansive development exemplified by the Court of Appeal decision in *R v Panel on Takeovers and Mergers, ex p Datafin plc* [1987] 1 QB 815 and clearly demonstrated in New Zealand in cases such as *Mirelle Pty Ltd v A-G*, HC Wellington, CP 969/91, 27 November 1992, *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd [1994] 2 NZLR 385 PC*, and *Electoral Commission v Cameron* [1997] 2 NZLR 421 CA. A decision or exercise of power affected by a public element will expose it to judicial scrutiny.

Despite the broadening of the traditional limits of review the statistics for 1997 and 1998 do not suggest any corresponding increase in the success rate of plaintiffs. I suggest that the judicial review outcomes can be credibly attributed to the machinery of decision-making which I have discussed. Challenges predominantly fail not because of a mood in administrative law but because, arguably, the quality of contemporary decision-making approaches that which administrative law has in mind. Where public sector processes may once have caused dismay, expressions of judicial admiration for departmental procedures can, in the nineties, be found in the judgments. In *Mirelle* Heron J, in respect of a tender process which the Ministry of Commerce conducted, accepted the need to have a method of sale which thwarted any possibility of favouritism and which assured even-handedness. He said the system developed was a model and the Ministry was entitled to nothing but credit for the efficient way in which it put the tendering process into place. Heron J said it was a "model of good administration ... I have nothing but admiration for it". (at 20.)

What does all this mean for today's state sector decision-maker? First, the context in which the application for review or the threat of challenge is made. Despite the inevitable grumblings about ever changing criteria applied by the Courts and the unpredictability which this is said to create the reality is that most decisions on review are left intact. Lord Cooke has said he is confident that in a quarter of a century as Judge of several jurisdictions he had decided many more administrative law cases in favour of the authority than in favour of the challenger. "*Administrative Law: Discretion or Valour?*" Administrative Law Bar Association Annual Lecture, Lincoln's Inn, 24 November 1997.

Second, there is a presumption of legality and, except in rare cases of flagrant invalidity, the challenged decision is operative unless the Court sets it aside: *A J Burr v Blenheim Borough* [1980] 2 NZLR 1, 4 a decision of Cooke J, as he then was. More recently Lord Cooke said extrajudicially that the "administrator is entitled to the benefit of the doubt". (ALBA Lecture.)

A related point is that the executive can be confident of the respect which modern senior Judges have for the legitimacy of governmental operations. The cases which I discuss in the last part of this paper show this: a minister will not be restrained from introducing a Bill into Parliament; declarations will not be granted if they are sought for political purposes and lack a sound legal basis; bodies whose findings it is in the public interest to know at the earliest opportunity will not be muzzled and interim relief will be refused where the public interest (especially in relation to safety) must prevail over the private interest.

Third, if government is to govern it must proceed with its policies and statutory functions until the Court tells it otherwise. The practical consequence is that where there may frequently be little incentive for a defendant in civil litigation to be proactive in its defence, the same is not often

true of the defendant in an application for review. The potential for judicial review to frustrate policy objectives and create uncertainty with respect to statutory responsibilities needs to be recognised and rigorously addressed. So long as a challenge to a decision remains unresolved there is uncertainty about how to continue. It is therefore often in the defendant's best interests to take the offensive and work towards an early disposition of review proceedings.

DEFENDING RELEVANT INTERESTS

Strategic litigation

If, as this paper suggests, the quality of decision-making is better than ever, (despite the increasing complexities in the decision-making process) why is there little sign that the number of applications for judicial review is declining? There is a category of litigation which we recognise to be strategic in the sense that the plaintiff will frequently be advantaged by the mere commencement of the action regardless of its outcome. Judicial review may be used as a "political weapon" and may be instituted for purposes unrelated to the declaratory relief for which the supervisory jurisdiction of the Court is conventionally invoked. This political or strategic motivation is not new and has been noted as being consciously adopted in the United Kingdom from the 1970s onwards by pressure groups seeking change in government policy and methods of decision-making. (De Smith, Woolf and Jowell, supra note 8 para 1-041, p 23.) Indeed, the English Treasury Solicitor's perception is that the delay in decision-making or implementation which judicial review can cause "is an advantage which has not escaped the notice of some applicants". Those in his department were surprised at the poor quality of some of the applications brought at public expense. (A H Hammond CB QC (Treasury Solicitor) "*Judicial Review: the Continuing Interplay between Law and Policy*" [1998] PL 34, 39.)

The delay and uncertainty which is introduced by the application for review is capable of being deliberately exploited to achieve a range of benefits

The delay and uncertainty which is introduced by the application for review is capable of being deliberately exploited to achieve a range of benefits: to disrupt a tendering process; to prevent information which the plaintiff regards as harmful to it from becoming public; to impede progress with unpopular policy formulation or implementation; to achieve a stay of parallel litigation pending the outcome of the application for review or even to prevent a regulatory body from exercising its statutory powers where that will disadvantage the plaintiff.

Defendants need to recognise strategic litigation for what it is and use proper strategic responses to protect their immediate and longer-term interests. "Every application for judicial review, however routine, has some implication for policy, and for the extent to which policy can be created and exercised without restraint" (Ibid, p 34). So that it is not just the litigation which demands attention but the political and administrative consequences of the litigation even if it is ultimately successfully defended. The threat or service of proceedings frequently causes a conflict for the government defendant. On the one hand it is tempting to meet the demands of this one plaintiff if that will make the litigation go away. But if the decision or exercise of power is beyond criticism the perceived benefit in "settling" is overcome by the longer term consequences of this expedience. To defer to the demands of an unmeritorious claimant has consequences for a greater public interest. Government power exercised lawfully is legitimate. It derives from the mandate of Parliament and the authority of the government which has the support of Parliament. There is a constitutional interest in upholding the legitimate exercise of power.

Furthermore, the public sector defendant has reputational, policy, statutory and economic interests which require protection in the immediate and long-term. Short term micro gains may imperil the long-term view and create undesirable precedents. They are to be avoided and there are a range of litigation options which defendants can feel as confident of using in their defence as plaintiffs do in their challenge. These opportunities are present when the litigation is commenced, during the course of the litigation and even at its conclusion. Examples follow of the specific litigation steps which the defendant decision-maker may take to promote or protect the relevant interests. This part of the paper is not definitive but illustrative.

The commencement of litigation

Interim declarations

The application for review is frequently accompanied by an application for interim orders. There may be sound reasons for agreeing to interim relief but to do so because it is believed to be pointless to do otherwise, or to avoid the cost of opposing, is misguided. With the interim order in place, or the undertaking given, there may be little incentive for the plaintiff to progress its claim. With the status quo maintained the defendant must assume the role of plaintiff and take the litigation initiatives to progress a piece of litigation it did not commence. Interim relief should be opposed where there are grounds for doing so. There can be substantial benefits from opposition other than "winning": risks can be identified. A preliminary discussion of the issues can give an objective picture of what the Judge will think at trial.

Furthermore, there are real benefits from successfully opposing an interim application. If the interim remedy is required to maintain the status quo while rights are determined, it follows that if those rights are determined conclusively following the interim orders hearing, there may be no need for a final hearing.

Equally, it may be possible for the Court on an interim orders hearing to reach a view on the central issue which will effectively determine the proceeding. This occurs when the crucial issue raised by the pleadings is a question of law (as opposed to a question of mixed fact and law). Where, for example, the plaintiff challenges the decision-maker's interpretation of legislation the High Court can reach a final view on the question which, once reached, may leave nothing for a substantive hearing. In *Eagle Air Group v Civil Aviation Authority of New Zealand* HC, Wellington, CP 96/98, 14 May 1999 the plaintiffs applied for interim relief to enable them to carry on their air transport operations. Heron J recorded in his oral judgment that in the course of submissions before him the argument came does to one of interpretation. The plaintiffs had one view of the Civil Aviation Rules, the CAA another. As the Judge put it, "the battle lines had been drawn" and although there were a number of causes of action pleaded evidence was not really

relevant to what was now "the subject of an interpretation". Heron J preferred the CAA's construction and the application was refused with costs. Thus the Authority was free to continue to discharge its statutory functions according to its view of the law.

The opportunity of obtaining such an outcome is lost when the defendant consents to interim relief.

There are occasions when the Judge may go further than is strictly required on the interim orders hearing and comment on the merits of the claim. In my experience judicial observations about the lack of strength in the plaintiffs case, or concern at the defendant's, can be a useful aid in negotiating a discontinuance of the proceeding. Again, this kind of opportunity is lost if consent is given to interim relief or if undertakings are offered.

In *Eagle Air* the Court was referred to a significant amount of affidavit evidence. If an application for interim orders is to be opposed it is in the defendant's interests to place before the Court that which is relevant and which exposes the decision-making process.The evidence will be required for the substantive hearing and there is much to be gained in providing it to parties and Court at the earliest opportunity. More is said below on the subject of evidence.

Striking out

My first comment is cautionary. Just as governmental interests can be imperilled by strategic litigation taken to achieve delay, so can it compromise its own interests by taking, itself, interlocutory steps which have the effect of dragging out rather than concluding the process.

Having said that, as with any other proceeding, an application for review will be struck out if it fails to disclose a reasonable cause of action or is abusive of the Court's processes. Although the scope of review has expanded so that, for example, in New Zealand the Courts will not now shrink from supervising the activities of an unincorporated body exercising public regulatory functions there remain those areas of government activity about which the Court acknowledges it has no legitimate concern. (See *Electoral Commission v Cameron* [1997] 2 NZLR 421, concerning the Advertising Standards Complaints Board.) The Courts will resist reviewing alleged misuse of power where it is clear that the conduct at issue is not amenable to review. A very recent example illustrates the point. The brief facts follow.

In May 1997 government set up an independent body, the Roading Advisory Group, to make recommendations on road reform. When the Group completed its report in November 1997 Cabinet decided that it should be released for consultation. When the report was released pursuant to the Cabinet direction the Prime Minister publicly commented that government would make decisions on the recommendations in the report and therefore invited public submissions on the detail of what the report proposed. It was made clear that the report itself was not government policy although government did support the adoption of the commercial model for roading which the Advisory Group proposed. The Christchurch City Council, having made submissions on the report, issued proceedings. It claimed the report contained an error of law which misled the public consulting on the report and thereby flawed the consultation process.

In striking out the claim the Judge accepted the Solicitor-General's argument that intervention of the Courts requires the administrative action which is the subject of criticism to be amenable to judicial review. The report was from a group that did not exercise any power, public or otherwise. Its views had no authoritative character and its function was no more than to submit proposals on desirable policy which would be implemented by legislation. Neither the report from such a body nor the public consultative process based on it was amenable to review. Furthermore, the Court would not make a declaration where the questions were purely abstract. (*Christchurch City Council v A-G*, HC Wellington, CP 76/98.) Gallen ACJ also relied on the principle of non-interference by the Courts in parliamentary proceedings expressed by Cooke P in *Te Runanga o Wharekauri Rekohu v A-G*: "it is impossible to suppose that a minister may be judicially prevented from presenting to a representative assembly a measure for consideration" [1993] 2 NZLR 301, 308.

In areas of policy reform to be effected by legislation, such as in the *Christchurch City Council* case, the Court is not being asked to supervise any exercise of public power but to advise in the sphere of pure policy. It is well accepted that the larger the sphere of policy and the more the decision-making is acting within the realm of elected representatives, the less inclined the Courts will be to intervene. (*CREEDNZ v Governor-General* [1981] 1 NZLR 172, 198.) In these cases, relief is refused not in the exercise of the Court's discretion but for the more fundamental reason that there is no tenable basis for review. In this situation there are sound reasons why a strike-out application should be made. It has every prospect of success and is therefore a step best able to protect the public interests for which the defendant is responsible and which are threatened by the proceeding.

Security for costs

I do not spend a great deal of time on this topic. My personal view is that where a private sector interest may apply for security for costs for strategic reasons I do not see this

Table 1:
Judicial review decisions as a proportion of all decisions recorded in Briefcase

Research for this paper focused on two questions: (i) the incidence of judicial review applications in New Zealand, compared to other forms of litigation, over the past decade and (ii) the success rate of judicial review applications (ie whether relief sought was granted) during 1997 and 1998. A different approach to the research was adopted in each of the two areas of focus.

To obtain an indication of trends over the decade Briefcase database entries concerning "judicial review" at either an interlocutory or substantive stage were compared with the total number of entries for that year and expressed as a percentage. The following figures were obtained:

1988	2.5%
1989	3.1%
1990	2.8%
1991	3.0%
1992	2.6%
1993	3.2%
1994	3.4%
1995	2.6%
1996	4.4%
1997	4.7%
1998	3.8%

Table 2:
Judicial review outcomes in 1997 and 1998

Figures relating to the outcome of judicial review applications over the last two years were obtained after comprehensive research. Briefcase database entries dated 1997 and 1998 and containing the phrase "judicial review" were categorised, recorded in an index and cross referenced with similarly treated Linx database entries. Each entry was separately analysed and its outcome recorded. The results obtained were as follows:

Total number of judicial review judgments	**123**
Substantive Determinations – at first instance or on appeal	89
Number of those applications which were declined or struck out	66 or 74.2%
Number of those applications which were granted	23 or 25.8%
Number at first instance	76
a. Number of those applications which were declined/struck out	58 or 76.3%
b. Number of those applications which were granted	18 or 23.7%
Number on appeal	13
c. Number of those applications which were declined/struck out	8 or 61.5%
d. Number of those applications which were granted	5 or 38.5%
Interim Orders – at first instance or on appeal	18
Number of those applications which were declined	14 or 77.8%
Number of those applications which were granted	4 or 22.2%
Number at first instance	16
a. Number of those applications which were declined	13 or 81.3%
b. Number of those applications which were granted	3 or 18.8%
Number on appeal	2
c. Number of those applications which were declined	1 or 50%
d. Number of those applications which were granted	1 or 50%
Other	19

particular option as available in the same way to the central government defendant to a review proceeding. There are sound reasons in principle why plaintiffs affected by an allegedly improper exercise of public power ought not to be dissuaded from their grievance procedure by the imposition of a security of costs award. In any event the Courts are unlikely to allow this to happen.

However, there are occasions when security for costs have been awarded in judicial review proceedings (*Ngataringa Bay 2000 (Inc) v Minister of Defence* (1992) 6 PRNZ 190 and *Kapiti Regional Airport Ltd v A-G*, HC, Wellington, CP 236/96, 30 July 1997) and it is an option clearly open to the defendant. Future applications are likely to be resolved by striking the proper balance between, on the one hand, the interests of justice in having Courts supervise exercises of power and, on the other, the public interest in not funding from the public purse clearly unmeritorious litigation.

Conduct of litigation

Evidence

I emphasise only one aspect of the conduct of the litigation because of its significance. As in any dispute about facts, the evidence is crucial. If the conduct which is the subject of challenge will not withstand scrutiny it should not be defended but if the decision-maker has every confidence in the integrity of the decision which is impugned there is every reason why that process should be revealed to the Court. The assistance which the Court gains from such fulsome disclosure generally works to the defendant's advantage. If the defendant wants to defeat the application for review it must supply the evidence of the lawfulness of its conduct. The Court's task can be made more difficult if a relaxed attitude is taken to the filing of evidence. In *Smith Kline & French Laboratories v A-G* for example, Jeffries J spoke of the thundering silence of the defendant and expressed annoyance at having to "scurry" through exhibits of correspondence attached to the plaintiff's affidavits to obtain information about the defendant's procedures. [1989] 1 NZLR 385, 394.

By contrast in a review proceeding alleging deficiencies in a consultation process the Minister of Energy filed an extensive affidavit. In spite of its length Williams J reproduced it in full in his judgment because he considered "it demonstrates most vividly the intensive consideration of all of the key issues in the Board's plan and underscores the difficult balancing exercise involved". (*Auckland City Council v Auckland Electric Power Board*, HC, Auckland, CP 26/93, 16 August 1993 at p 89.) As that case demonstrates the evidence may persuade the Judge to refuse relief in the exercise of his or her discretion, even where there is substance in the plaintiff's case. The Judge was clearly influenced by the "exhaustive consideration of the matter at ministerial level .... The range and depth of the official advice tendered to the minister was most impressive and the minister's carefully considered approach was a model of quality ministerial scrutiny and decision-making". (p 93.)

End of litigation

Costs

A successful public sector defendant is, in principle, as entitled to costs as any other successful defendant although I do not generalise about the prudence of seeking to recover costs. For some government defendants there are sensitivities which they must recognise which have no significance for others. But other than in cases where the public interest has been served by having the litigation brought or where public interest sensitivities arise, it is responsible to seek costs. Public sector defendants are required to be assiduous in protecting budgets including when they defend litigation. Some awards of costs seem to recognise this. In *Johnson v Attorney-General* HC, Napier, CP 24/97, 11 May 1998 Neazor J struck out the proceeding upon an application by the defendant (the Land Transport Safety Authority) that the plaintiff take immediate steps to bring the matter on or that it be struck out. The Judge awarded $10,000 costs. It is not suggested that this is a typical award for the Crown on such an application but it illustrates my point that the litigation risks which the Crown assumes are recognised and that the principle of entitlement to a reasonable contribution to costs is applicable to the defendant in judicial review.

A relevant factor for the Court in assessing costs is the purpose for which the litigation was brought. In *Hamilton City Council v Waikato Electricity Authority* HC Hamilton,

Table 3:
Judicial Review Outcomes for 1997

Total number of judicial review judgments	**79**
Substantive Determinations –	
at first instance or on appeal	58
Number of those applications which were declined or struck out	44 or 75.9%
Number of those applications which were granted	14 or 24.1%
Number at first instance	50
a. Number of those applications which were declined/struck out	38 or 76%
b. Number of those applications which were granted	12 or 24%
Number on appeal	8
c. Number of those applications which were declined/struck out	6 or 75%
d. Number of those applications which were granted	2 or 25%
Interim Orders –	
at first instance or on appeal	12
Number of those applications which were declined	10 or 83.3%
Number of those applications which were granted	2 or 16.7%
Number at first instance	10
a. Number of those applications which were declined	9 or 90%
b. Number of those applications which were granted	1 or 10%
Number on appeal	2
c. Number of those applications which were declined	1 or 50%
d. Number of those applications which were granted	1 or 50%
Other	11

Table 4:
Judicial Review Outcomes for 1998

Total number of judicial review judgments	**44**
Substantive Determinations –	
at first instance or on appeal	31
Number of those applications which were declined or struck out	22 or 71%
Number of those applications which were granted	9 or 29%
Number at first instance	26
a. Number of those applications which were declined/struck out	20 or 76.9%
b. Number of those applications which were granted	6 or 23.1%
Number on appeal	5
c. Number of those applications which were declined/struck out	2 or 4%
d. Number of those applications which were granted	3 or 6%
Interim Orders –	
at first instance or on appeal	6
Number of those applications which were declined	4 or 66.7%
Number of those applications which were granted	2 or 33.3%
Number of judgments at first instance	6
a. Number of those applications which were declinc	4 or 66.7%
b. Number of those applications which were granted	2 or 33.3%
Number on appeal	–
c. Number of those applications which were declined	–
d. Number of those applications which were granted	–
Other	8

CP 21/93, 29 September 1993 there was a good deal of argument about the plaintiff's motivation in mounting a challenge which was ultimately unsuccessful. Hammond J said that it had real relevance to the questions of costs which he had to determine.

CONCLUSION

In this paper an emphasis on case law was deliberately avoided. To concentrate on case law is to concentrate on the judiciary as the guardians of legality while ignoring the constructive response of government to judicial concerns about administrative action.

The significance of the contribution which judicial review cases have made to the understanding which public bodies have about the way in which their powers must be exercised is beyond question. They have contributed to an institutional awareness of "lawfulness" as a value which is at the heart of the concept of good administration. The law is no longer seen to be of marginal relevance to the business of administration. It is central. The environments in which public powers are exercised in modern times is increasingly complex but it is not just the public or the judiciary who expect the fundamental principles of good administration to guide the exercise of power: the administration expects it of itself. Through its own processes government has promoted those important values and principles. The question is whether decision-making is enhanced.

The quality of decision-making will always be difficult to appraise. For so long as judicial review retains its present popularity there will be a public perception of a bureaucracy which, for the most part, is undeserved. Private interests are often perceived to be in conflict with the public interest and those situations cause antagonism. Where the grievance has attracted publicity the public perception will be informed by the media presentation of the issue which frequently is focused on the disappointment over an outcome rather than a failure in process. Nevertheless, the facts do seem to tell us something. Thousands of decisions affecting individuals are made each year. A handful of those are declared to be unlawful. There is a basis for asserting that in the late nineties the administrator is, by and large, getting it right and although I do not recommend complacency I do advocate the defence of the defensible.

Note: *All of the results contained in tables are as at 10 February 1999.*

All entries in each of the tables are exclusive of local government or "judicial" bodies. ❑