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THE ELECTION

The recent election campaign raises a number of issues of interest to public lawyers. Even if the electoral system is to be retained in principle, some detailed changes may be necessary.

UNDERSTANDING MMP

While the bulk of population may understand the basics of MMP, there is considerable confusion about some of the more esoteric issues. Attempts to engage in tactical voting require a detailed knowledge of constitutional issues.

An example was provided by the exchange of tactical voting broadsides between ACT and National. ACT put out a leaflet saying that a party vote for ACT was more effective than a party vote for National, since a huge number of National party votes were required to produce the first National list MP after the electorate seats had been allocated.

This was misleading, because its implicit starting point is that National might have received zero list votes. But this is not a realistic scenario. ACT was obviously only going to have an influence at the margins and, in that case, the number of list votes per list MP is equal.

National retaliated with a letter saying something that was simply untrue. This was that the Governor-General was obliged to call first on the leader of the largest party to form a government. An informal survey during pre-Christmas cocktail parties reveals that a large proportion of lawyers were deceived by this, so the confusion it caused amongst the rural population must have been great. National's own strategists credit it with recovering two percentage points from ACT.

The applicable constitutional convention, of course, is that the Governor-General calls on the leader of the largest party to form a government. Furthermore, in the run up to the 1996 election campaign Sir Michael Hardie Boys made it clear that he would not call on anyone to form a government until the politicians had sorted out who it should be.

A number of people attempted to vote tactically in other ways, such as by voting Labour on the assumption that it would win so that it should have a clean win and not have to rely on the Alliance or the Greens. This was a forlorn hope, flew in the face of Labour statements that it would govern with the Alliance in any case and may, given the final figures, have actually prevented a National led coalition.

The truth of MMP is that the outcome of shifting votes is entirely unpredictable, being contingent on so many variable factors.

SPECIAL VOTING

The special voting system and the delay in producing the official results clearly had a substantive effect, as it has done more subtly on previous occasions. Had the true result been known on election night then, for better or worse, the Greens would have been able to bargain their way into coalition.

It is time this nonsense came to an end. There is no reason why a proper result cannot be declared on the night, indeed this is what happens in far more populous countries such as the United Kingdom. There are two separate issues here, although the press tends to conflate them.

The first is special voting. The arrangements to enable people to vote outside their own electorates are expensive and incompatible with producing a quick result. Much of the expense is wasted as is shown by the high percentage of special votes found to be invalid. Anyone who knows they will be away should apply for a postal or advance vote. These should then be counted on the night. Overseas voters should, again, vote by post in advance or nominate proxies.

The second issue is the checking of the votes and the registers, another self-inflicted injury. It would be elementary to send registered voters cards telling them at which polling booth they had to vote. This is what occurs elsewhere. This makes the checking of registers for duplication redundant, although it does not, of course, eliminate personation.

The centralisation of the count in each electorate would be beneficial. A result would be forthcoming and the onus thrown onto candidates to demand recounts, which could be conducted immediately. Votes would be counted by staff who had not been on duty all day at the polling booths. This might reduce the apparently high error rate. And election night would become more fun as results were announced by local worthies having their Warholian five minutes of fame, rather than having figures drib and drab in from polling booths. As a concession to practicality, the Maori electorate votes would have to be counted at the general electorate centres.

If one is opposed to this idea, then one must question the utility of producing a result on the night. Alternatively, there should be a ban on coalition agreements prior to the announcement of the official results and the Parliamentary Services Commission should not waste time on induction courses for new MPs prior to the announcement of the official results. One of the chief values of those induction sessions is that they enable new MPs to meet in a non-confrontational setting and the Green MPs in particular must have been left feeling that they had arrived at school after the first week of term was over. ❑

CONSTRUCTION CONTRACTORS

D F Dugdale, The Law Commission

introduces a Law Commission study paper

Construction contractors (head-contractors and subcontractors) are almost never paid in advance and are rarely in a position to stipulate for security. Retention of title to such materials as they supply is not in practice available to them because title on affixing passes by operation of law to the landowner. So they suffer the disadvantages of any unsecured creditor.

Subcontractors are at the further disadvantage that the cashflow on which they rely dries up if the owner is unable to pay, or if a superior contractor diverts cash which should flow to the subcontractor. An owner may run out of money or may withhold moneys relying on a setoff based on acts or omissions for which a particular subcontractor has no responsibility. A superior contractor may apply to other difficulties money that should be paid to his subcontractors.

An owner or a superior contractor may dispute liability on manufactured grounds to disguise his impecuniosity. Even such a spurious dispute may take time to resolve.

Subcontractors will be even worse off if their contracts restrict their right to cease work on the ground of non-payment, or if as is today common they include a "pay when paid" or "pay if paid" clause. The effect of such clauses is to make the subcontractor's entitlement to be paid conditional on the superior contractor receiving his payment. So the risk of the owner's financial problems and possible insolvency is not borne solely by the head-contractor but shared between the head-contractor and his subcontractors.

Because subcontractors' work is short, they are fearful that tagging their tenders to exclude such provisions will lose them the job. To that extent such provisions are not agreed to as the result of a process of free bargaining.

It is either illegal or commercially impractical for the subcontractor bound by a "pay if paid" provision to insist that his obligation to pay his own employees and suppliers of material be subject to a corresponding condition. So subcontractors tend to be hardest hit by a drying up of the cashflow. They have an obligation to pay, but no entitlement to be paid. Their position is even worse if their contracts prevent their ceasing work on the ground of non- payment.

There is no doubt that there are superior contractors who wrongly withhold payments from subcontractors, but there is no agreement as to the extent of the problem.

The traditional method of protecting construction contractors was by statutory provision for liens over the owner's land and charges over moneys due to superior contractors. Statutory schemes often provided for hold-backs or retentions to give charges something to bite on, and common too were provisions impressing a trust on so much of moneys received by superior contractors as was due to contractors lower in the chain. A Maryland statute of 1791 was followed by comparable legislation in every state of the US, in every Canadian province and in some Australian states. New Zealand had such a statute from 1892 until the repeal in 1987 of Part II of the Wages Protection and Contractors Liens Act 1939 on the not totally convincing ground that:

> ... it is not possible to reach agreement with the industry on the reform of the revised liens Act, and the reason is that the interests of contractors and subcontractors are diametrically opposed to each other. Contractors prefer to hang on to the retention money for as long as possible and subcontractors prefer to be paid as soon as possible. The position is hopeless. The law must go .... *(See GWR Palmer at 482 NZPD 503.)*

The Ministry of Commerce as part of its current review of insolvency law invited the Law Commission to revisit this issue. The Commission's report to the Ministry has now been published in the Commission's Study Papers Series (*Protecting Construction Contractors* NZLC SP 3).

The solution currently tending to find favour in comparable common law jurisdictions is an abandonment of liens and charges in favour of an imposition of contractual terms aimed at the swift clearing away of blockages in the cashflow. A regular cashflow is essential in itself, but an additional consequence of the removal of such blockages is that concealed inability to pay on the part of an owner or superior contractor comes to light much sooner. If a construction contractor is not going to be paid then the earlier in the course of the contract that he discovers that position the less likely it is that the non-receipt will be ruinous.

The most appropriate reform model is the NSW Building and Construction Industry Security of Payment Act 1999. Pay if paid clauses are deprived of effect. There is fast track judgment for unpaid instalments except to the extent that liability to pay the whole or part of an instalment is contested on grounds clearly stated. Whenever a party is entitled to fast track judgment he is also entitled to stop work. If there is a contest there is a procedure for adjudication by a swift and informal process to determine the amount to be paid. Such rulings will not constitute res judicata. The decision is as to the amount of the immediate payment to be made but issues relevant to that determination remain able to be re-agitated at a later stage. The essential purpose of the procedure is to put an end to a situation where disputes hold up the cashflow.

The Contractors' Federation which includes both head-contractors and subcontractors supports such a statutory regime in principle. The proposal is favoured by the Subcontractors' Federation. The Registered Master Builders Federation has yet to be convinced. ❑

SAME-SEX RELATIONSHIPS

D F Dugdale, The Law Commission

presents the Law Commission's response to the Ministry of Justice

Of the 163 submissions received by the select committee considering the De Facto Relationships (Property) Bill, 83 favoured including same-sex relationships within the definition of a de facto relationship. One of those submissions was from the Law Commission which in its 1997 Report *Succession Law: A Succession Adjustment Act* (NZLC R39) had urged that in the context of succession there was no justification for distinguishing between de jure and de facto and between heterosexual and homosexual relationships. On 24 August 1999 the Ministry of Justice published a discussion paper *Same-Sex Couples and the Law* posing questions to be answered by members of the public ("What do you think about there being a law on dividing property, when same-sex relationships break down?") and a third document called *Same-Sex Couples and the Law – Backgrounding the Issues*. The time for making submissions expires on 31 March 2000. Consideration by the select committee of the De Facto Relationships (Property) Bill meanwhile stands adjourned.

It is the Law Commission's view that properly to inform public debate there is more that could and should be said than is to be found in the Ministry's publications. For that reason it has published in its Study Papers series its submission to the Ministry (*Recognising Same-Sex Relationships* (1999 NZLC SP 4)) The Commission says:

> We hope that even if the conclusions which we suggest do not command general support the present paper may have some value if only as a quarry that could be mined for ideas and information.

The paper first considers the arguments in favour of legal recognition for same-sex relationships. It points out that it is not enough to rely on the arguments on the basis of which homosexual acts between consenting males were decriminalised because legal recognition goes beyond any acceptance that the state should keep out of the nation's bedrooms.

The paper suggests that rights talk is of no help. As *Quilter v Attorney-General* [1998] 1 NZLR 523 predictably held, nothing in New Zealand rights legislation overrides the fact that to the legislators of 1955 marriage in the Marriage Act of that year contemplated only a heterosexual union. Even in the context of an inquiry not as to what the law is but as to what it should be, reliance on statutory generalisations simply muddies the argument. The question is not as to the effect of the rights legislation, it is whether sound reasons exist for changing the law. The Commission suggests that the most cogent argument is that one of the ways in which human sexuality manifests itself is in the formation of publicly avowed and socially recognised relationships intending to be enduring.

The legal code of a state properly responsive to the aspirations of its citizens will make provision for such relationships be they heterosexual or homosexual. In the view of the Commission neither the fact that provision in other jurisdictions for the registration of same-sex relationships is not as commonly availed of as might have been expected, nor the opposition to any law change by proponents of what they style Queer Jurisprudence should stand in the way of reform.

The paper then considers the form that reform should take. It rejects as an appropriate model the 1999 New South Wales amendment to what is now named The Property (Relationships) Legislation Act. The scheme of that statute is to confer certain rights where there is a "domestic relationship". The definition of this term (set out in the paper) does not require the existence of any sexual element but is broad enough to include same-sex relationships. It seems to the Commission that the definition is fraught with uncertainty and that the statute's technique of selecting certain specific areas where de facto partners have rights carries with it an unacceptable risk of accidental omission.

The solution which the paper commends is a provision for the registration of same-sex partnerships. The first such statutory provision was in enacted in Denmark in 1989 and the second in Norway in 1993 and the paper contains translations of the two (extremely elegant) statutes. Since then partnership registration has become possible in a number of European states and provinces. Partnership registration has almost all the consequences of marriage, the exception being in relation to the rights and duties as between parents and children. So registration is available only if each partner is free of any other impediment and dissolution is handled in the same way as a marriage dissolution.

The paper argues against same-sex marriage stricto sensu. The Dutch cabinet has approved such a law change in the Netherlands, but the legislation is not yet in place. Some New Zealand gays and lesbians reject registered partnerships as second rate or inferior and insist that they should be able to marry. Registered partnerships provide all the necessary benefits, and it is appropriate that in deference to those for whom marriage has a religious significance that status should be reserved for heterosexual relationships. Tolerant understanding in the Commission's view is a two-way street. Just as some heterosexual couples are in de facto relationships in preference to marriage, so also if registered partnerships become available some (perhaps most if the European experience is a useful guide) will prefer not to enter into registered partnership. To the extent that the law regulates the affairs of those who abstain from formal relationships in this way, the same rules should apply to same-sex as to opposite-sex couples. ❑

ADMIRALTY PRACTICE

Tom Broadmore, Barrister, Wellington

reviews Toh Kian Sing "Admiralty Law & Practice" *(Butterworths Asia, 1998)*

The red tide of Empire has now receded to the United Kingdom and a few isolated dots on the map. Driftwood from that tide abounds, but this book reminds us of one of its more curious but nevertheless enduring features. That is the ancient English jurisdiction of the Lord High Admiral over maritime matters – a jurisdiction which, in its modern guise, is now exercised by Courts of the old Empire in countries as diverse as Australia, Pakistan, Kenya and Hong Kong.

Admiralty law has always been different. Not only did the Admiral jealously preserve for his Court an independence from the King's ordinary Courts, but also the sources of the law were not those of the common law. Primarily they were a series of medieval codes from various parts of Europe, and the general law of the sea observed in the great trading ports of the continent. (Indeed, until near the end of the nineteenth century the practitioners and Judges of admiralty were drawn from the civil lawyers of Doctors Commons.) The most obvious features distinguishing admiralty jurisdiction from other areas of English law are the action in rem (in which a ship itself is named as and treated as a defendant); the maritime lien (whereby certain classes of claimant have a priority charge which travels with the ship despite changes in ownership); the right to enforce actions in rem and maritime liens by way of arrest of the ship involved; and the system of sale of a ship under arrest and the fixing of priority of entitlement to the proceeds after judgment.

It was this law, along with the common law, that followed the English traders and colonists around the world. During the nineteenth century the superior Courts of all British colonies including New Zealand were vested with admiralty jurisdiction under successive Imperial statutes culminating in the Colonial Courts of Admiralty Act 1891. The Courts exercised that jurisdiction under rules made earlier in the nineteenth century under the Vice-Admiralty Courts Act 1863. (For a detailed historical account, from a New Zealand standpoint, see the report of the Special Law Reform Committee on Admiralty Jurisdiction, March 1972.) Most Commonwealth countries have now adopted their own statutes and procedural rules – in New Zealand, the Admiralty Act 1973 and Part 14 of the High Court Rules – but the scope, concepts and language of the Imperial statutes and rules remain strongly evident.

Despite this, texts on Admiralty jurisdiction and practice are few, and chauvinist in nature. Where once admiralty cases were a rarity, they are now comparatively frequent; and there is a growing number of largely unreported New Zealand decisions. But for overall guidance on law and practice, New Zealand practitioners have until now routinely had to refer to the out-of-print McGuffie, *Admiralty Practice*, Meeson, *Admiralty Jurisdiction and Practice* (London, 1993), and Hetherington, *Annotated Admiralty Legislation* (Sydney, 1989).

There is thus the opportunity for a text to reflect the international but nevertheless largely uniform scope of the topic. Toh Kian Sing's new book is that text. It is expressly directed to the law and practice of admiralty in Singapore and Malaysia, where it will no doubt fill a particular need. But the book is no less welcome and important in New Zealand, because the author is prepared to take an international view in his discussion of admiralty statutes and precedents. As he notes in the preface, his hope is that the book will serve as a source-book of comparative Commonwealth case law. That hope appears to be fulfilled.

The book opens with a detailed historical introduction to the topic, no less helpful to the New Zealand than the Singapore practitioner. Individual topics such as the subject matter of jurisdiction, the action in rem, arrest, security, maritime liens and priorities are all dealt with in detail by reference to Singaporean and Malaysian statutes and rules which closely resemble their New Zealand equivalents; and the discussion is consequentially valuable.

But what sets the book apart from its few alternatives is the breadth of reference. Apart from English authorities and texts, readers are referred to important texts and materials originating elsewhere, such as the Australian Law Commission's *Report on Civil Admiralty Jurisdiction* (1986) and Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800* (Cambridge, 1970). There is wide reference to Australian, Canadian, South African, Hong Kong, and, of course, Singaporean and Malaysian cases. As a result, the author's discussion of particular topics is informed by authority from throughout the common law world; and readers have the advantage of a convenient introduction to such authority for their own further research.

New Zealand cases feature appropriately in the text and footnotes, including *Air New Zealand v The Ship "Contship America"* [1992] 1 NZLR 425, (jurisdiction clauses); *ABC Shipbrokers v The Ship "Offi Gloria"* [1993] 3 NZLR 576 (maritime liens and priorities); *Colombo Drydocks v The Ship "Om Al-quora"* [1990] 1 NZLR 608 (ownership and beneficial ownership); and, also on that last topic, several reported cases involving Russian vessels. Indeed, most admiralty cases reported in the *New Zealand Law Reports* since the enactment of the Admiralty Act 1973 appear to be noted. Of particular interest is the detailed and critical treatment of *The "Betty Ott"* [1992] 1 NZLR 655 (priority between classes of mortgage).

This book is comprehensive, detailed and helpful. It is well and logically organised, and clearly written. Not least, it is much cheaper than its English equivalents. I thoroughly commend it. ❑

ARBITRATION BOOKS

Carole Durbin, Simpson Grierson, Auckland

reviews two books about arbitration

INTERNATIONAL ARBITRATION

International Commercial Arbitration: A Handbook by Mark Huleatt-James and Nicholas Gould, 2nd ed, (LLP 1999)

The authors of this book are partners in the London law firm of Lovell White Durrant. They are both Fellows of the Chartered Institute of Arbitrators. This is a second edition. The first edition came out in 1996.

The principal changes take account of the revisions to the arbitration rules of international arbitration institutions such as the American Arbitration Association, the China International Economic and Trade Arbitration Commission, the International Court of Arbitration and the London Court of International Arbitration.

The intent of the authors was to provide "a slim volume providing an overview" of international commercial arbitration. The book is directed at people such as in-house lawyers who have broad responsibilities but need to understand the basics. It does not aim to be a detailed treatise on the law and practice of international commercial arbitration. This is perhaps underscored by the fact that only ten cases appear in the Table of Cases for the whole book.

The style of the book is precise and logical without being boring. It is a clear and succinct exposition and does not suffer from being too UK-centric.

The book kicks off with an appealing and very brief historical overview with references to Paris, the Trojan prince. Other matters dealt with in the preliminary chapter include arbitration in comparison with other ADR procedures and litigation, the legal significance of the labels "international" and "commercial" and references to some arbitration essentials.

The next sections look at applicable laws and rules (eg UNCITRAL), the arbitration agreement, the commencement of the arbitration and the appointment of the arbitral tribunal, the jurisdiction, powers and obligations of the tribunal, the proceedings, awards, recognition or enforcement of awards and, finally, resisting awards.

There is considerable evidence of the practical leanings of the authors. For instance in the discussion on the number of arbitrators, while giving the appointment of three arbitrators support on large and important disputes, the authors go on to say that (at p 33):

> parties should not be hidebound by this, particularly where speed is important. Good arbitrators tend to be busy arbitrators. Trying to fix dates for hearings when all three arbitrators are available at the same time can be a difficult task, and can extend the length of the arbitration considerably. A tribunal of three arbitrators tends to be three times more expensive than a tribunal of one!

To give you another indication as to the "flavour" of the book I have chosen another extract dealing with the proceedings themselves (p 75):

> Getting at the truth is always difficult, and may sometimes be impossible. A balance has to be struck between taking too long and spending too much money in an attempt to get near the truth, at one extreme, and not trying sufficiently hard to get at the truth at the other. Superimposed on this dilemma is the division between those who think that the best way of getting at the truth is to let the parties test each other's evidence and those who think that the truth will best emerge if a neutral third party (ie the Judge or the arbitrator) has the task of ferreting it out. Traditionally the civil law systems have favoured the Judge or arbitrator having the prime obligation for ferreting out the truth, whereas the common law systems have put that burden principally on the parties themselves.

The reviewer found this book well worthwhile. It has much of interest to practitioners of arbitration generally and not just to those involved in international arbitration. It would be a good starting point for practitioners involved in arbitration as well as for those with a more peripheral interest in the topic. Some topics suffer from being dealt with in a very summarised fashion but overall the book is excellent.

BEING AN ARBITRATOR

So you really want to be an arbitrator? by Mark Cato (LLP 1999)

The target audience for this book is the aspiring arbitrator or an arbitrator in his or her first few references. It is written very much in an English context. The author by original training is a Chartered Surveyor. He has been a full-time arbitrator since the late 1980s. In the early 1990s he completed a Masters degree in Construction Law and Arbitration at King's College, London.

The references to the author's goddaughter as "dear girl" got on the nerves – but I am sure he meant well. The book is not a weighty tome. To give you a flavour, the following is typical: (from p 88):

> OK, said Thomasina, you've covered a lot of ground, how do you ensure that there is no confusion about what you have agreed? Quite simply, I said, by producing an Order for Directions. Perhaps you would like to see a copy of a typical Order that I would produce following such a preliminary meeting?
>
> Oh dear, said Thomasina, my dear godfather, I really don't think I could take any more today. I promise you, I really did find what you had to say really interesting and want to hear more.

Notwithstanding the irritating stylistic device used of chatting in informal tones to the goddaughter throughout, there are some parts of this book that are useful.

For a preliminary meeting an extensive agenda is proposed which even if it would not suit every arbitrator does provide a helpful checklist for an arbitrator deciding what should go on the agenda.

For the hearing itself the author of the book recommends sitting only from 10.00 am to 5.00 pm on four days of the week. This is a little less per day than is common in New Zealand and the restriction to four days is also unusual – although that suggestion has real merit.

An interesting suggestion for the bundle of documents is that the arbitrator advises the parties that he will not look at the bundle for 24 hours after he receives it so that both parties have an opportunity to check what the other side has put in, to pick up an "inadvertent" inclusion of improper material eg without prejudice communications. These can then be taken out without the arbitrator ever having seen them.

A sample is also given of quite an extensive fees agreement. Arbitrators are sometimes not as transparent about fees as is desirable and this sample gives some interesting ideas. It canvasses a minimum non-returnable commitment fee (not common here), hourly rates for preparatory work, sitting hours and award writing, classes of travel, interim accounts and payment in the event of a settlement.

Chapter 10 addresses the hearing itself. Interestingly enough the author says that it is his practice to have already prepared the first part of the award setting out the background to the dispute and the issues as has appeared from the pleadings and documents before the hearing even starts. He suggests colour coding the pleadings and then having an index to the notebook of the hearing with columns for each issue which are filled in with the colour coded page numbers. He makes the point that other arbitrators have different systems but that it is important to have a system for following issues through the evidence without having to re-read it all each time.

He reminds the reader to arrive early, bring glasses (if any), coloured pens, the Old and the New Testaments and a ruler. On the first day he points out the need to check the lay-out of the hearing room and that any microphones are in place and working. These sorts of matters may seem banal but in the reviewer's experience they can make a real difference to the perceived competence of an arbitrator.

The author asks each witness to consent to him taking a Polaroid photograph of the witness. This has never happened in any hearing the reviewer has been in but she was quite taken with the idea. This certainly would help the memory in a long case with many witnesses.

Chapter 11 deals with writing the award. In some places it is engagingly simplistic in a legal sense (but many, if not most, of the target audience are potential lay arbitrators). The author even sets out a mnemonic he uses as a checklist for his awards.

Right at the end of the book there is a short chapter on other forms of alternative dispute resolution. The author puzzlingly includes "capitulation" in these. Other matters dealt with in an extremely summary way are negotiation, mediation/conciliation and adjudication. The summary on mediation is not helpful. Mediation is defined as "the intervention, ... of an independent third party in the dispute, who, by shuffling between them in a series of individual meetings, attempts to draw them towards a settlement". This definition would make any experienced mediation practitioner shudder.

So, in summary, this is not the book to buy if you are looking for an erudite treatise or if you are irritated by a hokey style or if you already have experience as an arbitrator. But it is easy to read and does contain a few hints which any new arbitrator would find helpful. ❑

LETTER

MAORI LAND LAW

In a recent editorial (November 1999) you allege that decisions under the Maori Land Act (more usually known as the Te Ture Whenua Maori Act) are ad hoc and policy oriented, lacking fixed rules, and contrary to the rule of law.

With respect, your criticism oversimplifies both the Act and its purpose, and the rule of law.

You are right in saying the Act is policy-oriented. Parliament decided to use the Maori Land Court to assist Maori to promote the retention, use, development and control of Maori land by its owners and their kin groups. The Act provides mechanisms to help those owners manage issues arising from the problematic system of multiple ownership. (That ownership system is itself the product of earlier government attempts to substitute predictable and fixed rules (of succession) for what critics unversed in Maori culture saw as unpredictable subjective criteria.)

You appear mistaken in saying the decisions on land alienation are ad hoc. They follow the process and criteria specified in the Act (ss 151-154). Criteria in s 152 require the Court to verifying transfer formalities (including informed consent by owners, as ownership records are maintained by the Court), adequacy of consideration, and compliance with trust terms. Once these criteria are met, the Court has an overriding discretion (s 153) to grant or refuse confirmation. This is perhaps the main focus of your objection. But there is room within the rule of law for discretionary resolution of legal questions "as a means of overcoming in particular cases the undesirable consequences of excessive rigidity, formalism or subtlety in the law" (Beinart, cit G de Q Walker, The Rule of Law, 20.) Thus s 153 enables the Court to resolve disputes among owners or deal with exceptional circumstances, but cannot legitimately be used simply to veto an ordinary transaction between willing parties. In reported decisions under s 153, the Court assesses applications against the factors in ss 154 and 17 and the preamble of the Act.

As long as the mechanisms in the Act are congruent with public opinion and values, and as long as the discretion contained in the Act continues to be exercised with appropriate judicial restraint, the rule of law is enhanced rather than weakened by such provisions.

Cheryl Simes
O'Sheas, Hamilton

WORLD TRADE BULLETIN

Gavin McFarlane, Titmuss Sainer Dechert and London Guildhall University

plays those old Seattle blues

PARALYSIS IN GENEVA?

Since the collapse of the WTO ministerial conference in Seattle at the beginning of December 1999, very little has been said by the officials of the WTO, and trade representatives of the various member states. In view of what took place then, they can be forgiven for appearing rather shell-shocked; it does seem however that there is general agreement among them that silence is the best prescription for the time being. Ali Mchumo of Tanzania is the current chairman of the WTO general council. In a statement following the Seattle debacle, he called on all members to exercise restraint on matters under discussion "so as not to prejudice further fruitful discussion", or the positions of other members.

> Members have made it clear that informal consultations are necessary on a wide variety of issues, including the issue of deadlines. Many members urged understanding by all members in those consultations, and they urged due restraint on the part of members. This approach would be without prejudice to the position on rights and obligations of members.

This does not exactly give the impression of an organisation which is at ease with itself. His statement seems to be aimed more at containing tensions which continue to bubble away beneath the surface, and which will undoubtedly erupt again on any future attempt to get a new GATT/WTO round of negotiations off the ground. The WTO general council decided on 17 December to postpone "until early 2000" a decision on how to proceed with issues outstanding from the Seattle ministerial conference. One or two voices have been raised around the world in the meantime expressing the need for resumption of the discussions at an early date, but until the United States makes a move, nothing will be done. And as their presidential election race hots up, there will be little interest in America over the WTO issue until the new president is safely in the White House. But if WTO leaders are being cautious in their public statements, some political leaders are less so. When talks eventually resume, perhaps later this year or at some time in the future, the non-governmental organisations which were involved in the demonstrations in Seattle are likely to play a much larger part in the proceedings, and may well have official standing in some of the discussions. A large helping of goodwill is going to be needed to get the WTO machine into the air again, and politicians will not assist matters by decrying either what took place in Seattle, or the motives of those who were involved.

WHAT HAPPENED IN SEATTLE

That there would be deadlock at the World Trade Organisation ministerial meeting in Seattle was fairly predictable; quite a few commentators were aware that there were going to be some pretty sharp reactions when the delegates eventually got to the venue. That something was brewing became apparent in the week previous, when for example a Channel Four News broadcast from WTO headquarters in Geneva took place against the background of a demonstration by protesters who had chained themselves to the staircase *inside* the WTO building. But no one connected with international trade relations really expected that the good burghers of Seattle would be excluded from their downtown area by running conflicts between riot police and determined demonstrators of a kind which the United States has not witnessed since the Vietnam War protests of a generation or more ago. Water cannon in action, and delegates confined to their hotels because they could not be guaranteed safe passage to the buildings in which the WTO meetings were scheduled to take place were items which had certainly not been on the agenda. But as the watching TV viewers around the globe soon found out, there was very little else which actually had managed to get on the agenda. When the event broke up in disarray on Friday, the closing day, the bitterness of that warring factions seemed to have placed the future existence of the World Trade Organisation in peril.

THE MAIN PLAYERS

At least three different main pressure groups were present at Seattle and trying to get their projects across. But as rapidly became apparent, even within these main groupings, the choristers were not all singing from the same hymn sheet. First and foremost were the developed countries, eager to spread the doctrine of universal free trade, and the blessings which they said that it offered to mankind. But even among the developed countries there was extreme friction. The United States wanted to run the show, and tried from the outset to fix the agenda to suit its own ends. But not for the first time, Trade Secretary Charlene Barshevsky was considered by some to be rather too strident in setting out her stall, and her position as chairperson was not well received in all quarters. There was conflict between the United States and the next largest economic grouping, that of the European Union. Washington nurtured a strong ambition to get the markets of the fifteen member states opened up to its exports of agricultural produce; in this she was supported by the rest of the food producing Cairns Group of countries. But the EU would have nothing of this, and flatly refused to allow any concessions on the common agricultural policy. Indeed, Pascal Lamy the EU trade minister was soundly berated by the EU ministers present in Seattle for even daring to make overtures to the Americans about horse trading concessions on the point. The dissension could be broken down even further, for it was obvious

in the run up to the negotiations that there had been the utmost difficulty among the member states in arriving at any common kind of negotiating stance. The next sizeable grouping was that of the developing states, some of which were said to be so poor that they were unable to send any form of representation to Seattle. Many have open doubts about the benefits of being in the WTO at all, and some are beginning to say that not only can they not meet the obligations which they have undertaken as a result of the previous Uruguay round of the General Agreement on Tariffs and Trade (GATT), but that they are considering pulling out of the organisation altogether. Certainly the top dogs in the WTO did not set out a stall which was in any way designed to appear attractive to this underdeveloped grouping. The major developed countries appeared only concerned to force the developing world to open up their markets completely, and to remove all barriers to trade in services. This would allow western countries to enter their domestic markets of banking, insurance and pension provision. But to the disgust of the under-developed world, the advanced economies were not prepared to make any realistic concessions; the things which these poorer states were really after at Seattle was an opening up of markets in the richer parts of the world to their agricultural products, and also to their low grade manufactured goods such as textiles. But they quickly discovered that the developed world had not the slightest intention of making any concessions on these points. Worse still, the underdeveloped representatives found that Ms Barshevsky was attempting to organise the meetings on the most important and sensitive subjects on a basis which would exclude the poorer states, and limit participants to a kind of club within a club, an inner circle of the great and the good who expected to run the show exactly as they wanted to. So incensed were these underdeveloped states that for virtually the first occasion in international relations, they stood together and said that they were simply not going to be participants in a game of this kind. So the intransigence of the Afro-Caribbean states was a major factor contributing to the collapse of the talks in December.

The third major element in the drama was the grouping of protesters broadly categorised as the non-governmental organisations (NGOs). No one really knows exactly how many organisations were represented at the WTO demonstrations, let alone the number of participants. There were those with environmental concerns, and others whose chief motive for being there was to protest against perceived job destruction. It is not the function of this column to be judgmental; on issues of this kind strict objectivity is called for. Suffice to say that it does not seem helpful to attempt to demonise either those elements advocating the extension of free trade, and those who protest that they wish to cut it back. As we stand at the beginning of a new century, the changes which are taking place are terrifyingly swift, and would have been unforeseeable even fifteen years ago. Where are the new technologies going to take us all? How will mankind cope with climatic changes, or the rapidly ageing populations around the world? There are no obvious answers to these questions, and those who claim to be able to foretell the future are treated with some suspicion. There is undoubtedly resistance to further change which derives from these concerns. Unfortunately if decisions are taken which prove subsequently to have been very wrong indeed, they may prove to be irreversible. But against that it must be acknowledged that the degree of trade liberalisation which has taken place this far has on the whole brought about a good deal of benefit to the states which have been concerned in it.

DON'T SHOOT THE PIANIST!

Some criticism has been directed at Mike Moore, who found himself in the hottest seat of all at Seattle, as the incoming Director-General of the World Trade Organisation. As chief executive he took the blame for almost everything which went wrong, but much of this was misdirected. After all, he had only come into the job in September, in a year in which the two major economic blocks – the USA and the EU – had been at each other's throats with bitter arguments over international trade disputes which they were litigating in the WTO dispute resolution forum. But the reality is that no one could have brought the warring factions together. As the WTO is at present constituted, the issues are too deep seated to have been resolved in the run up to Seattle. Indeed, it is probably all to the good that they have been dragged out into the open in this way, because after so much plain speaking, there can be no excuse now for failure to address them. President Clinton was also subjected to much criticism after the event for his handling of the issues, but it is unrealistic to have expected much else in a US electoral year once the demonstrators were on the streets.

A WORD FROM MIKE MOORE

Understandably Mike Moore has been keeping a low profile since Seattle, but he has issued a brief statement. He says that despite the setback, the WTO objectives remain unchanged. He has put forward four main points:

1. To continue to negotiate the progressive liberalisation of trade;
2. To put trade to work more effectively for economic development and poverty alleviation;
3. To confirm the "central role that rules based trading system plays for our member governments" in managing their economic affairs cooperatively;
4. To organise the WTO along lines which more truly represent the needs of all its members.

This seems to reflect an appreciation of the urgent need for the WTO to take greater account of the disenchantment of much of its underdeveloped membership. But he also needs to pay still more urgent attention to the open hostility to the current WTO agenda which is increasingly being expressed within the populations of member states. The publicity which minority organisations obtained for their causes on the streets of Seattle has caused many more individuals to question some of the consequences of what the WTO is about. Mr Moore needs to start taking their concerns on board if he is to have any chance of success during his tenure of the D-G's seat. His background does make him very well placed to understand what is being said by non-governmental organisations concerned with environmental and employment issues. Before turning to politics in New Zealand he was a construction worker, an employee in the meat industry, a social worker and a printer, which is a background quite unlike those of all previous holders of the position of Director-General of the WTO or its GATT predecessor. He has been particularly concerned during his political career with fostering closer relations between New Zealand and Asian countries, a factor which may well have led to his acceptance as a compromise candidate to break the deadlock caused by the retirement of Renato Ruggiero. ❑

INDEPENDENT TRUSTEES

Ross Holmes, Ross Holmes Lawyers, Auckland

continues the debate on whether independent trustees are needed

The recent paper delivered by Mr John Hart "Design and Content of Trust Deeds" published in *Trusts Conference* (New Zealand Law Society 1999) has again raised the question of whether there is a need for "independent trustees".

He stated (without referring to any authority) at pp 129-130:

> There is an increasing awareness in New Zealand of the desirability of having independent trustees, which arises from concerns that a trust can be attacked as being a sham, or a bare trusteeship, or an agency relationship, in circumstances where the settlors have not sufficiently divested themselves of ownership and control of trust assets ....
>
> In the writer's opinion there has been a degree of scare-mongering in relation to sham trust issues ....
>
> One commentator [although he did not name me, he was referring to me] takes the view that there is no need to have independent trustees because, as a matter of fact, so-called independent trustees in New Zealand are always mere puppets of the settlors. Hence having those alleged independent trustees adds nothing to the structural integrity of the trust. In the writer's opinion, however, this analysis begs the question. The better view is to suggest that not only should independent trustees be appointed, but they should exercise their functions in a proper manner and not merely be a cypher for the settlors ....
>
> It is established law that if a settlor purportedly establishes a trust with that settlor as sole trustee exercising full discretionary powers, and if the settlor is also a beneficiary of the trust, then the rights vested in the settlor in the capacity as trustee of the trust constitute a general power of appointment which, by definition, effectively means the assets have never been divested by the settlor.
>
> [If joint settlors are also the sole trustees and beneficiaries that does not constitute] some kind of joint general power of appointment ... as the existence of a general power of appointment focuses on a single individual, and given the need for the two spouses to agree as trustees in exercising any of their powers under the trust deed, arguably a proper trust relationship has been created which does not constitute a general power of appointment.

You cannot generalise in the estate planning field, as Mr Hart has done, and be correct. To do so without a detailed analysis supported by reference to relevant authorities begs the question. Bald unsupported statements such as these, serve only to create further confusion in the legal profession. Whether an independent trustee is appropriate will depend on what the settlor's objectives are, and how they can best be achieved.

If, as Mr Hart says, there "is an increasing awareness in New Zealand of the desirability of having independent trustees, which arises from concerns that a trust can be attacked as being a sham, or a bare trusteeship, or an agency relationship, in circumstances where the settlors have not sufficiently divested themselves of ownership and control of trust assets" that is a matter of concern, as such a situation can only have arisen due to a misunderstanding of the law in these areas.

WHY APPOINT "INDEPENDENT TRUSTEES"?

There is nothing to prevent the appointment of an independent trustee, and in some cases it will be necessary to do so in order to best achieve the settlor's objectives. However there is no legal need to do so, so long as the settlor is not the sole trustee and the sole beneficiary.

A trust with the settlor as the sole trustee or one of the trustees is legally valid, so long as the settlor is not the sole beneficiary. This was decided by the Privy Council in *CSD v Perpetual Trustee Co Ltd* [1943] AC 425, [1943] 1 All ER 525. The decision was followed by the House of Lords in *St Aubyn (LM) v Attorney-General (No 2)* [1951] 2 All ER 473) and in *Oakes v CSD* [1954] AC 57, [1953] 2 All ER 1563. The Trustee Act 1956 (New Zealand) which applies to trustees of wills, also applies to trustees of trusts. It contains no restriction on the appointment of a sole trustee.

The divesting of ownership and control of assets by a settlor is not related to the presence or absence of independent trustees.

In *Oakes v CSD* [1954] AC 57, [1953] 2 All ER 1563 the settlor was the sole trustee and one of five beneficiaries together with his four infant children. The Privy Council held that under the trust the whole beneficial interest in the property had passed to the settlor and his children. Lord Reid in delivering the judgment of the Privy Council stated at p 1567:

> If property is held in trust for the donee, then the trustee's possession is the donee's possession for this purpose, and it matters not that the trustee is the donor himself. The donor is entirely excluded if he only holds the property in a fiduciary capacity and deals with it in accordance with his fiduciary duty.

Once the assets have been validly transferred to the trustees of the trust, the trustees thereafter control the assets as trustees not as settlor, even if the settlor is the sole trustee as in the *Oakes* case.

The use of too many or the wrong sort of words, could make the intended trust invalid, if as a result basic trust law requirements for the validity of a trust do not exist: the trustees must at all times be accountable to the beneficiaries, and that they must have the ability to bring an action against the trustees to enforce the trust: *Re Cook* [1948] Ch 212; *Re Heberley* [1971] NZLR 325, at p 334 per Turner J.

BONA FIDE TRUSTS

In *Marac Finance Ltd v Virtue* [1981] 1 NZLR 586 (CA) it was established that where the essential genuineness of the documentation is challenged a trust may be treated as a sham only:

- where the document does not reflect the true agreement between the parties in which case the cloak is removed and recognition given to their common intentions; and
- where the document was bona fide in inception but the parties have departed from their initial agreement and yet have allowed its shadow to mask their new arrangement.

Once it is established that a transaction is not a sham its legal effect will be respected: *Marac Finance Ltd v Virtue* [1981] 1 NZLR 586 (CA).

On the other hand if there is no intention to create a trust, there is no trust regardless of the form of words used, and regardless of whether there are independent trustees.

No one has ever suggested, as alleged by Mr Hart, that, as a matter of fact, so-called "independent" trustees in New Zealand are always mere puppets of the settlors. If trustees exercise their functions in a proper manner, and there is an intention to create a trust, no problems are created by the presence or absence of "independent" trustees. The cases establish that far more trusts with "independent" trustees have been set aside as "shams", than trusts without independent trustees.

It is a fundamental requirement for the existence of a trust that the trustee is under an equitable duty to someone else. Accordingly a trust will not be legally effective where a sole trustee claims to hold property on trust for himself or herself as sole beneficiary: *Morice v Bishop of Durham* (1805) 10 Ves 522, *Re Selous, Thomson v Selous* [1901] 1 Ch 922, *Re Cook (deceased), Beck v Grant* [1948] 1 All ER 231, [1948] Ch 212, *Re Annett, Annett v Taylor* [1956] NZLR 929 and *Re Cook* [1948] Ch 212, *Re Heberley (deceased)* [1971] NZLR 325; and H A J Ford and W A Lee, *Principles of The Law of Trusts*, 3rd edition, 1996 at para 5010. But there is no prohibition on a person settling property upon a trust of which he or she is a trustee and also one of a number of discretionary beneficiaries.

POWERS OF APPOINTMENT?

If a settlor is a sole trustee and a beneficiary of the trust, are the rights vested in the settlor as trustee a general power of appointment which means the assets have never been divested by the settlor? Not only is this contrary to the decision of the Privy Council in *Oakes v CSD* [1954] AC 57, [1953] 2 All ER 1563, but it incorrectly classifies all the powers of a trustee of a discretionary trust as a general power of appointment.

A trust and a power of appointment differ in that beneficiaries under a trust have rights of enforcement which mere objects of a power lack. So long as basic trust law is observed, the fact that a settlor is also the sole trustee will not on its own result in there being no trust.

The authority upon which Mr Hart relies may be the seminar paper delivered by Mr Denham Martin "Advanced Trusts" (New Zealand Society of Accountants, 1995), at p 10, which after referring to a passage from the 2nd edition of H A J Ford and W A Lee, *Principles of The Law of Trusts* states:

> if a sole person is given unlimited powers over trust property by a settlor, there may be a possibility that no trust exists. A requirement for two trustees to exercise the powers cures this deficiency: *Re McEwan* [1955] NZLR 575.

It appears that Mr Martin relied upon the following passage from H A J Ford and W A Lee, *Principles of The Law of Trusts*, 2nd edition, which is now included in the 3rd edition at para 5020 footnote 1:

> A power conferred on two or more trustees does not raise the problem: *Re McEwan* [1955] 575.

The case of *Re McEwan* is not authority for the contention advanced by Mr Martin. *Re McEwan* in fact establishes that a trust and a power of appointment differ. The case concerned a mere discretionary power of appointment of beneficiaries given to two trustees of a will to appoint as beneficiaries "such person or persons [including the trustees] as my Trustees may by any deed or deeds at any time or times within a period of ten years from the date of my death" and in default of appointment to his son. Gresson J held this was a general power of appointment. In doing so he held that a trust and a power of appointment differ. He stated at pp 583-584:

> It must ever be remembered that a trust and a power of appointment differ. There is no duty to exercise a discretionary power: it is not a trust; and the general principles which make a trust void for uncertainty since no one can enforce it, have no application. It must be remembered too, as was said by Lord Halsbury LC in *Quinn v Leatham* [1901] AC 495 that:
>
> > A case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. (Ibid 506.)
>
> In this case ... there is a mere power, not, it is true, exercisable by a single person in any way which he may think fit, for it requires the concurrence of two minds; but it is a mere power and not a trust. Whether it could be validly exercised by the survivor of the two donees I have not been asked to determine, and I make no decision in that regard; but I do decide that there has been a valid testamentary disposition of the property comprised in the residue.

CONCLUSION

A trust which meets the requirements of trust law for validity, which the parties intend to take effect, and which takes effect in accordance with its tenor, cannot be a sham, or a bare trusteeship, or an agency relationship for trust law purposes (although statutes may for the purposes of that statute treat the trust as the "alter ego" of the settlor), whether there are or are not independent trustees.

The chapters I am writing for Butterworths text on Trusts (to be published in 2000) will deal with these issues in greater detail. ❑

"PRIME NECESSITY" NOT NECESSARY

Justine Kirby, Chapman Tripp, Wellington

discusses Vector v Transpower *and the doctrine of prime necessity*

The Commerce Act 1986 promotes competition in markets in New Zealand. To this end, it establishes a generic regime to regulate behaviour and acquisitions threatening competition. Despite – or perhaps because of – its simplicity, the Act is often subject to challenge. As well as regular reviews of its provisions and criticisms of major decisions, some litigants have tried to side-step the Act by invoking a common law doctrine. However, the Court of Appeal has recently upheld the primacy of the Act, rejecting the common law doctrine of "prime necessity" in *Vector Ltd v Transpower New Zealand Ltd* 31 August 1999, CA32/99.

BACKGROUND

Vector Ltd (formerly Mercury Energy Ltd), an electricity distribution company, buys transmission services from Transpower New Zealand Ltd. Transpower, a state-owned enterprise, owns and operates the national grid which transmits electricity from generators to users (electricity distributors and large industrial users). Transpower has a practical monopoly over transmission services.

Vector argued that the common law doctrine of prime necessity required Transpower, as a monopoly supplier of essential services, to supply those services on terms (including prices) that are fair and reasonable. As well as a declaration to that effect, Vector sought an inquiry as to its damages and repayment of the difference between the prices it had paid and fair and reasonable prices. The High Court struck out this cause of action: *Mercury Energy Ltd v Trans Power New Zealand Ltd* (1999) 8 TCLR 554. (Mercury also relied on s 36 Commerce Act, which prohibits use of a dominant position in a market for anti-competitive purposes. The High Court did not strike out that cause of action, but gave Mercury leave to file an amended statement of claim.) Vector appealed to the Court of Appeal.

PRIME NECESSITY IN NEW ZEALAND LAW

Prime necessity is commonly traced back to Sir Matthew Hale's *Treatise de Portibus Maris* in the 17th century, and a line of authority beginning with two early nineteenth century cases (*Bolt v Stennett* (1800) 8 TR 606, 101 ER 1572 and *Allnutt v Inglis* (1810) 12 East 527, 104 ER 206). The judgment of Richardson P, Gault, Blanchard and Tipping JJ, delivered by Richardson P, noted early New Zealand cases referring to the doctrine, as well as the Privy Council case of *Minister of Justice for the Dominion of Canada v City of Lévis* [1919] AC 505 (which coined the term "prime necessity").

Richardson P also referred to *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd* [1994] 1 NZLR 551, 557, where it was common ground between the parties that Electricorp as a monopolist was obliged to supply, and to do so at fair and reasonable prices. The Privy Council left open whether the Courts would fix a fair and reasonable price (*Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 387).

The Court concluded that the doctrine had become part of New Zealand common law. While its scope has not always been clear, Richardson P stated that it "embodies a principle that monopoly suppliers of essential services must charge no more than a reasonable price" (pp 22-23). His Honour was nevertheless careful to place the doctrine in its historical context, stating at p 23:

> The doctrine is a somewhat blunt instrument. It speaks of a bygone age where legislation had a limited role. It gives no guidance as to how the doctrine is to operate to fix prices in the complex environment of a modern economy and extensive legislative landscape. It is perhaps best viewed as a backstop common law remedy applied in the absence of other remedies and where there are no contra-indications to its use.

EFFECT OF THE COMMERCE ACT

Richardson P then examined how legislation affected the common law doctrine ie:

- Does legislation displace the doctrine?
- Does any displacement abolish the doctrine, or is it merely held in abeyance until such legislation is repealed?

Vector argued that the doctrine could co-exist with the Commerce Act, as s 36 of the Act regulated anti-competitive behaviour, not supply obligations independent of competition. The Court rejected this argument, holding that the doctrine could not operate here as it was precluded by the effect of the Commerce Act (which was reinforced by the effect of the State-Owned Enterprises Act 1986), with Richardson P stating at p 26:

> By [the Commerce Act] Parliament clearly and deliberately moved away from earlier regulatory approaches to light handed regulation. The selection of a particular form of regulation involves consideration by government and Parliament of fundamental issues of social and economic policy and obviously includes assessments of the trade-offs between the costs associated with particular regulatory regimes and the benefit they are expected

to deliver. If upheld in this case prime necessity would involve heavy handed regulatory intervention on Transpower's pricing, through the Courts and potentially on a day to day basis at the suit of individual customers of Transpower, of a type which Parliament decided it did not wish to impose; and to do so would be inconsistent with the purpose and scheme of the Commerce Act.

The Court also recognised that "[p]rice control through the Courts is a form of state control" which would be inconsistent with the process for price control in Part IV of the Commerce Act (p 26).

The decision in this case is welcome. Although the prime necessity doctrine has not loomed large in recent competition law cases, its possible application has added to uncertainty faced by some suppliers (especially utility suppliers) in setting and enforcing prices or refusing supply. The inevitable price of such uncertainty is greater cost for the supplier and, ultimately, consumers.

price setting is a protracted and complex matter, not suited to the adversarial process and would have to be done on a regular or continuous basis

DOWN BUT NOT OUT

While the Court of Appeal has all but excluded the application of the doctrine while the Commerce Act remains in force, the judgments leave open its future application. Firstly, the judgment delivered by Richardson P does not expressly state whether the doctrine was abolished by the Commerce Act or merely displaced while the Act is in force. Thus, on the repeal of the Commerce Act – or presumably a relevant amendment – litigants could seek to have the doctrine revived.

Secondly, Thomas J in his separate judgment, while agreeing that the doctrine was excluded in this case as being inconsistent with the Commerce Act, discussed "the further development of the doctrine in New Zealand" (p 29). His Honour considered that the doctrine should be reformulated to reflect modern commercial and economic conditions, with its objective being to curb the exploitation of monopoly power (p 31). This reformulation may also have been motivated by the juridical basis of the prime necessity and related doctrines being unclear. (For a comprehensive discussion of the case law, see Michael Taggart, "Public Utilities and Public Law" in *Essays on the Constitution*, ed Philip Joseph, Brooker's, 1995.)

Recognising the difficulties in the Court acting as a price-fixing authority, Thomas J advocated shifting the focus from setting a fair and reasonable price to "whether [monopoly] power was being abused by the monopolist in refusing to supply or otherwise placing supply in jeopardy", with an unjustifiable price pointing to an abuse. He concluded at p 32:

> [T]he question as now framed, that is, whether the prices at which the essential services are supplied are such as to negate or undermine the obligation to supply or are so extortionate as to amount to an abuse of the monopolist's power is a much narrower question than the question of what is a fair and reasonable price.

This reformulation bears obvious parallels to administrative law principles, where Courts purport not to dictate a decision maker's decision, but can invalidate a decision if it is outside the range of decisions that are "reasonable". (See, eg *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA), 131-132.) While the Courts would not set prices under this reformulation, it is nevertheless difficult to see how they could avoid analysing factors relevant to price – raising the very objections applying when Courts set prices.

As recognised by the High Court and Court of Appeal in this case, price setting is a protracted and complex matter, not suited to the adversarial process (involving allocation and subsidisation issues for all customers) and would have to be done on a regular or continuous basis (pp 17 and 28). Also, the possibility of judicial error should make Courts reluctant to set or evaluate prices (Areeda and Hovenkamp, *Antitrust Law*, vol 3, para 723b, in the context of predatory pricing).

In so far as Thomas J proposes a general test based on "abuse" of monopoly power, this raises similar difficulties to those that arise in determining whether a person has "abused" a dominant position. See *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC).

COURTS AS PRICE SETTERS?

Leaving aside the effect of the Commerce Act on the common law, the more fundamental issue is whether the Courts should entertain a cause of action based on the prime necessity doctrine at all. Once the Court of Appeal decided that the Commerce Act displaced the doctrine it was unnecessary to decide whether, but for this displacement, the doctrine should remain part of New Zealand law (although it is clear that Thomas J thought that it should).

The Courts' ability to develop the common law is often used to extend judicial power into new arenas. However, Courts can also abolish common law doctrines that have become inappropriate in light of other developments. Thomas J, speaking extrajudicially, has stated:

> No clear dividing line exists between the function of the legislature and the function of the Judge in respect of lawmaking. What is certain is that Judges cannot abdicate their responsibility to keep the law abreast of the times. ... The common theme of Canadian cases is that, while major and complex changes to the law with uncertain ramifications should be left to the legislature, the Courts can and should make changes to the common law to reflect the changing social, moral and economic fabric of society. ("A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993) 23 VUWLR Monograph 5, 28-29.)

One relevant consideration is that over time, and often as a matter of historical accident rather than principle, certain matters will be accepted to be within the province of the Courts; others, the legislature and/or government. New Zealand is unusual in that utilities supplying essential services were traditionally government-owned and subject to heavy handed regulation of prices and other matters. Thus, the reason the prime necessity doctrine has been applied or discussed only a few times in New Zealand cases is that there was little need for it (p 24, and Taggart, pp 214-215 and 254-259).

The late 1980s and 1990s saw corporatisation and privatisation of state-owned businesses together with the introduction of light handed regulation. While some argue that such reforms open the door for greater use of the prime

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ACCESS TO ESSENTIAL FACILITIES IN AUSTRALIA

Frank Zumbo, University of New South Wales

with a different answer to the question of regulating utilities

With the privatisation of public utilities in both New Zealand and Australia, the issue of access to essential facilities with natural monopoly characteristics has emerged as a key aspect of the debate concerning how best to promote competition in industries previously dominated by government monopolies. As they have been privatised or franchised, attention has turned to whether access to essential infrastructure facilities operated by those monopolies should be regulated, and, if so, by what means.

In Australia, such issues have been dealt with through the enactment of statutory access regimes. In particular, the federal, state and territory governments have, in keeping with their inter-governmental agreement on the need to allow access to essential facilities, enacted statutory access regimes. Australia hence has an increasing number of statutory access regimes for dealing with such facilities as gas pipelines, electricity grids, railways, airports, telecommunication services and shipping channels.

The existence of such regimes clearly impacts both on the ownership or control of the facilities and on intending users. Where a party operates an Australian essential infrastructure facility, that party will need to be aware of how a relevant statutory access regime impacts on the facility. Indeed, an operator of an essential facility will not only need to appreciate how the facility may become subject to an access regime but, more importantly, whether it should submit an undertaking to the appropriate regulatory authority in relation to the terms and conditions for granting access to the facility.

Significantly, the regulator's acceptance of an undertaking by the provider of the service will enable that provider to have a degree of certainty concerning the terms and conditions on which it will provide access to the facility. In the absence of an appropriate undertaking, the provider of the service may face the possibility of access to the facility being made subject to a statutory access regime and a regulator arbitrating the terms and conditions of access.

Similarly, a party wishing to commence operations in Australia requiring the use of an essential facility should give consideration to the role of access regimes in securing the use of such facilities. Such consideration may be critical to that party's ability to compete in the Australian market and, in particular, to the level of capital required to commence Australian operations.

THE ACCESS REGIMES

The adoption of a statutory framework for dealing with access to services provided by Australian essential facilities has been a central feature of the national competition policy reforms implemented in recent years by the Australian governments. This regulatory framework – found in Part IIIA of the Federal Trade Practices Act 1974 and comparable state and territory legislation – has introduced a new dimension into Australian trade practices law. While s 46 of the Federal TPA remains relevant where an organisation with a substantial degree of market power refuses to supply a service, the enactment of Part IIIA and comparable state and federal legislation has established a statutory mechanism for gaining access to services provided by Australian essential facilities.

The types of facilities covered by Part IIIA and comparable legislation include railway lines, gas pipelines, electricity grids, and airports and related infrastructure such as freight handling facilities. An industry-specific access regime for telecommunication services has been included in Part XIC of the Federal TPA.

In general, access legislation covers those services provided by infrastructure facilities having natural monopoly characteristics. The facilities, which are considered uneconomic to duplicate, represent bottlenecks in the economy. Access to services provided by the facilities is seen as integral to an organisation's ability to compete in the particular market. For example, an organisation in control of gas supplies will need to either build its own pipeline or have access to another organisation's pipeline to transport the gas to the metropolitan areas in which the gas will largely be sold. Where the pipeline comes within the terms of a statutory access regime, the organisation can seek access to the pipeline to transport its gas supplies.

Access legislation raises issues for not only organisations wishing to seek access to services, but also those organisations which operate the facilities. Either way, an organisation will need to assess the relevance and potential impact of Part IIIA and comparable state and territory access legislation.

Step one: does Part IIIA apply?

The first step in assessing the relevance of Part IIIA involves identifying the particular service or services that may be caught by Part IIIA. Care must be taken to distinguish between the provision of a service and the infrastructure facility involved. This distinction which underpins Part IIIA makes it necessary to identify the relevant service with precision.

Once the relevant service is identified, an assessment will need to be made as to whether or not it is covered by the definition of service found in s 44B of the *Trade Practices Act*. Under that definition:

"service" means a service provided by means of a facility and includes:

(a) the use of an infrastructure facility such as a road or railway line;

(b) handling or transporting things such as goods or people;

(c) a communications service or similar service;

but does not include:

(d) the supply of goods; or

(e) the use of intellectual property; or

(f) the use of a production process;

except to the extent that it is an integral but subsidiary part of the service.

This definition is the key to the operation of Part IIIA. In order to seek access under Part IIIA, the particular service must come within the definition. The exceptions must be carefully noted as Part IIIA is not intended to cover goods, intellectual property or production facilities unless they are a necessary part or aspect of the provision of the service. Clearly, since the focus of Part IIIA is on the provision of a service, any access to goods, intellectual property or production facilities is only relevant to the extent that it is necessary for gaining access to the primary service. Importantly, while a service that does not fall within the definition of service is not covered by Part IIIA, consideration may still need to be given to the possible application of s 46 of the TPA or a state or territory access regime.

Indeed, s 46 continues to be relevant to any organisation seeking access to goods or services. That provision relevantly provides:

(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

Where a refusal to supply is found in breach of s 46, the Court may order the organisation to supply the particular good or service in question. In such circumstances, the purpose for the refusal to supply becomes the focus of the inquiry rather than whether or not the good or service has natural monopoly characteristics or is uneconomic to duplicate. Significantly, s 46 deals with anti-competitive conduct, while Part IIIA is intended to be pro-competitive in its operation.

Accordingly, s 46 is geared towards penalising anti-competitive rather than providing a mechanism for facilitating access to services provided by natural monopolies. More importantly, a judicial forum may not be the best forum for determining issues such as the price, terms and conditions of the access, particularly given that a Court is ill-equipped to supervise any ongoing supply arrangement. Nevertheless, s 46 provides another mechanism for securing access, particularly in those areas excluded under the Act's definition of service.

Where a refusal to supply is found in breach of s 46, the Court may order the organisation to supply the particular good or service in question

Step two: declaration of services

Where the definition of service is satisfied, an organisation seeking access to a service may make a written application to the National Competition Council (NCC). The NCC – established as part of Australia's national competition policy reforms – is required under Part IIIA to consider the application and to make a recommendation to the designated Minister on whether or not the service should be declared. While the designated Minister will ultimately make the decision on whether or not to declare the service, the NCC plays a significant advisory role in relation to the application.

Upon receipt of an application under Part IIIA, the NCC will, as a matter of practice, make available the application itself and an issues paper it has prepared regarding the application. The material is publicly distributed and made available through the NCC's website http://www.ncc.gov.au. In addition, the NCC will meet the parties and call for submissions from interested parties.

Following this consultative process, the NCC will decide whether or not to recommend the declaration of the service. For example, the NCC may, under s 44F(3), decide to recommend against the declaration of the service on the basis that the application was not made in good faith. Similarly, the NCC is prevented from recommending the declaration of a service that is the subject of an access undertaking that has been accepted by the Australian Competition and Consumer Commission (ACCC) under s 44ZZA of the Act.

A further restriction on the NCC's ability to recommend the declaration of a service relates to a situation where the service is covered by a state or territory access regime considered to be an effective access regime by the Federal Treasurer under s 44N. In these circumstances, the NCC must follow the Federal Treasurer's decision unless it believes that, since the Treasurer's decision was published, there have been substantial modifications to the access regime or to the principles in the relevant inter-governmental agreement governing the development of state and territory access regimes.

In the absence of a restriction on the NCC's ability to make a positive recommendation, the NCC can recommend to the designated Minister that the service be declared. In doing so, the NCC must be satisfied of the all the following matters outlined in s 44G(2):

(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy;

(d) that access to the service can be provided without undue risk to human health or safety;

(e) that access to the service is not already subject of an effective access regime;

(f) that access (or increased access) to the service would not be contrary to the public interest.

These matters provide the focal point in relation to whether or not a service will be declared under Part IIIA. The matters are relevant to both the making of the NCC's recommendation and the decision by the designated Minister on whether or not to declare the service. Since all six matters need to be satisfied, an assessment of the matters provides a very good indication of whether or not the service is likely to be declared.

Step three: decision by Minister

Once a declaration recommendation is received from the NCC, the designated Minister is required to decide whether or not to declare the service. While the designated Minister will ordinarily be the Federal Treasurer, provision is made in s 44D for the Premier of a state or the Chief Minister of a territory to be the designated Minister where a state or territory is the provider of the service.

In making a decision, the designated Minister is prevented from declaring a service that is the subject of an access undertaking that has been accepted by the Australian Competition and Consumer Commission (ACCC) under s 44ZZA of the Act. Likewise, where the service is covered by a state or territory access regime considered to be an effective access regime by the Federal Treasurer under s 44N, the designated Minister must follow the Federal Treasurer's decision unless it believes that there have been substantial modifications to the access regime or to the principles in the relevant inter-governmental agreement governing the development of state and territory access regimes.

In the absence of a restriction under Part IIIA, the designated Minister can declare the service if, as in the case of the NCC, the Minister is satisfied of all of the following matters:

- access (or increased access) will promote competition in at least one other market;
- it would be uneconomical for anyone to develop another facility to provide the service;
- the facility is of national significance;
- access can be provided without undue risk to human health and safety;
- the service is not already the subject of an effective access regime; and
- access (or increased access) would not be contrary to the public interest.

The designated Minister is required under s 44H(7) to publish the declaration or the decision not to declare the service. The Minister is also required to give reasons for the decision to the provider and the party making the application. In practice, the Minister has made public the reasons for decisions made under Part IIIA. The Minister can take upwards of 60 days after receiving the NCC's recommendation in which to make a decision. If a decision is not published in that period, the Minister is taken to have (i) decided not to declare the service, and (ii) published that decision not to declare the service.

The provider or the party making an application each have 21 days after the publication of the Minister's decision in which to seek a review of that decision before the Australian Competition Tribunal (the Tribunal). In reviewing the Minister's decision, the Tribunal has the same powers as those of the designated Minister and is able to affirm or set aside the Minister's declaration or decision not to declare the service. A declaration made or varied by the Tribunal will be taken to be a declaration by the designated Minister for the purposes of Part IIIA.

Once the designated Minister declares a service under Part IIIA, a party seeking access is able to privately negotiate with the provider of the service

Step four: access to declared services

Once the designated Minister declares a service under Part IIIA, a party seeking access is able to privately negotiate with the provider of the service. If a private agreement is reached on the issue of access, the parties can apply to have the agreement registered by the ACCC. The ACCC must consider the application and, in doing so, is required under s 44ZW(2) to take into account such issues as the public interest and the interests of all parties who have rights to use the service.

Where the ACCC decides to register the agreement, the parties can, pursuant to s 44ZY, enforce the agreement through the Federal Court of Australia. Where, however, the ACCC decides not to register the agreement, a party to the agreement has 21 days after the publication of the ACCC's decision in which to apply to the Tribunal for a review of that decision. In conducting its review, the Tribunal has the same powers of the ACCC and is able to either register the agreement or affirm the ACCC's decision not to register the agreement.

Failing an agreement on access to the declared service either party may notify the ACCC of an access dispute. Where an access dispute is notified, the ACCC is empowered to arbitrate the dispute. Following the arbitration, the ACCC is required under s 44V to make a written determination on access to the service. In making that determination, the ACCC must take into account the matters specified in s 44X. These matters include:

- the legitimate business interests of the provider;
- the public interest;
- the interests of all parties who have rights to use the service;
- the direct costs of providing access to the service;
- the value to the provider of extensions whose cost is borne by someone else;
- the operational and technical requirements necessary for the safe and reliable operation of the facility;
- the economically efficient operation of the facility.

While the ACCC is able to deal with any matter relating to access to the service, there are a number of restrictions imposed on the ACCC in making its determination. For example, under s 44W(1), the ACCC's determination cannot have the effect of:

- preventing an existing user from obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements;
- preventing a person from exercising a right to obtain a sufficient amount of the service;
- depriving a person of a protected contractual right;
- allowing a third party to become a part owner of the facility without the consent of the provider of the service;
- requiring the provider of the service to bear the cost of extending the facility or maintaining extensions of the facility.

Importantly, the ACCC's determination does not have to require the provider to grant access to the service. Before making a determination the ACCC must give the parties to the arbitration a draft determination. Once the determination is made, the ACCC is required to give the parties its reasons for making the determination.

A party to the ACCC's determination has 21 days after the making of the determination in which to apply to the Tribunal for a review of that determination. In conducting its review, the Tribunal has the same powers of the ACCC and is able to either affirm or vary the ACCC's determination.

A pre-emptive strike

A provider of a service potentially covered by Part IIIA may pre-empt an application to declare the service by giving the ACCC a written undertaking under s 44ZZA in connection with the provision of the access to the service. Since a service cannot be declared if it is subject to an access undertaking, a provider of a service may use an undertaking to outline its price, terms and conditions of granting access.

Although the ACCC can take into account any matter it thinks relevant in deciding whether or not to accept an undertaking, the process does allow a provider to have an input into the circumstances in which access to the service will be granted. In some cases, an industry body may also give a written code to the ACCC setting out rules for access to a service. This has occurred with the National Electricity Code.

State and territory access regimes

Part IIIA is only one of the statutory access regimes that may apply to services provided by Australian essential facilities. For example, a service may be covered by a state or territory access regime or an industry-specific federal access regime such as the one established for telecommunication services.

While the telecommunications access regime is administered by the ACCC, a state or territory based regime will be administered by the competition regulator in the particular state or territory.

A state or territory may develop an access regime in relation to services provided by facilities located in the particular state or territory. Importantly, Part IIIA is not intended to apply services covered by state or territory access regimes considered to be effective access regimes. A service that is covered by an effective access regime cannot ordinarily be declared under Part IIIA.

CONCLUDING REMARKS

The implementation of an Australian statutory framework for allowing access to services provided by essential facilities enables a party to proceed through the required steps in a bid to secure such access. By providing such a statutory framework, the Australian governments have recognised that the ability to gain access to services in appropriate circumstances is crucial to the promotion of competition in the marketplace. In such circumstances, providers and potential users of services will need to continually reassess the impact of Australia's access regimes on their business operations. ❑

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necessity doctrine (eg Taggart, pp 215 and 262-264), the better view is that in New Zealand supply and pricing issues are generally accepted to be matters regulated – to the extent that they are regulated at all – under legislative authority. Even if the Commerce Act were to be substantially amended or repealed to loosen price regulation (which is unlikely in the short run, given current government and opposition policies), this would represent a deliberate policy choice by Parliament on the extent to which prices should be regulated.

Modern economic understanding and market conditions also militate against the usefulness of the prime necessity doctrine. Developments in economic theory in the 19th and 20th centuries (reflected in the public policy not only of New Zealand but of comparable countries in the 1980s and 1990s) point towards a greater role for market forces over state regulation. Market developments such as the recent electricity reforms at the retail/distribution level (allowing retailers to compete for customers in any distribution area) and the entry of new telecommunications companies and consequent price competition also suggest that the market should be the primary means of controlling prices. Modern market structures also increase the difficulties faced by external authorities in setting or evaluating prices (set out above).

Against such developments, the prime necessity doctrine looks increasingly anachronistic. Thus, judicial lawmaking power could be appropriately used not to reformulate the doctrine for future application, but to abolish it entirely.

Incidentally, this would be consistent with the High Court of Australia's rejection of the doctrine in *Bennett and Fisher Ltd v Electricity Trust of South Australia* (1961-62) 106 CLR 492. In that case, Dixon CJ, after referring to an early English case discussing ferries, stated that "[i]t is impossible to reason from such analogies to the effect of a modern statutory authority granted to a public utility supplying electrical power and energy".

CONCLUSION

Vector v Transpower was never going to be a compelling case for applying the prime necessity doctrine: the proceedings were brought by one large corporate against another and "smack[ed] of judicial review in another guise" (pp 27 and 33). In any event, the Court's rejection of the doctrine as being inconsistent with the Commerce Act is welcome. However, as the judgments provide a basis for the doctrine being revived if there is significant legislative change, the Courts could yet assume an inappropriate price regulating role in future. ❑

COSTS AND CASE MANAGEMENT CHANGES

LITIGATION

with

Andrew Beck

NEW COSTS RULES

Litigators in the High Court are now required to think very differently about costs. Following a lengthy gestation period, the High Court Amendment Rules 1999 (SR 1999/334) introduced a radically new approach to the way in which costs will be addressed. The new RR 46 to 48G are effective from 1 January 2000, and are applicable to all proceedings, regardless of when they were commenced (the transitional provisions are discussed below).

As before, the award of costs remains fundamentally a discretionary power of the Court, and R 46(1) continues to maintain the Court's discretion as the overriding principle. The rules also adopt the traditional view that costs go with success. For the first time, however, the rules have incorporated specific guidelines as to how a proper award should be reached within the exercise of the discretion. The touchstones of the new approach (as expressed in R 47) are that:

- Costs should reflect the complexity and significance of the proceeding;
- Determination of costs should be predictable and expeditious;
- The award should be based on reasonable, not actual costs.

Complexity and significance

The rules have attempted to recognise the fact that there is a wide variety of proceedings and procedures in the High Court, and that there should not be "one price for all". This is done in two ways: proceedings have been divided into three categories, and steps in proceedings are classified in three bands.

The three categories of proceedings are (R 48(1)):

Common lawyers will start the new millennium facing two significant changes. The new cost rules and national case management procedures both came into effect in the High Court on 1 January 2000.

- Straightforward proceedings within the competence of junior counsel;
- Average proceedings requiring counsel of average skill and experience; and
- Complex proceedings which require counsel with special skill and experience.

It will clearly be important to determine at an early stage into which category a proceeding will fall; there will presumably be a tendency to start by assuming that a proceeding will fall in category 2, unless there is some justification for regarding it as simpler or more complex than the average proceeding. While this process will be obvious in respect of some types of proceedings, such as undefended bankruptcy petitions or summary judgments, in many cases there could be room for considerable debate. Rule 48(2) empowers the Court to make an advance determination of the category, and once this has been done, the category is deemed to apply throughout the proceeding unless there are special reasons to the contrary. This will almost certainly become a standard item to be addressed at the initial conference which is part of the new case management procedures (see case management discussion below), although it does not currently feature on the standard checklist.

The wording of R 48(2) suggests that it is possible for a single proceeding to fall in more than one category at various stages. It is difficult to reconcile this with R 48(1), which requires every proceeding to fall into one of the categories; there is no provision for part of a proceeding to be categorised differently and in principle it would seem undesirable. The potential for controversy and complexity is daunting, and should be avoided by addressing the issue early and conclusively.

The three bands into which steps are divided are time related. It has to be decided whether a small, normal or large amount of time is considered reasonable for the particular step, and it will then fall into band A, B or C accordingly. As with the categories, the tendency will be to start with band B, unless there is some particular factor justifying a different conclusion.

Given the fact that each step in the proceeding has to be separately considered, there is the potential for the calculation of costs to be a time consuming and disputatious exercise. There is no provision for the determination of bands in advance for a particular proceeding, and such a determination would defeat the purpose, which is to tailor the costs to the amount of work objectively required. It seems that a full bill of costs will have to be prepared by the successful party, in much the same way as for taxation in the English system. Where particular items are disputed by the other party, this will have to be resolved by the Court.

Predictability and expedition

One of the disadvantages of the traditional costs discretion is the wide variation in awards in essentially similar

circumstances. The rules have attempted to address this issue by providing a new scale, allocating a fixed value for each step taken in a proceeding. Rather than a monetary amount, the value is expressed in days and fractions of days, to which a multiplier is then applied. This makes for relatively easy updating so as to keep costs awards realistic. The multiplier values are set out in the second schedule to the rules, the time allocations in the third schedule.

As suggested above, the successful party will then be able to draw up a bill containing an appropriate dollar amount for each step in the proceeding. Where an item is not specifically provided for in the schedule, an amount has to be calculated by analogy, or failing that, in terms of the time likely to be required (R 48B(1)). The resulting bill will, subject to the matters mentioned below, represent the costs to be awarded to the successful party.

It is difficult to determine whether the apparent simplicity of the system will immediately achieve the aims of predictable and expeditious awards. There are a number of potential pitfalls. The first concerns disagreements as to the applicable band. There is no way of preventing this, but the Courts will presumably act so as to discourage it. The second is the Court's power to depart from the guidelines.

Rule 48C preserves the Court's jurisdiction to increase costs beyond those set out in the schedule, and to award indemnity costs. Increased costs may be awarded in specified situations, the rule making it clear that this conflicts with the "predictable and expeditious" principle, and is to be regarded as exceptional. The main situations in which such an order would be appropriate are where the reasonable time involved for a particular step is substantially higher than that allowed for in band C, where the other party has contributed unnecessarily to the time or expense involved, and where the party has brought a test case in the interests of other persons. Rule 48C(4) sets out the situations in which indemnity costs may be awarded, which are essentially the same as those developed by the Courts over the years.

Under R 48D, the Court may award less than the costs set out in the schedule. This would be appropriate where the time involved is substantially less than that provided in band A, where the subject matter or issues were of little significance, where there has been a partial failure on an issue which significantly increased the costs of the other party, and where the successful party has contributed unnecessarily to the time or expense of the proceeding. Once again, the rule specifies that such an order is exceptional.

The new system will have achieved its aims if parties are generally able to resolve costs issues without having to invoke the assistance of the Court. Given that such stress has been placed on the principles of predictability and expedition, it must be expected that the Courts will be reluctant to entertain squabbling over the calculation of costs, and will encourage counsel to adopt a responsible attitude. It may well be that the type of costs judgment which has become increasingly common in recent years will be a thing of the past.

Courts will be reluctant to entertain squabbling over the calculation of costs, and will encourage counsel to adopt a responsible attitude

Reasonable rather than actual costs

Recognising that the old scale of costs was entirely out of touch with reality, in the 1990s the High Court developed a new approach, paying considerable attention to the costs actually incurred by the successful party. Following the approach which has been articulated in cases such as *Holden v Architectural Finishes Ltd* (1997) 10 PRNZ 675 and *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] 3 NZLR 239, awards in the region of 60-70 per cent of actual costs became common, and substantial costs awards based on costs actually incurred were made in cases such as *Equiticorp Industries Group Ltd (in statutory management) v The Crown (Judgment No 49)* [1996] 3 NZLR 685 and *Dairy Containers Ltd v NZI Bank Ltd (No 2)* unreported, Thomas J, 22 December 1994, HC Auckland CP 911/91, 559/92. Most of the significant costs awards are helpfully set out in the table compiled by Hammond J in *Dymocks Franchise Systems* at 254-256.

The system which has been adopted in the new rules moves away from this approach. Although the rules are still underpinned by the notion of a reasonable contribution to costs, R 47(e) provides that this is not to depend on the skill and experience of the actual counsel involved, or the costs actually incurred. What has been adopted instead is a benchmark, considered to represent two thirds of a reasonable fee for a counsel of the appropriate experience. The amounts which have been adopted in the second schedule are $850, $1,300 and $1,900 per day, figures which were reached after extensive consultation with the profession.

The use of standard recovery rates has the advantage of making the total costs award for a trial far more predictable, with the result that a client can be advised what can be expected, either from a win or a loss. The end result is not unrealistic, as can be demonstrated in respect of the most basic claim falling in category 2, band B:

Commencement of proceeding:	3,900
List of documents	1,950
Production of documents	1,300
Inspection of documents	1,950
Memorandum for conferences (2)	1,040
Appearance at conferences (2)	780
Preparation for hearing	5,200
Appearance at hearing (2 days)	2,600
Sealing judgment	260
	18,980

The basic costs will obviously be increased where there are extensive interlocutory applications, but the aim of the case management system is to reduce the number of such applications by canvassing matters at the various conferences.

Interlocutory applications

A further significant development has taken place in the rules relating to costs in interlocutory applications. Rule 47(a) provides that, in principle, a party who succeeds in an interlocutory application should be awarded costs. Rule 48E goes on to require that, unless there are special reasons to the contrary, the costs of an opposed interlocutory application (other than a summary judgment application) must be fixed when the application is determined, and become payable immediately.

The rule is very obviously intended to change the traditional practice whereby costs on interlocutory applications are reserved in the ordinary course of events until the conclusion of

the proceeding. The objective seems to be to discourage interlocutory applications to some extent, and it may be no accident that this development has come at the same time as the extension of the case management system throughout the country. Use of the case management conference procedures (see below) has the effect of obviating many routine applications, and it seems likely that the number of Court appearances will be reduced.

Transitional provisions

The costs rules came into effect on 1 January this year. There are, however, provisions for proceedings which span the millennia. Rule 5(2) of the Amendment Rules provides that costs for any step in a proceeding are determined according to whether the step took place before or after 1 January 2000. Rule 5(3) defines the date on which a step is taken. There is an overriding discretion to have regard to the other basis for determining costs if the application of R 5(2) would lead to an unjust result.

In many extant proceedings, the application of the transitional rules would be very messy, particularly as the pre-2000 rules were not designed to deal with steps in proceedings. Where a proceeding is likely to continue for any length of time under the new rules, the most practical way of dealing with the situation would be to calculate costs under the new rules, and then make some adjustment if the result can be shown to be significantly different from what would have been awarded under the old rules.

Assessment of the system

Considerable thought has been put into devising the new system, and it has several potential advantages, notably in terms of greater uniformity of awards and predictability of outcomes. For conventional matters, it seems that the new approach will not result in significant changes to the amount of costs awards.

At the top end of the scale, however, costs awards on this basis are likely to be lower than those which have been made in cases such as those cited in Hammond J's table. On the negative side, the calculation of costs will be a more time consuming exercise; this may be minimised by keeping a type of running account with an ongoing record of the relevant steps as they occur. There are always dangers of the application of a scale becoming unduly rigid, but these have been reduced by the particular structure which has been chosen. There will no doubt be close monitoring of the system in its early stages to pick up any difficulties which arise.

CASE MANAGEMENT

The second important development in litigation this year concerns the adoption of case management practices throughout the country. The Case Management Pilot scheme was introduced in Auckland and Napier on 1 May 1994, and a similar scheme was introduced in Christchurch on 1 January 1998. As a result of those trials, a national case management system has been adopted for the High Court as from 1 January 2000. The rules governing the scheme are set out in a practice note, which has been widely circulated.

There are two avowed objectives of the case management system adopted in New Zealand. One is to keep proceedings under judicial supervision, managing them actively to ensure that issues can be expeditiously disposed of, and that cases do not languish in the Court system. The second is to encourage alternative dispute resolution wherever appropriate, so that a formal trial is seen as something of a last recourse.

Although the system is now operational nationally, it is not entirely uniform: registries operate on two different bases. Christchurch and Wellington operate on an "individual list" basis; other registries operate on a "master calendar" basis. In the individual list registries, cases are assigned to an individual Judge on commencement. In master calendar registries, only cases requiring significant judicial management are assigned to a particular Judge on commencement. This difference is rather unfortunate, as it tends to perpetuate the difficulties experienced by out of town counsel. It can only be hoped that, in time, a single system will be possible.

Track assignment

The case management system assigns cases onto one of three basic tracks: the immediate track, the swift track and the standard track (master calendar registries also have an assigned track for cases requiring special management). Immediate track cases are those which receive a hearing date on filing, and require little in the way of management, such as bankruptcy and liquidation proceedings. Swift track cases require priority hearing and do not involve full trial procedures. Examples are appeals, applications for judicial review and applications for interim orders. The standard track covers the remainder of proceedings. The different tracks have different timeline objectives, and are managed accordingly.

Conferences

The principal tool for managing cases is the conference, which is set up by the Court. Responsibility for progressing the proceeding to a hearing is therefore no longer solely in the power of the parties; the idea is that there are regular calls to account for what has been done (or not done) and to plan the future direction of the proceeding. The conference is preceded by an exchange of memoranda between the parties, dealing with the items specified in the checklists which are found in the Practice Note. This ensures that controversial issues can be easily identified.

Proceedings on the immediate track do not require conferences; they simply proceed on a conventional callover basis. Proceedings on the swift and standard tracks have an initial conference shortly after commencement of the proceeding. These are able to be conducted telephonically, and set the timetable for the proceeding. Proceedings on the standard track are followed up with a directions conference. This may or may not be required on the swift track.

At the directions conference of standard track proceedings, it is expected that the parties or their authorised representatives will attend. The idea is that parties should have some personal awareness of the progress of the proceeding, and that settlement negotiations should be a realistic possibility. While this is all very well in theory, it can create enormous logistical problems for little ultimate benefit, and there needs to be a degree of flexibility in the approach to such matters. Further evaluation and pre-trial conferences are held as and when required.

Once again, memoranda are exchanged in advance.

The conference system has considerable advantages. Because conferences are by appointment, there is no waiting around for matters to be called in a list. The memorandum ensures that discussion is directed, and that the judicial officer is familiar with the agenda. It is important to ensure, however, that the system is not applied rigidly – I was recently required to attend a conference before the time for filing a statement of defence had expired, which seems rather zealous.

Replacement of rules

The importance of the Practice Note cannot be overemphasised. It is now the principal set of guidelines for the conduct of civil proceedings, and has in many respects superseded the High Court Rules. One example of this is referred to in para 14.3. The old form of praecipe or fixture notice will largely fall into disuse. The fixture is allocated by the judicial officer at a conference when it is apparent that the matter is ready for hearing. Time limits provided in the rules for discovery and interrogatories have likewise become otiose. This is no doubt useful in providing a more responsive way of dealing with litigation. On the other hand there may be some concerns in that the Practice Note does not go through the processes of the Rules Committee. It may be asked why such practices cannot be incorporated as formal rules.

Second appeals

The continuing difficulties with the inappropriate prosecution of second appeals, and the policy of the Court of Appeal with regard to such appeals was once again addressed by that Court in *Snee v Snee* unreported, 1 November 1999, CA 198/99.

The case commenced as a matrimonial property dispute in the Family Court. That Court held that the matrimonial property agreement entered into by the parties was unjust, and that the property should be divided equally. The husband's appeal against this decision was allowed by a Full Bench of the High Court, which also refused leave to appeal further. The wife brought an application to the Court of Appeal under s 67 of the Judicature Act 1908, seeking special leave to appeal.

The Court of Appeal, in a unanimous judgment of Richardson P, Gault and Blanchard JJ, took the opportunity to make a strong statement on the proper place of second appeals. The Court began by reaffirming what it had said in *Waller v Hider* [1998] 1 NZLR 412, emphasising that the resources of the Courts and clients should not be wasted where there is no realistic hope of benefit. More importantly, it pointed out that the realistic hope of benefit is small in all but the most exceptional cases:

> ***More importantly, in the preceding ten years, only one appeal brought pursuant to special leave granted by the Court of Appeal under s 67 had been successful***

> Upon a second appeal this Court is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled on by a Court. (*Waller v Hider* at 413, per Blanchard J)

Where the issue is one of fact, the burden is significantly greater. Leave is not a viable prospect unless there is a substantial amount at stake (which is unlikely given commencement in the District Court), or there are special consequences such as bankruptcy or irreparable damage to reputation.

The Court was clearly concerned that its statements in *Waller v Hider* had not been heeded, pointing out that it had been confronted with a substantial number of s 67 applications in 1998 and 1999, only one of which had been successful: *Cranson v New Zealand Trainers' Association* [1999] 3 NZLR 641. That case occurred in an unusual context, and was seen by the Court as dependent on the outcome of the Privy Council appeal in *Lange v Atkinson* [1998] 3 NZLR 242.

More importantly, in the preceding ten years, only one appeal brought pursuant to special leave granted by the Court of Appeal under s 67 had been successful: *Engineering Dynamics Ltd v Norgren Martonair (NZ) Ltd* 29 October 1996, CA 105/96. (It might be noted that, despite the significant costs incurred by the appellant in pursuing the appeal, the High Court judgment in that case ([1996] 2 NZLR 235) was clearly wrong in law, justifying a second appeal.)

The Court went on to make the additional point that it is the High Court, as the intermediate appellate Court, which has the primary responsibility for correcting error and ensuring that justice is done between the parties. A further appeal can only be justified where there are wider public interests which require the attention of the Court of Appeal. Although the Court did not mention it, the fact that High Court appeals are now frequently heard by two Judges will undoubtedly serve to entrench that intermediate appellate role. This appears to be the first occasion on which the Court of Appeal has expressly defined the appellate role of the High Court, giving a firm indication as to how the hierarchy is to be viewed. It may be taken from this that the Court of Appeal intends to concentrate on its role as a final appellate Court.

The principles enunciated by the Court of Appeal are not new. They have been expressed consistently since the oft-cited decision of Salmond J in *Rutherfurd v Waite* [1923] GLR 34 and were reiterated as recently as in *S v S* [1999] 3 NZLR 513 (CA). The tone in *Snee v Snee*, however, contains a distinct note of warning, and the possibility of personal costs awards cannot be overlooked, given the statements of Thomas J in *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA).

It must also be remembered that a special leave application to the Court of Appeal under s 67 is an avenue of last resort. The substance of the case has already been addressed twice, and a previous application for leave to appeal refused; the odds against success are inherently great. The message from the Court of Appeal is that such an application is not appropriate other than in the most egregious circumstances. That will almost certainly not be the case where there have been concurrent fact findings and where the issue is simply one of importance to the parties. Apart from cases where there is an obvious public interest which has been overlooked by the High Court, it will be necessary to show consequences which border on the devastating in order to justify the application. ❑

CRIMINAL PRACTICE

with

Robert Lithgow

PROVOCATION

Paniani v R

([2000] 1 NZLR 234, Elias CJ, Keith and Panckhurst JJ)

On trial for murder, Mr Paniani admitted that he knew the serious beating he gave his wife was likely to cause her death and that he was reckless whether she died or not. The only issue for the jury was whether provocation reduced the offence to manslaughter. He was convicted of murder. He appealed.

The Panianis had a ten-year relationship punctuated by violence. The fatal beating took place at the end of a birthday party at their house. The party, which was held in the garage, began around 4 pm. Mr Paniani arrived home with B, a long-time friend of his, and they joined the party at 6.30 pm. Various guests came and went. Mrs Paniani became upset at the amount of attention her husband was paying to his sister's friend and when shortly after he went nightclubbing with them, she went into the house and went to bed. Sometime later, B went into the house and into the Panianis' bedroom. B claimed that he and the deceased kissed and fondled each other but did not have intercourse (DNA evidence confirmed that intercourse had not taken place). According to B, he was lying across the end of the bed and the deceased was lying across the side of the bed clad only in a T-shirt when Mr Paniani returned and walked into the room. B's evidence was that Mr Paniani said "sweet as" and B went back to the garage. Mr Paniani told the police that he came upon B and his wife having intercourse. Which ever version the jury might accept, the Judge ruled it was enough to put provocation to the jury.

According to Mr Paniani, after B left the bedroom, he grabbed his wife, who was climbing out of the window, and they both fell out. In any case, the Panianis appeared back at the garage about ten minutes later and Mrs Paniani had quite clearly been recently beaten. Soon after, Mr Paniani put her into a headlock and dragged her up the steps at the front of the house. B and another guest, A, tried to intervene. Their efforts angered Mr Paniani and he threatened to break his wife's neck if they did not go away. At that point, B said, B backed off. B's evidence was that Mr Paniani then said that B had "tried to fuck his missus" and told B to leave, which he did. The last remaining guests said that as they left, they could see Mrs Paniani in the bathroom cleaning up and the silhouette of Mr Paniani somewhere in the house. Later that night, Mr Paniani made two telephone calls: one to A asking him to come over as he had done something stupid and one to the emergency services.

The first two grounds of appeal relate to prosecutorial zeal in the form of a speculative allegation that the accused had had sex with the deceased during the attack and the adducing of additional propensity evidence creating unnecessary prejudice. ... The Court held that, although each ground had been made out and in combination they would have been enough to order a new trial, that would be unnecessary as the third ground of appeal provided independent reason to grant the appeal. Why it chose to ascribe the grant of retrial to one flaw rather than another is not stated. But the Court did take the opportunity to again remind the Crown to tone it down by reference to *R v Roulston* [1976] 2 NZLR, 644, 654 and *R v Harley Thomas* (15 December 1998, CA305/98) (prosecutors are not merely advocates for a cause but are bound by obligations of fairness). And so 1999 ended with a Court of Appeal criticism of Crown zeal, echoing the year before.

The third ground of appeal was a complaint as to the Judge's directions on provocation. The Judge directed the jury that, as a matter of law, the provocation must come from the deceased and could not come from B. The jury returned early asking to hear again the evidence of the last remaining party guests and the bit of Mr Paniani's interview as to the time frame from entering the bedroom to going inside again with Mrs Paniani. The jury also asked whether B's attempts to intervene on the steps could "compound" the provocation. The Judge answered the question by saying that B could not "revive" an original loss of control if the jury decided that that loss of control had in fact since subsided. The Judge then heard argument on that answer and called the jury back to offer a second answer, the defence recorded that answer as:

> provocation must stem from the person killed. It is possible to revive provocation. There is nothing after the first beating on the steps. Nor do the attempts to prevent harm constitute provocation.

Five minutes later, the jury returned a guilty verdict on the murder charge.

The Court of Appeal identified that Mr Paniani could have seen B's actions as directly related to the events in the bedroom and a continuing interference in the relationship between himself and his wife. Provocation must come from the deceased but another person can be so associated with that provocation as to constitute part of it. In this case, the jury may have been looking at events as something continuous over the entire 10-minute period but the Judge's answer effectively reduced the time period to events on the steps. Therefore, the Judge's direction was wrong. Further, the final sentence of the second answer effectively decided the question

of fact which it was not the Judge's function to decide; given the proximity of events the issue should have been left to the jury.

In some senses this case does not add anything to the law of provocation. The Crimes Act restricts provocation to words and actions of the victim. However, the cases set out in *Adams* and *Garrow and Turkington* illustrate an elasticity over many years as to conduct involving the victim rather than strictly emanating from the victim. This case, without saying so, confirms this flexible approach and realistically accepts the social context in which individuals interact.

EVIDENCE

ID evidence – s 344D directions to assist Crown

Tristram v R

(CA259/99, 28 October 1999, Tipping, Heron and Robertson JJ)

Tristram was tried for aggravated robbery. A service station was robbed by a man with a knife, wearing a cardboard mask. There were two attendants at the station when it was robbed, both knew Tristram and one was Tristram's second cousin.

The Crown alleged at trial that the accused knew that there was money on the premises at the time through the relative. The accused's palmprint was on the counter. The robber was seen on video to place his hand on the counter. The video did not show (the undisguised) Tristram in the service station after the counter was earlier wiped clean. There was also a confession.

The defence offered explanations for the palmprint that the man had returned innocently but that the video had missed him somehow. The confession was recanted. Owning overalls and sneakers like the ones the robber wore was denied. His mother provided an alibi. The attendants described a person unlike the appellant.

Tristram was convicted. He appealed against conviction on the ground that the Judge misdirected on identification evidence. Section 344D Crimes Act requires the Judge to give a warning to the jury when the Crown case depends wholly or substantially on the identification evidence of eyewitnesses. The Judge gave the standard warning and then said:

> This has been an unusual case because the witnesses, the two persons present in the service station, provide a description that does not particularly well match the accused. Indeed the witnesses suggest that their description does not match the accused. ... Nonetheless it is a situation where it is important that you realise that identification evidence can be unreliable, in fact the Crown case in this case is that notwithstanding that lack of certainty or even doubt on the part of the witnesses, the presence of the palmprint and the circumstantial evidence relating to the various other items such as the shoe print, the accused's knowledge of the layout and timing of the banking, the footprint and so on combined together to provide a stronger suggestion as to the identity of the robber and that even though the identifications are not particularly apt to the accused, nonetheless it was the accused who was the robber.

On appeal, the Court of Appeal held that s 344D did not apply in the circumstances of Tristram's trial as it did not depend wholly or substantially on the correctness of visual identifications – in fact, there was no visual identification of him. That section provides a statutory warning in the interests of the accused; the Judge must warn the jury not to find the accused guilty in reliance on the correctness of visual identification evidence. Here the Judge had warned the jury to be especially cautious before placing weight on exculpatory evidence and that was inappropriate and inherently prejudicial. The Court then looked at the application of the proviso to s 385 that allows the Court to not allow the appeal if, notwithstanding the error, "no substantial miscarriage of justice has actually occurred". The Court referred to *R v McI* [1998] 1 NZLR 696 as authority for the proposition that "Before the proviso may be applied, this Court must be sure that the jury would without doubt have convicted had the (trial error) not been present".

In this case that Court took the view that notwithstanding the palmprint and the unsatisfactory explanation for it; the confession and the unconvincing explanation about that, a jury may have seen things differently had the identification warning not been given.

Appeal allowed, retrial ordered.

Reading this case reminded me of a strikingly similar case of *R v Fulton*, tried before the same Judge (unreported, CA280/96, 7 April 1998). Fulton was accused and convicted of intruder rape of an elderly woman. The only evidence against him was a fingerprint that Fulton alleged was planted by police. Again there was no identification by the victim. Fulton absolutely denied the charge throughout. Miscarriages accepted by the Court on appeal were wrongful cross-examination and closing by the Crown on failure to give the explanation prior to trial. The Judge failed to intervene and the Court held that he should have. Further the Crown was criticised for evoking God's identification through the use of a biblical quotation (that was wrong in any event). Trial defence counsel had persuaded Fulton not directly to allege planting at trial as he risked putting character in issue, although that could be the only defence.

In that case the Court held there were Crown conduct breaches and the trial Judge's failure to deal with them was "persistent and substantial" but applied the proviso because of the lack of extrinsic evidence of planting.

PROCEDURE

Section 379A appeal jurisdiction

R v Henry

(CA355/99, 19 October 1999, Richardson P, Doogue and Robertson JJ)

This case has two aspects. First, a decision of a trial Judge to have a deposition read under s 184 Summary Proceedings Act where the deponent has gone overseas can be deemed to be a decision under s 344A Crimes Act and therefore appealed pre-trial under s 379A Crimes Act. Second, the Court will uphold the technical procedural requirements as being absolute preconditions to admission.

This case dealt with the deposition of a police officer who was heading overseas on extended leave. The Police applied to the District Court for an order that his evidence be taken in advance of depositions. The order was made ex parte. After considering the Summary Proceedings Act the Court held that the original application must be on notice. The evidence was duly taken. Counsel appeared for Mr Henry and protested. There was no cross-examination. The next step was the admission at trial and the Court on appeal reinforced the literal meaning of s 114(1A) Summary Proceedings Act. The section means that in the absence of consent, the technical (albeit protec-

tive) defect in the original evidence-taking process is fatal to admissibility.

Out of interest I refer to the reasoning of the Court that it could treat this appeal as though under s 344A even though it was not. Robertson J cited *R v Accused* (1991) 7 CRNZ 230 without amplification. But if you look at that case the majority there accepted that an appeal under s 23D Evidence Act – Mode of evidence for child complainants – was effectively a s 344A appeal because they were prepared to say the mode of evidence in question was a substantive issue rather than a procedural one. Richardson J delivered a carefully reasoned dissent asserting that only truly substantive applications, ie about the nature of the evidence, were intended to be appealable pre-trial and that s 379A Crimes Act was a closed list. None of that is referred to.

Confidentiality – banks and bank staff

R v H

(CA126/99, 6 October 1999, Keith, Blanchard and Robertson JJ)

The Hs were charged with drug offences, money laundering and social welfare benefit fraud. They appealed against three pre-trial rulings, including a ruling that the evidence of a former bank officer as to some of their banking transactions was admissible.

The observations of the bank officer in October 1996 initiated the police investigation and subsequent prosecution. After her suspicions were aroused, the bank officer spoke to an assistant manager and to her husband (who was a police officer). A letter was written to the bank's solicitor. The CIB became interested in the transactions and the bank officer reported to it on each transaction. The bank did in fact complete reports and send them on to the Police, as required by the Financial Transactions Reporting Act 1996, in late January 1997, some time after the transactions concerned took place.

The Hs appealed the pre-trial ruling that the evidence of the bank officer would be admissible on the basis that her evidence did not fall within the requirements of the Financial Transactions Reporting Act 1996 and therefore her evidence would be in breach of bank/customer confidentiality. The Court of Appeal rejected the argument that the Act is a code and the bank officer's evidence fell beyond the requirements of the Act. The Court held that the Act does not remove or limit common law obligations to disclose or report. In particular, the requirement to disclose iniquity is unaffected. Rather, it imposes duties on banks to disclose certain transactions in specified circumstances; it is about obligations of institutions to the state through the Police rather than the rights of their customers to confidentiality or privacy.

Further, obligations of confidence do not bind third parties; you cannot prevent others making inquiries. Indeed, when it comes to things like money-laundering, unless banks answer police inquiries there may never be enough to apply for a search warrant. The Court stressed that it is important to remember that the Act is not aimed at evidence gathering for the Court process, rather it is aimed at alerting the Police, here or abroad, to suspicious circumstances that may require investigation. The bank would have been within its rights at common law to respond to police inquiries before the Act and that must still be so now. The bank officer's evidence was admissible and the appeal failed.

SENTENCING

Home invasion and tariff cases

R v P

(CA344/99, 16 December 1999, Thomas, Doogue and Goddard JJ)

P was convicted of raping a woman in her own home so, by virtue s 17C(2) of the Crimes (Home Invasion) Act 1999, he became liable to imprisonment for 25 years (as opposed to 20 years for rape not involving home invasion). He was sentenced to ten years' imprisonment and appealed on grounds that the Judge had misapplied the Act and allowed twice over for the fact that the offence was committed in the victim's home. This is the Court of Appeal's first crack at the new Act so it took the opportunity to look at its terms and intended impact on sentencing principles and practice.

The Court of Appeal noted that Parliament clearly intended sentencing Judges to give discrete and concrete recognition to the fact of home invasion; a significantly greater penalty or longer term of imprisonment is required and the process by which the sentence is increased must be transparent.

The Court then made the following broad statements:

1. The approach must be flexible; it is undesirable to set down a guideline figure of half the increase in maximum penalty as the measurable increase in the sentence.
2. The decision as to how best to give concrete effect to the legislation must depend on the circumstances of the particular case, including whether there is a tariff.
3. Where there is a tariff, the required discrete and concrete recognition of the home invasion element can best be achieved by adopting a higher starting point.
4. The increase in the starting point must be emphatic. The starting point for a contested rape where the sexual violation occurs in the home is to be 11 years (as opposed to eight years for a non-home invasion rape). Having adopted this starting point, both aggravating and mitigating factors are to be taken into account.
5. Bearing in mind that the element of home invasion has already been allowed for in adopting a higher starting point, the sentencing Judge may nevertheless determine that the seriousness or particular nature of the home invasion involved warrants a further increase in the sentence over and above that allowed for in the starting point.
6. Where there is no tariff, it may be preferable to seek to arrive at the appropriate sentence either by direct reference to the increased maximum sentence or by first determining the sentence which would be considered appropriate under present sentencing practice and then increasing that sentence by such an identifiable measure as may be required in the circumstances to allow for the element of home invasion. Whatever approach is adopted, it is important that the penalty be definitely increased and that it be clear that the element of home invasion has been discretely addressed.
7. The totality principle would continue to apply – sometimes to adjust the sentence downwards. However, in applying that principle, care is required to ensure that the home invasion element is discretely addressed and clearly identified in the sentence.

8. Present sentencing levels must not decrease as a result of this legislation.
9. The new Act should not affect the application of s 5 Criminal Justice Act, which provides a presumption of imprisonment for serious violent offences unless there are special circumstances. On the other hand, it may well conflict with s 7, which provides that custodial sentences are to be as short as consonant with protecting the community, as sentences would sometimes be increased beyond what was required to ensure community safety. The Court observed that the new legislation would probably prevail but felt it better to leave that question open until an appropriate case came before the Court.

Applying the principles to the present appeal the Court held that the Judge had not followed the exact steps it had set out but he arrived at the correct sentence nonetheless. In particular, in this case the Judge was justified in seeing the home invasion element of this offence as serious enough to require recognition over and above the increased maximum sentence mandated by the Act. Appeal dismissed.

I identify this as a tariff case because of the detailed analysis of the legislation and the parliamentary background to it that Thomas J sets out. In another sense it is not a true tariff case as there is no schedule or discussion of a wide range of previous cases.

Another aspect is the role of the Criminal Appeal Division and such leading cases. The coram was one permanent member of the Court of Appeal and two High Court Judges, albeit with considerable criminal law experience. I had thought there was an understanding that the Permanent Court would address such significant issues. In reviewing the cases for this issue I first whittled the late 1999 pile to 17 cases. Within those 17 there were 11 different combinations of judiciary sitting. I'll count the whole year and report back. Consistency of approach is going to be an increasing problem.

Contemporary New Zealand Standards

R v Meroiti

(CA 392/99, 26 October 1999, Keith, Blanchard, Baragwanath JJ)

Mr Meroiti was prosecuted by the SFO for forging and uttering an altered valuation document related to a forestry in PNG. Meroiti was a former solicitor and acted for the interests of the Varagadi clan in PNG. In his view and in the clan's view a forestry valuer had grossly undervalued the project and therefore the clan's return. He altered the document to what he thought was the right figure. He asserted, and it was not rebutted at trial, or appeal that his valuation was in fact the correct one and that he had saved the clan from ruin and generally no harm done etc.

This was a rare case in which the SFO did not assert that imprisonment was the only option. The District Court Judge thought it was and sentenced Meroiti to eight months' imprisonment. On appeal His Honour commences with *Russell on Crime* 12/th ed and then the *Report on Forgery and Counterfeit Currency* (1973) from the Law Commission of England and Wales. His Honour then considers the appellant's argument:

> [Counsel's] powerful arguments on behalf of the appellant, inviting us to suspend his prison sentence, emphasised what he saw as a dilemma, between committing what was said to be an immaterial forgery and risking millions of dollars of loss. It was reminiscent of Bassianio's plea
>
> Wrest once the law to your authority, to do a great right do a little wrong ...
>
> But this Court must give a clear message to the business community that forgery will not be tolerated, whatever the apparent temptation. As Portia responded
>
> It must not be, ...
>
> 'Twill be recorded for a precedent,
> And many an error by the same example
> Will rush into the state. It cannot be.
> *The Merchant of Venice*
> *IV i.215-223*

If His Honour transposed Portia for Her Honour the sentencing Judge, it may not be getting to the heart of her reasoning. The most obvious reason Meroiti had to do a full time custodial sentence was that he had done it before.

The Court of Appeal do not, as they say, "tinker" with sentences. But for reasons not perhaps convincingly identified in the judgment the more correct sentence apparently should have been six months not eight. Yet, because of Christmas and all that, the release date was reportedly exactly the same.

Contempt – CER – Offensive Solicitor – Contemporary Australian Standards

Anissa Pty Ltd v Parsons

[1999] VSC 430 (8 November 1999) Supreme Court of Victoria

Cummins J begins:

> The hills of the Yarragon are green and shaded. The hourglass of the Latrobe Valley is there at its most slender, nestling between the grandeur of the Great Diving Range to the North and the finely delineated Strzelecki Ranges to the south. ... in pastoral serenity stood fifty trees.

It reminds me of the first words of my old school song "Nestling 'neath the hills of Taita, neatly clustered our co-oll-ege stands. ..."

The trees were on the wrong side of a boundary, itself the subject of a bitter family dispute. The most disputatious appears to have been Simon Parsons, landowner, disaffected son and solicitor of the Supreme Court of Victoria.

He had a bulldozer and driver bowl the lot until the driver was told an urgent injunction was being sought by phone. It was granted. Its wording was faithfully relayed to Parsons by another solicitor in the presence of police enlisted to prevent a breach of the peace. Upon being told of the injunction given by one Justice Beach, Parsons said "is that all" followed by the words, the subject of this case "Justice Beach has got his hand on his dick." and "Tell him, because if you don't, I will". The words were dutifully relayed and solicitor Parsons was brought before the Court for contempt.

There is quite a detailed exposition as to whether the words were uttered in a curial settling and other matters, but eventually Justice Cummins got to the point, as it were, namely, were the words uttered contempt of Court.

> The matter must be judged by contemporary Australian standards. It may be offensive, but it is not contempt of Court, for a person to describe a Judge as a wanker.

Warning: Do not try this at home – It is not an appellate decision and despite CER the decision may not enjoy the usual comity. Holders of Supreme Court of Victoria practising certificates may ignore the above warning. ❑

HOLIDAYS ACT NEEDS REFORM

Phillipa Muir and Duncan Sandlant, Simpson Grierson, Auckland

with the results of their survey of the Holidays Act in operation

It has been widely accepted that the Holidays Act is an antiquated piece of legislation which is in need of significant reform in a number of areas.

In July 1999, Simpson Grierson undertook a survey of employers representing a range of industry sectors and organisations with ten or more staff. The findings in the survey statistically represented the opinions and practices of medium to large New Zealand employers. These employers employ approximately 960,000 full-time equivalents, representing 63 per cent of the New Zealand full-time equivalent work force.

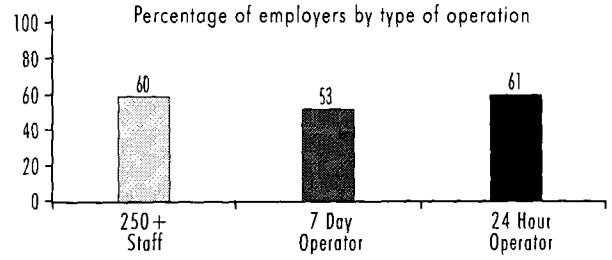
The objective of the Simpson Grierson Holidays Act Survey was to measure the way employers apply annual leave, special leave, statutory holidays, parental leave and long service leave. This survey was intended to obtain a complete picture of employers' opinions and their implementation of the relevant law relating to holidays and leave.

The Holidays Act is a dinosaur – change is well overdue. This is supported by the fact that over half of the employers surveyed found the Act unclear and considered that the Act should be repealed or significantly amended

KEY FINDINGS

It was clear from the results that over half the employers surveyed found the Act ambiguous and had difficulty calculating either annual leave, statutory holiday entitlements or both.

Problems calculating annual leave



Interestingly, the bulk of the employers surveyed also sought outside assistance to apply and interpret the Act.

Of further concern was the significant number of employers who were applying the Act incorrectly despite their belief that they understood the Act.

ANNUAL LEAVE

Calculating annual leave

It was found that over half of the employers surveyed had difficulty in calculating their annual leave entitlements. The key problems appeared to relate to employers calculating leave entitlements where they have large staff numbers and seven day or twenty-four hour operations. It is clear that the Act was not designed to cover employees in modern or changing businesses. For example, a shift worker who works rotations that do not correspond with calendar weeks creates difficulties for the employer. This is due to the Act's requirement that employees receive 15 days annual leave on their average weekly earnings.

Entitlements

Over 80 per cent of the employers surveyed provided senior management with more than 15 days annual leave, with only one per cent providing less than 15 days for salaried staff. These results indicate that most employers are providing over and above the minimum requirements. The majority of employers surveyed could be classified as "good employers" in relation to annual leave and have accepted the importance of holidays for staff welfare.

Additional leave

Most employers surveyed (76 per cent) provided additional annual leave after employees met certain criteria such as long service leave. The most common time employees needed to work for the organisation before they were entitled to qualify was between five to seven years.

Accrual of annual leave

It was found that almost two-thirds of employers surveyed do not insist on staff taking all of their annual leave in any given year. In addition, 92 per cent of employers allow employees to accrue annual leave if it is not taken within the year.

Although over two-thirds of employers surveyed want a legal provision to compel staff to take leave, 76 per cent of

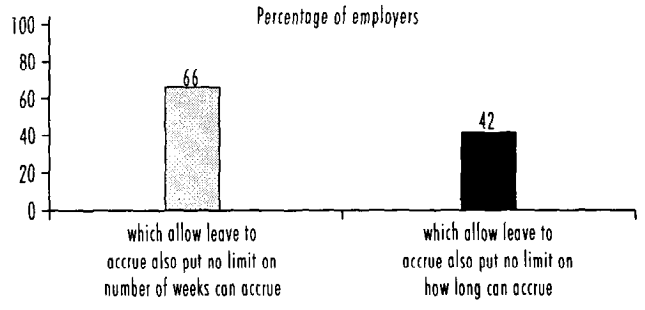
these employers never use the Act's seven day notice provision which is available (after consultation) to compel staff to take annual leave. Furthermore, of those employers which allow staff to accrue annual leave, two-thirds of employers put no limit on the number of weeks that can be accrued by employees.

It is clear that a number of employers are allowing annual leave to accrue with little or no restriction on the number of weeks that can be accrued.

There are several implications for employers who follow this policy:

- employers are exposed to key staff taking long holidays and/or large pay outs for unused annual leave when a staff member's employment terminates or the business is sold;
- employers have a significant contingent financial liability for accrued leave which, when paid out, will be calculated on the employee's current pay rates, not what the employee was earning at the time the leave was first accrued; and
- employees may not be taking sufficient breaks from work, contrary to one of the objectives of the Act.

Accrual of annual leave



Only eight per cent of the employers surveyed were invoking "forfeiture" clauses which allow annual leave to be forfeited if it is not used within the year. The value of such a clause has not yet been tested by the Courts. To be enforceable it would require the employee to have been given a fair opportunity to take accrued leave or risk forfeiting it.

STATUTORY HOLIDAYS

Calculating statutory holiday pay

Over half the employers surveyed had difficulty in determining statutory holiday entitlements. This percentage increased to over 60 per cent for larger employers or businesses operating seven days a week or twenty-four hours a day.

The Act provides for 11 statutory holidays to which employees will be entitled when they fall on days they would have otherwise worked. The problem with the legislation again relates to employees who do not work the ordinary Monday to Friday week. There is also a degree of confusion by the employers surveyed as to the rights of casual and temporary workers to be paid statutory holidays.

Monday-isation

When a statutory holiday falls on a Saturday or Sunday, s 9 of the Act provides that the holiday is recognised in law on the Monday and Tuesday following.

One of the main problems with Monday-isation is that for an employee who is rostered on a Saturday and not the Monday, the employee is not entitled to a paid statutory holiday or a day off in lieu unless it is expressly provided in their employment contract. Similarly, an employee is unlikely to be paid penal rates under the contract unless specified in the employment contract.

Usually staff who work on Anzac or Waitangi Days, and who get more than ordinary rates, do not qualify for a day in lieu. However, for all the other statutory holidays, the right for a day in lieu arises irrespective of the payment rate. This situation again arises due to the assumption underlying the Holidays Act that all employees work 9 am to 5 pm, Monday to Friday, which is no longer appropriate and creates inequities among significant groups of employees.

Over half of the employers surveyed (60 per cent) do not Monday-ise public holidays but recognise them on the day they fall.

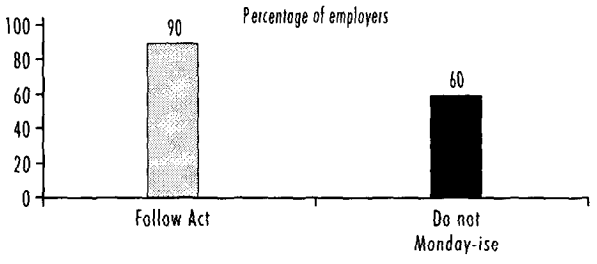
Contract clauses

Approximately half (53 per cent) of the employers surveyed had clauses in their contracts which required full-time waged staff to work on statutory holidays. The Court of Appeal has held that employees can only be made to work on a statutory holiday if this has been clearly specified in their employment contracts (*Barry Court Motel and Tourist Flats Ltd v Mitchell* [1996] 1 ERNZ 558). It is clear from the survey conducted that a number of employment contracts do not contain such clauses yet the employers are requiring staff to work on statutory holidays.

Days off in lieu

In 1996 the Court of Appeal in *Ports of Auckland Ltd v New Zealand Waterfront etc Union* [1996] 2 ERNZ 22 held that employers have to provide staff with a paid day in lieu if they require those staff to work at all on a statutory holiday.

Statutory holidays: Monday-isation



Of some concern is the statistic that 38 per cent of the employers surveyed have staff who work overlapping shifts on statutory days (ie work on a statutory holiday) and yet appear to be in breach of the Act by failing to provide full days off to employees who work such hours. Furthermore 11 per cent of employers employing staff on statutory holidays are in breach of the Act by failing to give a whole day off in lieu to staff who work on statutory holidays. Not only does it appear that some employees are missing out on their statutory entitlements, but their employers will have a potential liability for back-pay and penalties under the Act.

UNUSED HOLIDAYS

Simpson Grierson's survey also found that of those employers that allow staff to accrue annual leave 40 per cent of those employers are allowing staff to cash up some of their accrued leave. Of those employers who provide days off in lieu for staff on statutory holidays, eight per cent were allowing staff to cash up some of these in lieu days.

The Employment Court in *New Zealand Harbour Workers Union v Lyttelton Port Company Ltd* [1995] 2 ERNZ 177 has held that employers must allow employees to take their annual leave entitlement (a minimum of three weeks) and to exercise their rights to statutory days in lieu within 12 months of the statutory holiday occurring. It has also been confirmed by the Employment Court that leave taken will accrue if it is clear that employers are "paying out" unused statutory holidays and annual leave.

The Act makes no mention of the issue of cashing up leave entitlements. However, it is clear that a purpose of the Act is to provide rest and relaxation for employees so the option of "cashing up" leave entitlements could be held to be in breach of the Act.

Interestingly, 80 per cent of employers surveyed currently employ part-time temporary waged staff. Yet the Act fails to specifically deal with the different categories of employees which now exist and gives limited, if any, direction to employers in this regard.

PAID PARENTAL LEAVE

There is currently no statutory requirement for employers to provide paid parental leave. Parental leave entitlements are covered by the Parental Leave and Employment Protection Act 1987. The Act prescribes minimum entitlements for maternity, paternity and extended leave (collectively called "parental leave"). The main features of the Act are:

- 14 weeks maternity leave;
- two weeks paternity leave; and
- extended leave of up to 52 weeks.

The Act also provides for ten days special leave without pay for a pregnant female to use for reasons connected with the pregnancy.

A small majority (51 per cent) of employers surveyed consider there should not be any statutory paid parental leave. The majority (57 per cent) consider that if paid parental leave should become law, it should be funded by government taxes.

Only 13 per cent of the employers surveyed currently provide paid parental leave. Typically they provide at least six weeks for female employees and at least two weeks for male employees. There have been a number of political parties who have indicated a willingness to introduce some form of paid parental leave in the next term. However, the results of this survey show that just over half of employers disapprove of statutory paid parental leave.

MILLENNIUM-NEW YEAR 2000

When this survey was undertaken in July 1999, 50 per cent of employers were requiring some staff to work during the millennium and 69 per cent of employers had made it mandatory for selected staff. For employers requiring staff to work the millennium, most of those employers were paying better than ordinary rates. This was more prevalent among full-time and part-time waged staff, but less so for salaried staff and senior management.

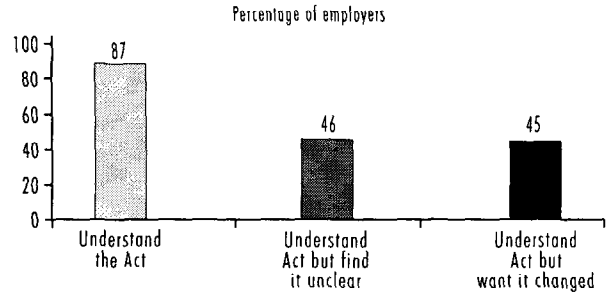
There was no legal requirement for employers to treat the millennium changeover days any differently from usual statutory holidays. However it is clear that a significant number of employers provided employees with more generous arrangements for this New Year's Eve/New Year's Day. Some of these arrangements included higher pay rates, bonuses and time in lieu to ensure technology and staffing issues were properly managed and contingency planning in place.

UNANSWERED QUESTIONS

There are a number of questions relating to the Holidays Act that either remain unanswered or require clarification. These include:

- What are the pay rates for annual leave for the various categories of workers?
- Can any annual leave be cashed up by employees?
- Can annual leave be forfeited if it is not taken in the year it falls due?
- What are the rights of casuals, temps and commission workers to be paid statutory leave?
- Can the inequities arising from Monday-ising be removed?
- Can any unused statutory holiday be cashed up?
- How do you calculate annual leave for a part-time employee?

Opinions on comprehension



CONCLUSION

The Holidays Act is a dinosaur – change is well overdue. This is supported by the fact that over half of the employers surveyed found the Act unclear and considered that the Act should be repealed or significantly amended.

Whilst the wording of the Act needs complete rewriting, most employers do not want to decrease the minimum statutory entitlements available to employees. In fact, a number of employers surveyed confirmed they are providing greater benefits than they are statutorily required to do so. A number are providing more than three weeks annual leave, payment of double time for working on a statutory holiday, leave for long service staff and paid parental leave.

Of immediate concern is that 70 per cent of employers currently need advice to apply the Act. There is obviously also a need for significant publicity of employer/employee rights and entitlements under the Act over the millennium vacation.

It is clear that the time for reform of the Holidays Act is well overdue. Leave arrangements should be a fundamental part of the employer – employee relationship, yet the Simpson Grierson Survey confirms that there is widespread confusion and some non-compliance with the Act at present. The Holidays Act needs to be amended urgently to restore clarity, consistency and confidence in this area. ❑

YOUNG OFFENDERS

Gabrielle Maxwell and Allison Morris, Victoria University of Wellington

revise and update their NZLS Youth Advocate training paper

Popular beliefs about youth crime as serious, rapidly increasing and out of control do not match the experience of those working with young offenders and nor do they match what we know from the statistics compiled by the police. Of course, some young people commit very serious crimes; and, of course, some young people stretch our patience and our resources. But it is important for us as professionals dealing with youth crime to place these headlines and the accompanying stories into their proper context. This paper aims to present accurate and current information on youth crime in New Zealand, on the background of young offenders and on the factors that are associated with their offending and reoffending.

How many young people offend?

The answer to this question depends on what is meant by "committing offences". Most people do something which breaks the law at least once while they are growing up. Few young people ever come in contact with the police, however, and those that do, for the most part, have only the one experience. A much smaller group repeatedly offend or commit serious offences. An indication of these numbers can be found in those appearing in the Youth Court. In 1996 the percentage of all young people aged 14-16 appearing in the Youth Court was 2.4 per cent. (Spiers, 1998, *Conviction and sentencing of offenders in New Zealand: 1988 to 1997*. Ministry of Justice.)

In the year 1997/98, police statistics recorded that 43,504 offences committed by offenders under the age of 17 years had been resolved by their officers. There are some problems with these figures. They are not an accurate representation of the number of offences that are actually committed, because many offences are never reported to the police let alone resolved by them. Nor are they an accurate representation of the number of offenders; more than one offence may have been committed by a particular offender. It is also important to note that these figures are police records; the offenders responsible for these offences may not be convicted in a Court and, in some cases, the offenders will never be charged because of insufficient evidence. Nevertheless, these figures are the "best" in terms of inclusiveness and, in New Zealand, they are also the only ones available which provide information on the age of offenders.

This total of 43,504 offences resolved by the police in 1997/98 that were attributed to offenders under the age of 17 years at the time of the offence represents 22 per cent of all the offences resolved in that year. In other words, just over one in five resolved offences were attributed to young people. An unpublished paper prepared for the police by Schollum (1999, *Police statistics in relation to offenders in the 10-13 year age group*. NZ Police) suggests that these 43,504 offences represents a total of 14,333 offenders under the age of 17 years: equivalent to 1.5 per cent of the total population of those under 17 years. However, the proportion of those aged 14-16 is higher: 5.5 per cent.

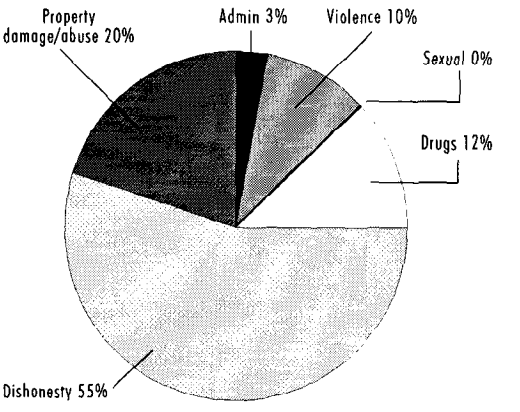


Figure 1 – *Apprehensions of juveniles by the police: 1997/98*

Types of offences in comparison with adults

There are considerable differences in the pattern of offences committed by children or young people and by adults. Figure 1 shows that dishonesty offences account for 55 per cent of youth crime and most of the rest of the offences involve abuse or damage to property or drugs and anti-social offences. Violence accounts for only ten per cent of youth crime and sexual offences make up less than half a per cent.

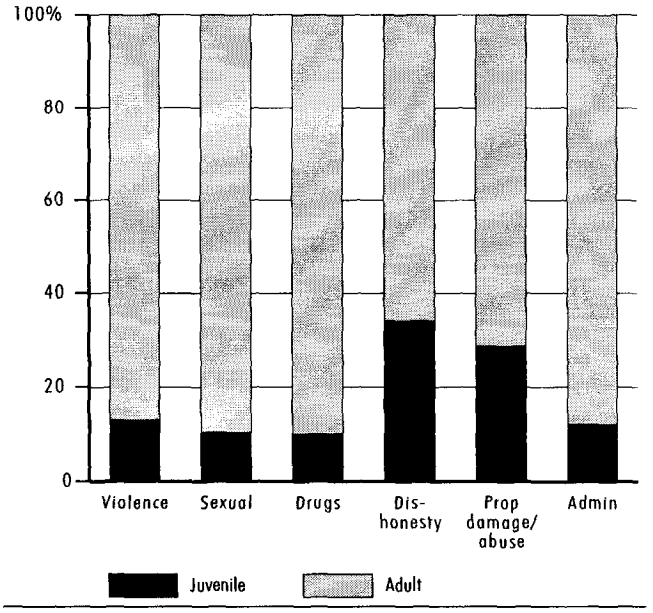


Figure 2 – *Proportion of each of the main types of offences resolved by police attributed to juveniles in 1997/98*

Figure 2 presents the proportions of all resolved offences that were attributed to juveniles for each of the major types of offences for 1997/8 in a way that contrasts adult and juvenile crime.

This Figure shows that, in comparison with adults, a higher proportion of young people are responsible for dishonesty and other property offences while a relatively smaller proportion of them are responsible for other offences including offences of violence, sex offences and drug offences. However, in every category, young people make up a minority of the offenders identified by the police.

How serious is youth crime?

Information on youth crime can be found in data we collected in 1990/91 on a sample of 462 offenders coming to the attention of the police in five different districts over a period of three months. (Maxwell and Morris, 1993, *Families, victims and culture: Youth justice in New Zealand.* Institute of Criminology, VUW.) These findings underline the relatively minor nature of most youth crime:

- Nearly half committed offences of minimum seriousness (mostly property and dishonesty offences involving goods of less than $100 in value);
- Most of the remainder involved offences of medium seriousness such as burglary and car conversion;
- Only five per cent involved serious offences of violence or involving major property damage;
- 80 per cent of cases involved only one offence.

More recently, there have been claims that the number of serious offences committed by 10-13-year-olds is increasing. Information on this issue comes from a report on child offenders published in 1995. (Maxwell & Robertson, 1995, *Child offenders: A report to the Ministers of Justice, Police and Social Welfare.* Office of the Commissioner for Children.) This study showed that, of the most serious or recidivist child offenders nominated by the police in 1994, only ten of the 109 children committed offences that could be classified as of "maximum seriousness". A detailed analysis of the offences showed that four children were involved in arson, five were involved in violence towards other children and one committed a sexual offence. These offences are serious but it is important to recognise that they are relatively uncommon. Detailed information of this type is not available for more recent years; however, the increase in all violent and sexual offences attributed to children aged 10-13 years only shows a minor change, from eight per cent to nine per cent, between 1995/96 and 1997/98.

Is youth crime rising?

Since 1988/89 there has been a steady increase in the number of young people offending. In 1988/89, 33,500 police resolved offences were attributed to juveniles and by 1997/98 this had risen to 43,504. However, over the same period there had also been substantial increases in the number of resolved offences attributed to adults: from 112,800 in 1988/89 to 152,809 in 1997/98. Figure 3 sets out the changes since 1990.

Figure 3 shows the general rise in total offending. The lower portion of the bar shows that Juvenile crime as a proportion of total crime has, remained fairly stable over this period. The actual percentage variation over this period has fluctuated only from 21 per cent to 23 per cent.

Sometimes the media headlines have focused on increases in child offending. An examination of the date shows that there has been little change in the total number of

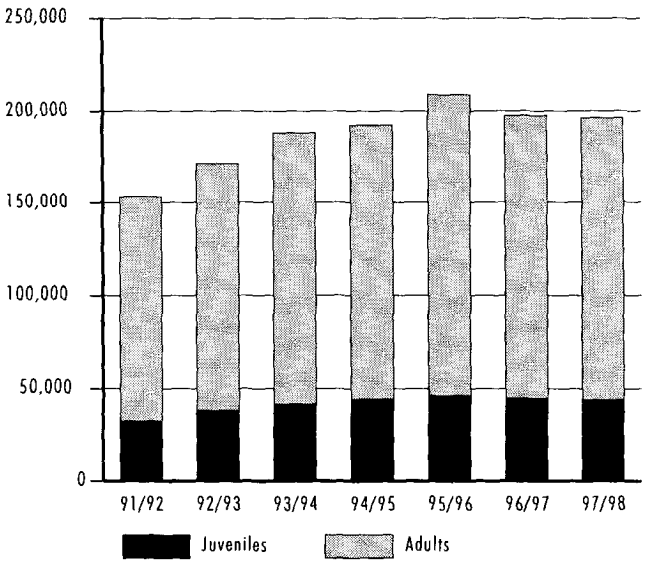


Figure 3 – *Apprehensions of offenders in relation to total recorded offences 1991/92-1997/98*

offences attributed by the police to children under 14 years and that offending by 10-13-year-olds remains a very small proportion of all offending with offending by 0-9-year-olds even more uncommon. However, there has been a dramatic increase in one particular age group; this is among 31-50-year-olds where resolved offences show a marked increase since 1991/92.

Changes in type of offences

At times the media have focused on increases in violent offending by children or young people. Two points need to be made here. First, over this period, the number of violent offences as a whole has increased. Second, the increases in violent offending do not represent any significant change in the percentage of young people involved in violence; it fluctuated from 12 per cent down to 11 per cent, back to 12 per cent and up to 13 per cent. Figure 4 makes the point graphically.

Figure 4 shows that the rise in violent offences by those under 17 is similar to the rise in violent offences by adults. Overall, the proportion of violent offences attributed to those under 17 remained fairly constant.

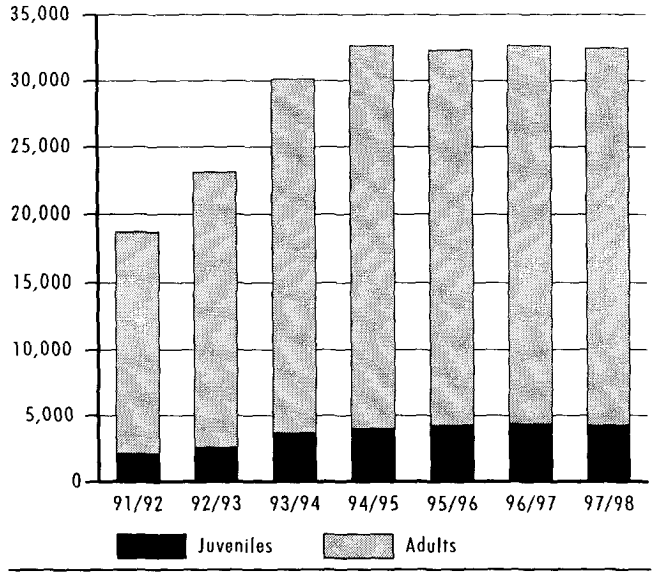


Figure 4 – *Apprehensions of offenders in relation to recorded violent offences for the years 1991/92-1997/98*

A further question is whether or not the age at which children start becoming violent is decreasing. There could be some substance to this claim.

From 1991/92 to 1997/98 the number of resolved violent offences attributed to 0-9-year-olds almost doubled and so did the number attributed to 10-13-year-olds — but then so too did the violent offences attributed to 31-50-year-olds and to those over 50. An alternative explanation for these changes is that society is becoming less tolerant of violence and that bullying, stealing from other children with threats and family violence have become increasingly probable targets for police action. Without further research, it is not possible to test such an explanation; however, the opinions of many police officers support this.

Over the period examined, the picture for sexual offending among young people is stable.

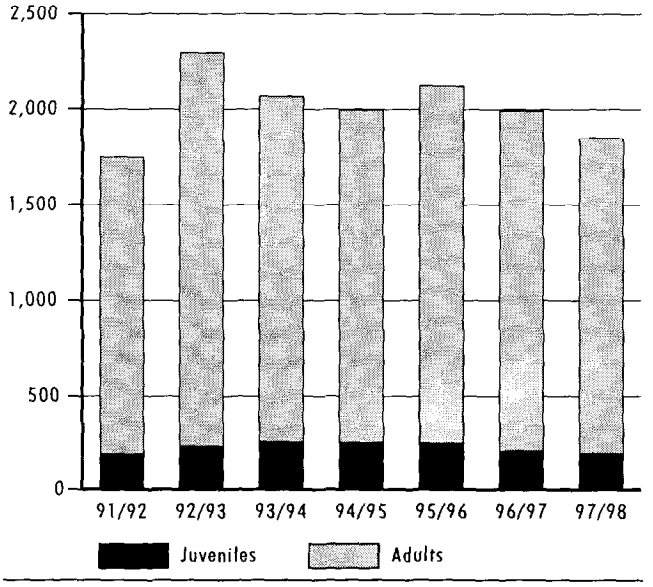


Figure 5 – *Apprehensions of offenders in relation to recorded sexual offences for the years 1991/92-1997/98*

As can be seen from Figure 5, there has, overall, been little change in the number of resolved sexual offences since 1991/92. The number attributed to those under 17 was 191 in 1991/92 and the number in 1997/98 was 194.

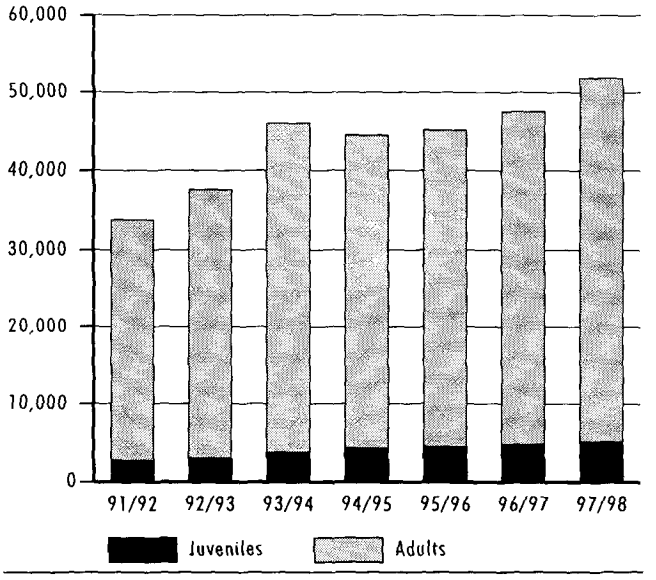


Figure 6 – *Apprehensions of offenders in relation to recorded drug offences for the years 1991/92-1997/98*

On the other hand, there has been an increase in the relative proportion of resolved offences in the areas of drug and anti-social behaviour attributed to juveniles.

Figure 6 shows that numbers have risen since 1991/92 from 2,700 to 5,230; this represents a shift from eight per cent of all drug and anti-social offending being attributed to those under 17 to ten per cent. However, although this is a significant shift, the change is not enormous.

The biggest single group of offences for young people dishonesty offences. Altogether these make up about 60 per cent of offending by those under 17.

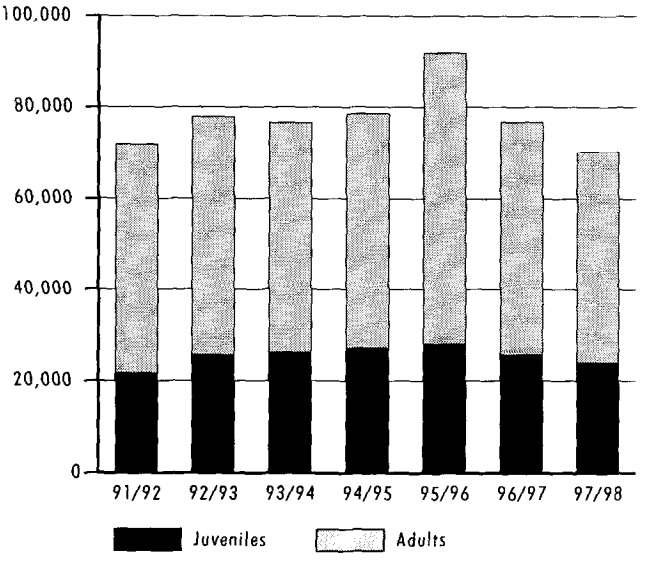


Figure 7 – *Apprehensions of offenders in relation to recorded dishonesty offences for the years 1991/92-1997/98*

Over the years 1991/92 to 1997/98, Figure 7 shows that the numbers of young people involved in these offences (mostly shoplifting, theft, burglaries and stealing cars) has not risen; indeed, there has been a decline in these offences for the last two years on which data are available. At the same time, the proportion of offences attributed to juveniles has not changed around 30 to 35 per cent.

More "hard core" young offenders?

Another claim that is commonly made is that there are now more children or young people who are recidivist offenders and that the proportion of "hard core" juvenile offenders is increasing. However, we have absolutely no data to confirm or disconfirm such claims. This lack of data is a concern. It should certainly be possible to record Court appearances and reappearances for young people and to publish annual statistics on these, but currently this is not done by either the Ministry of Justice or the Department for Courts. In our research, we found that, of about 200 young people who went to a family group conference in 1990/91, only around a quarter were "persistent recidivists" four years later. The only earlier published data on reoffending of young people comes from Lovell and Norris (1990. *One in four: Offending from age ten to twenty-four in a cohort of New Zealand males.* DSW) on a cohort followed from ages 10 to 24 who were aged 10 in 1967. They found that, of those who had offended at least once before the age of 17, a third had appeared before the Court more than once as an adult over the next seven years and a third of those committing a large number of offences before the age of 17 were also classified as having committed a large number of offences as an adult. These two sets of data are not exactly comparable but they

do not suggest that there have been massive changes in reoffending rates over the last twenty years.

Who and why?

In most countries, the peak age of offending is around 17. Certainly this was so in the study of a large cohort studied in New Zealand from the early 1970s through to the 1980s (Lovell and Norris, 1990). It is also true of the large cohort study carried out by Farrington (1994, "Human Development and Criminal Careers" in Maguire Morgan & Reiner, *Oxford handbook of criminology*, Clarendon Press.) Characteristically, the likelihood of offending increases quite fast in the years up to 17 and then drops off more slowly in the years 17 through 19 and 20 to 29.

Information on the characteristics of young offenders can be found in earlier data from our 1990/91 sample (Maxwell and Morris, 1993). It showed that:

- Eight out of ten of those apprehended were boys;
- Equal proportions (42 per cent each) were Maori and Pakeha and about one in six were Pacific Islanders;
- 27 per cent were 14 years old, 35 per cent were 15 and 38 per cent were 16 years;
- 90 per cent of those involved were living at home and all but 18 per cent were still at school or in a job;
- 58 per cent had previously come to police notice.

Underlying juvenile offending and particularly offending by the relatively young are other factors that stem from the lives of relative disadvantage and abuse that is so often associated with serious early offending. A study in 1994 of 109 repeat or serious child offenders aged 10 to 13 years (Maxwell & Robertson, 1995) provides some information on backgrounds although, as these authors state, this information was not systematically recorded in the files they studied and the statistics that follow probably under-represent the true picture:

- One in five (21 per cent) were not living with their own family;
- Two thirds (65 per cent) had experienced changes of caregivers while growing up;
- Over a third (38 per cent) had other family members involved in crime;
- Nearly a half (48 per cent) were either already involved in alcohol or drug use or other family members were;
- Six out of ten had at least one incident of recorded physical abuse, witnessing family violence, sexual abuse or neglect;
- Nearly nine out of ten (86 per cent) were experiencing schooling problems, truanting, on correspondence or suspended;
- Three quarters (76 per cent) of parents were not coping;
- Nearly three quarters (72 per cent) were already known to or in the care of the Children and Young Persons Service;
- Eight out of ten (80 per cent) had at least three of the above adverse background indicators.

The above findings are underlined by Fergusson et al (1992, *The childhoods of multiple problem adolescents: A 15 year longitudinal study*. Christchurch Child Health and Development Study.) This showed that in a cohort of 1000 children aged 15 years, ten per cent could be classified as experiencing problems of some sort including anti-social behaviour. Of these, three per cent could be classified as multi-problem children who were involved in offending, experiencing mental health problems, already involved in sexual activity and likely to be experimenting with drugs and alcohol. Almost all of these multi-problem children were in the most disadvantaged five per cent of the sample; the children in this group were characterised by having at least 19 of a list of 39 adverse background factors. These factors include:

Child rearing practices:

- Child was not breast fed;
- Child did not receive immunisations and have access to other preventive health care;
- Child received less than two years preschool education;
- Child's mother was in lowest decile on emotional responsiveness;
- Child's mother in lowest sextile of maternal avoidance of punishment.

Family material conditions

- In lowest decile of average family living standards.

Family stability

- More than three changes of residence;
- More than two changes of parent figures;
- Parental separation;
- Step parent entered the family.

Parental background

- Young parents;
- Parents lacking educational qualifications;
- Parents never attend church;
- Single parent family at birth
- Low socio-economic status;
- Drug, alcohol and substance abuse;
- Family history of offending.

Early anti-social behaviour

- In trouble with police, neighbours or at school;
- Smoking at an early age;
- Use of illicit drugs;
- High absenteeism;
- Poor school achievement.

Thus young offenders come from disadvantageous family backgrounds in both material and other terms. They are often identified as problems for their parents and at school at a relatively early age. They tend to experience a range of problems including mental health problems, involvement in drugs and alcohol and early sexual activity.

Why do they reoffend?

Those who reoffend show many of the characteristics of disadvantage that identify other young offenders. But there are important differences and many of those who offend as 14-16-year-olds will go on to live a relatively trouble free adult lives. Maxwell and Morris (1999, *Understanding reoffending: report to Social Policy Agency and Ministry of Justice* Inst of Crim VUW) showed that, for a group of 14-16-year-olds who had had a family group conference, under a third had been persistently reconvicted, in the adult criminal Courts.

Those who were persistently reconvicted differed from those who were not reconvicted in terms of early life events and early negative outcomes including many of the factors

identified by Fergusson. Other factors associated with reoffending included:

Early life events

- Not having people they admired, wanted to be like, who cared about them and people outside the family who they felt close to;
- A lack of knowledge of and pride in their culture;
- Not having parents who knew where they were, or adults who were home when they came home from school;
- Not having an effective relationship with their father;
- Being bullied, harshly punished or abused and witnessing family violence.

Early negative outcomes

- Not spending leisure time constructively;
- Truanting, being suspended or expelled;
- Not achieving at school.

Family group conference events

However, this study also found that family group conference events could have an impact on reoffending, independently of previous life events and patterns of offending. Those who did not reoffend were more likely to report that they:

- Agreed with decisions of family group conferences;
- Felt remorseful, apologised to the victim, attempted to repair damage, completed tasks agreed to;
- Were not shamed by the process.

Subsequent life events

The subsequent life course was also different for those not reconvicted compared to those persistently reconvicted. Those who did not reoffend were most likely to report that they:

- Had support after the family group conference;
- Had completed education or obtained training;
- Had obtained a job;
- Had developed positive close relationships with others and/or a partner;
- Did not live in many different places and associate with other offenders or gangs;
- Did not drink a lot, smoke and use dope;
- Did not experience psychiatric difficulties.

They were also more likely to report feeling good about themselves and their life. In other words, a successful family group conference that resulted in remorse without shaming followed by support could lead to positive outcomes in terms of successful reintegration into the community, reduced reoffending and general wellbeing.

Implications

The statistics presented in this paper describe the nature and extent of offending by children and young people. Over recent years, the pattern has remained fairly constant with children and young people being responsible for about 22 per cent of the total offences resolved by the police. About three quarters of these offences are for dishonesty or property abuse and damage. Only ten per cent are for offences involving violence and sexual offences make up less than a half of a per cent. The proportion of serious offences committed by children and young people is considerably less than ten per cent. Thus, if there is anything distinctive about offences committed by children and young people, it is that they are generally less serious than those committed by adults and are more likely to involve dishonesty and property abuse or damage.

Over the last seven years, there have been increases in the number of offences for which offenders have been apprehended across all age groups. The amount of change in the number attributed to children and young people is very similar to the overall pattern; the largest increases have occurred in the 31-50-year-old age group. Over this period, the number of offences of violence as a whole have also increased. The amount of change in the number of violent offences attributed to young people is very similar to the overall pattern and, again, the greatest increase is in the 31-50-year-old age group. In terms of change, therefore, the amount of offending by children and young people is in line with overall patterns for crime in New Zealand.

With respect to the question "why do young people offend and reoffend?", the answers lie firstly in their immaturity and in their family backgrounds and life experiences. Most children and young people will offend while growing up. However, those who offend more seriously and who persist in offending will have experienced adverse background circumstances. They are much more likely to have been deprived as children in terms of both material circumstances and physical and emotional care. As children, they will have been more likely to have been harshly punished, neglected, abused, bullied or to have grown up with family violence. They will have been more likely to have been placed in social welfare care, to have failed at school, to have truanted, to have been suspended or to have been expelled. They are likely to have lacked people to whom they felt close, who cared about them and who supervised them.

Reoffending is also affected by experiences in the criminal justice system. Those who actively participate in successful family group conferences, who feel remorseful, who complete their tasks and who are not shamed by the process are less likely to reoffend. Those who do not reoffend are also more likely to have been reintegrated into society, to have adopted a stable life style, to have developed close relationships with friends, family and a partner and to have obtained training or employment. These are important findings because they indicate that professionals who are involved in the youth justice system can have an impact on the future of the children and young people they work with even when their backgrounds have been particularly adverse and their futures look bleak.

Finally, we suggest that it is important to continue to challenge inaccurate media representations of young people and their offending. Inevitably, people become alarmed about offending that affects their lives. However, being the victim of a crime by a young person is not as common as being a victim of an adult. And children are more likely to be the victims of adults than adults are to be the victims of children. The principal findings of research on youth crime are that:

- Most young people offend at some stage while they are growing up;
- Most do not offend seriously;
- Very few become serious and persistent offenders;
- When they do offend, persistently, the chances are high that they have come from backgrounds of disadvantage and have already been victims of abuse, instability and a lack of love; and
- Appropriate responses to youth offending though effective family group conferencing can reduce the risk of reoffending in the future. ❑

RYLANDS v FLETCHER IN NEW ZEALAND

Margaret Vennell, University of Auckland

finds there is still life in the old doctrine

Whether the doctrine of *Rylands v Fletcher* has been absorbed into negligence in New Zealand or whether it exists as an independent tort is a moot point. The question may now have been answered that it has not been absorbed into negligence by the unanimous decision of the Court of Appeal in *Hamilton v Papakura District Council and Watercare* (unreported CA 242/98, 29 September 1999; judgment delivered by Gault J). The decision of the Court of Appeal in *Autex Industries Ltd v Auckland City Council* (unreported, CA 198/27, 23 February 1998, see Cheer [1998] NZLJ 344) was an indication that, if an appropriate case came before a Court here in which the question was fully argued, *Rylands v Fletcher* might still have a life here. *Hamilton* seems to be the appropriate case.

In *Hamilton* the allegation was that there had been spraying of weeds around the catchment of the water supply lake and that run off had contaminated the water which was used by the Hamiltons in which to grow their hydroponic tomato crop. Williams J in the High Court found that on the evidence this was not proved and the Court of Appeal was understandably reluctant to upset a finding of fact by the trial Judge. The action was pleaded on three grounds: namely a breach of an implied term under the Sale of Goods Act 1908, s 16(a) that the water supply was fit for the purpose for which it was supplied; negligence and the doctrine in *Rylands v Fletcher*. From the point of view of this note it is the latter argument which is of interest.

Autex was an application for summary judgment. A city water main had burst causing damage to the Autex premises. The plaintiff argued *Rylands v Fletcher*, as its principle cause of action, relying on the earlier settled law as decided in *Irvine & Co Ltd v Dunedin City Corporation* [1939] NZLR 741. The Auckland City Council respondent opposed the entry of summary judgment on the ground that *Rylands v Fletcher* was no longer good law in New Zealand, relying in its argument on the case of *Burnie Port Authority v General Jones* (1994) 179 CLR 520 (HCA), where the High Court of Australia held that in Australia the doctrine of *Rylands v Fletcher* had been absorbed into the tort of negligence. (This argument was not raised in *Hamilton*.)

In *Autex* the majority of the Court of Appeal (Richardson P, Gault and Henry JJ) refused to decide the matter on a summary judgment application, on the grounds that there was insufficient material before the Court to allow it to reconsider *Irvine Industries* which after all, had stood for fifty years as settled law; and therefore, it was appropriate for the matter to be remitted back to the High Court for full argument. The minority (Keith and Blanchard JJ) took the view that there was still room for the *Rylands v Fletcher* doctrine to be used in New Zealand, and that *Burnie* was not the law in this country. It is understood that *Autex* was settled in favour of the plaintiff, although the details remain confidential.

That case was essentially an argument between the insurers of Autex Industries and those of the city council as to which should shoulder the losses which were comparatively small (in the order of $100,000). *Burnie Port* had suggested that *Rylands v Fletcher* had now been absorbed into the tort of negligence. The contemporaneous House of Lords decision in *Cambridge Water Co v Eastern Counties Leather* [1994] 2 AC 264 had classified an isolated escape as a branch of the law of the nuisance with foreseeability of damage as a requirement. (This in fact may owe its genesis to *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (HL), and *The Wagon Mound (No 2)* [1967] 1 AC (PC): see Vennell, "The Essentials of Nuisance" (1977) 4 Otago LR 56. In *Hamilton* the Court has accepted that foreseeability is a requirement of both nuisance and its offshoot *Rylands v Fletcher*, pointing out that the similarities between nuisance and *Rylands v Fletcher* are clear. *Rylands v Fletcher* deals with an isolated escape whereas nuisance is usually concerned with a continuing wrong, or at least one which has potential for continuance.

In *Hamilton* the Court did not consider whether the Australian view in *Burnie*, to the effect that nuisance had now been absorbed into negligence was the law in New Zealand, but the answer would seem not. In the words of Gault J [at 74] "It has long been considered that liability in nuisance is strict"; once the plaintiff has proven damage to his property ... the plaintiff has established a prima facie case of nuisance. It is then incumbent on the defendant to raise a defence, such as that he was exercising reasonable skill and care in the ordinary and natural use of land. As recognised in *Cambridge Water* this defence moderates the application of the principle of strict liability which was eroded further by the House of Lords when they included foreseeability of damage on the part of the defendant as prerequisite for establishing liability. Although it was not mentioned specifically this is not the same as proof in negligence where it has to be proved affirmatively by the plaintiff that the defendant breached a duty to act with reasonable care. Thus it can be said that in negligence the burden is on the plaintiff whereas in nuisance the burden shifts to the defendant to raise a defence.

Rylands v Fletcher was accepted wholeheartedly in the United States, if not immediately then soon after the doctrine was promulgated. This is explained by Gary Schwarz in his essay "*Rylands v Fletcher*, Negligence and Strict Liability"

(*Essays in honour of John Fleming* ed Cane (1998)) as, according to one theory, a form of enterprise liability. The perpetrator can carry out a dangerous activity but if so must carry the risk of harm to others.

As Fleming pointed out, from its inception "it was subjected to a process of constriction and many exceptions were grafted onto it". (*Fleming* 9th ed, p 377) Nevertheless the principle is very useful and it can be argued that it is, even today, in accord with economic theory. There has long been controversy as to whether *Rylands v Fletcher* and indeed nuisance are distinct torts. In 1967 Millner (*Negligence in Modern Law*) argued that both were now part of the law of negligence. (This was supported by Buckley, in *The Law of Nuisance* (1981).) Certainly some classes of nuisance are close to negligence as are some *Rylands v Fletcher* activities. But there will be exceptions. It may accord with notions of fairness that the Eastern Counties Leather Company should not be liable for something which happened years before and which nobody knew was likely to cause harm, and that the Burnie Port Authority was not liable under *Rylands v Fletcher*. The majority of the High Court took the view that, once it is accepted that proximity is required in a *Rylands v Fletcher* situation, "it is highly unlikely that liability will not exist under the principles of ordinary negligence where liability would [also] exist under the rule in *Rylands v Fletcher*".

There were really two questions before the Court in *Autex*, first, whether *Rylands v Fletcher* still applied in New Zealand, and, second, was it part of the tort of nuisance as the House of Lords had decided in *Cambridge Water*. If the latter was the case then foreseeability would be required, even although liability was strict. The questions have now been unequivocally answered by the Court of Appeal in *Hamilton*, where it was said further "once it has been shown that the damage was foreseeable, it is irrelevant that the actual act causing the damage was not the fault of the defendant or that the defendant acted with reasonable skill and care". Cheer argues that in *Autex* the Court of Appeal "by placing *Rylands v Fletcher* under the umbrella of nuisance, did not substantively discuss the fact that the latter has been invaded by negligence in recent years". ([1998] NZLJ 344, 345.) Now one may say that the Court of Appeal in *Hamilton* has clearly shown the inherent differences between foreseeability in negligence and foreseeability in nuisance and *Rylands v Fletcher*.

In New Zealand the law has stood for sixty years, it having been decided by the Court of Appeal in *Irvine and Co Ltd v Dunedin City Corporation* [1939] NZLR 74 where the local authority was held liable under the doctrine of *Rylands v Fletcher* for flooding caused by a burst water main. Counsel for the Auckland City Council in *Autex* had not provided evidentiary foundations for his arguments as to the future course of the common law in New Zealand. He submitted that the matter should not be dealt with on an application for summary judgment. The majority therefore took the view that it should not decide the question. The minority (Keith and Blanchard JJ) were not so timid.

In their view the conveyance of water, gas and electricity in city streets however common was still a "non-natural use". There remains, it was said, an inherent danger in the bulk carriage of water under roadways, although it may well be that the risk has reduced. Fleming in (1995) Tort Law Review described *Rylands v Fletcher* as a vital component of tort theory and pointed out that the theories underlying strict liability and negligence are quite different: "Strict liability deals with activities which even when carried out with due care retain abnormal risk and could be deemed negligent as such but for the countervailing utility (p 60)". In Fleming's view, no doubt influenced by his teaching and writing in North America, persons such as local authorities conducting ultra hazardous activities are better placed to assess, manage and spread the risk, rather than the loss being carried by individual members of the community.

Gary Schwarz (p 216) has no quarrel with the requirement of foreseeability in *Rylands v Fletcher*, as suggested by Lord Goff in *Cambridge Water*. Blackburn J's references to "likely to do mischief" if it escapes which were quoted with approval by Lord Cairns in the House of Lords(1868) 3 HL 330 at 339-340, would seem to presuppose foreseeability or something very like it. Now the Court of Appeal has unanimously shown that it is adopting the approach indicated by the minority in *Autex*, which can co-exist with *Cambridge Water* but not with *Burnie*. It has also indicated indirectly that it is in agreement with both Fleming and Schwarz. It is worthwhile to remember too that an important difference between some actions in nuisance is that they can be remedied by an injunction where as *Rylands v Fletcher* which is available for an isolated escape will not be. It seems that we now follow *Cambridge Water* rather than *Burnie*. ❑

NUCLEAR WASTE AND MARINE POLLUTION

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asks whether the shipments through the Tasman are properly authorised

The shipment of plutonium from Europe to Japan and of nuclear waste on the return journey has brought into new prominence the dispute between states that wish an unrestricted right of innocent passage through the seas and those who want to restrict that right to prevent the risk of harm to their marine environments.

The route of the ships takes them near national waters of countries like the Gambia, South Africa, Australia, New Zealand and Oceania. Indeed Australian waters were entered to drop off an injured crewman. Yet those states have no say in what passes their doorstep. The states involved in the shipment argue that all ships have the right of innocent passage through territorial seas, regardless of the cargoes they are carrying as part of customary international law.

But is this "right" of innocent passage valid in the modern world? Even in the 1950s, there were no cargoes that could have such a potential for harm to the marine and coastal environment. For fishing or tourist interests the effect of an incident involving such cargoes could be catastrophic. Even if there were no release of plutonium, confidence in local products or resorts would be severely damaged.

RADIOACTIVE WASTE

For land-based transport of radioactive materials, the principle is different. The European Community Directive on the Supervision and Control of Shipments of Radioactive Waste between Member States and into and out of the Community (Dir 92/3/EURATOM) is emphatic.

> Whereas, to protect human health and the environment against dangers arising from such waste, account must be taken of risks occurring outside the Community; whereas therefore, in the case of radioactive waste entering or leaving the Community, the third country of destination or origin and any third country or countries of transit must be consulted and informed and must have given their consent.

This reflects the IAEA code of good practice on the international movement of radioactive waste.

The Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal is even more direct. It "[f]ully recognis(es) that any state has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in its territory". (art 1.3.) Unfortunately this does not apply to radioactive wastes.

The Directive defines "shipment" to mean "transport operations from the place of origin to the place of destination" which would seem to include maritime transport. But there was no consultation, information or consent by coastal states in the shipment from UK and France to Japan. The question may therefore be whether those shipments, in passing the coastal states, entered the "country".

Under art 2 of the UN Convention on the Law of the Sea (UNCLOS) a state has sovereignty over its territorial sea, which can extend up to 12 miles from its coast. That sovereignty has to be exercised in accordance with UNCLOS and to other rules of international law. Nevertheless I would suggest that a ship entering a state's territorial sea enters the country for the purposes of the Directive.

The situation as regards the Exclusive Economic Zone – which can extend to 200 nautical miles from a state's coast – is different. In the EEZ a state has only limited sovereignty, although it extends to jurisdiction for the protection and preservation of the marine environment (UNCLOS art 56(1)(b)(iii)). Again that jurisdiction has to be exercised subject to the other provisions of the Convention. Here it would be more difficult to argue that for the purposes of the Directive a ship entering a state's EEZ, enters that country.

However the Directive is concerned with the preservation of the environment, which must include the marine environment. Even if a ship carrying such wastes does not enter the "country" when it crosses into an EEZ, it does come under the state's environmental jurisdiction. If a state has environmental jurisdiction over a sea area then I would suggest the word "country" should be defined by the Courts in such a way as to include a state's EEZ.

This is reinforced by the way the matter is put in the Basle Convention. It is concerned with entry into an "area under the national jurisdiction of a state" which is defined as "any ... marine area ... within which a state exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment". (Art 2.9.) Certainly it is settled law that Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community – *Gianni Bettati v Safety High Tech Cases* C-284/95 and C-341/95, (1999) 11 Jo Env Law 354, 371.

If the ship carrying the waste remains in the high seas after leaving its state of origin until it reaches its state of destination then the Directive does not apply. Article 87 of UNCLOS gives complete freedom of the high seas. Given the potential effect of a marine incident involving radioactive wastes, it may be time to reconsider that freedom.

LIABILITY FOR HARM

In the event of an incident causing damage from the radioactive or other properties of the material being carried the provisions of the Vienna Convention on Civil Liability for Nuclear Damage 1963 will apply between those state parties

to that Convention. The Convention relating to Civil Liability in the field of Maritime Carriage of Nuclear Material 1971 says that if there is liability under the 1963 Convention then that Convention will apply.

The Convention, finalised in 1963 and not amended since, contains several areas not in line with modern legal thinking. In the definition of "Nuclear Damage" the principal damage covered is loss of life, and personal injury or any loss of, or damage to property arising from, in effect, the carriage of nuclear material amongst other things – art. 1(1)(k)(i). This would not help commercial sea fishermen who have no property in the fish they catch. Nor would it cover harm to the environment. Although art 1.1(k)(ii) adds "any other loss or damage so arising or resulting if and to the extent that the law of the competent Court so provides", this may not help if the Court considers it has to apply ordinary common or civil law rules.

The 1992 Protocol to the International Convention on Civil Liability for Oil Pollution Damage 1969 gives a far wider definition. "Pollution damage" means "loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment, other than loss of profit from such impairment, shall be limited to costs of reasonable reinstatement actually undertaken or to be undertaken". (Art 2), para 6. Damage also includes, "the costs of preventive measures and further loss and damage caused by preventive measures". The Nuclear Damage Convention 1963 should be amended in line with this provision.

Article IV.3 relieves an operator of liability in the event of damage caused through armed conflict, etc ... and a grave natural disaster of an exceptional character. It is not easy to understand this exemption as it applies to the transport of materials by sea. If the operator decides to run the risk of transporting materials by sea, he should be liable for any damage resulting from it no matter what the cause.

Article V of the Convention allows the installation state – the UK and France in this case – to limit the liability of the operator to not less than US$5 million for any one nuclear incident. This needs substantial upward revision.

On the whole the Convention – where it applies – is unsuitable for modern conditions. Times have moved on but the Convention has stood still. If the carriage of nuclear materials by sea is going to be a regular phenomenon then the Convention should be given a thorough overhaul.

INNOCENT PASSAGE

There are two views of this "right". When Egypt ratified UNCLOS it declared that it would require ships carrying nuclear or other inherently dangerous and noxious substances to obtain authorisation before entering its territorial seas. (*Law of the Sea Bulletin*, Special Issue, 1987.3) Haiti has adopted legislation under which the entry of ships carrying hazardous or polluting wastes into its ports, territorial sea or EEZ is prohibited. (Ibid No 11 July 1988 13.)

The 1992 Declaration of the Special Meeting of the Conference of Heads of Government of the Carribean Community (CARICOM) stated that shipments of plutonium and other radioactive or hazardous materials should not traverse the Caribbean Sea. In 1996 CARICOM called on nations currently engaged in the shipment of hazardous substances through the Caribbean Sea to respect the wishes of the Community by immediately halting such operations. (CARICOM press release 50/1996.)

Other states take a diametrically opposite approach. The United States and the Soviet Union issued a joint declaration in 1989 confirming the right of innocent passage for ships within the territorial sea:

> All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorisation is required. (*Jackson Hole Declaration*, 23 September 1989, 1989 ILM 1446.)

The right of innocent passage is established in UNCLOS art 17. The only control is, under art 23, to ensure that ships passing through territorial seas carry those documents, and observe the special precautionary measures, established for them by international agreements.

It may be, however, that the UK, France or Japan should have carried out an environmental assessment of the potential effects of a release of plutonium from the shipments in accordance with art 206 UNCLOS. Article 206 applies where states have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of the marine environment. It is difficult to see how a release of plutonium into the sea would not cause substantial pollution. Presumably the argument is that, given the safety precautions, there are no reasonable grounds for believing that pollution would be caused.

Thus the issue for the International Tribunal on the Law of the Sea here would be how "may" in art 206 should be interpreted. If the precautions taken are such that it is reasonable for a state to say that there are no grounds to foresee substantial pollution from the activity in question, then is it absolved from the provisions of art 206? Alternatively if there is a risk, should there be an assessment in accordance with art 206 to determine, and publicise, the nature and extent of that risk?

Further, even if there is no need for an assessment, should the state of shipment in any event, under art 204 of UNCLOS, evaluate the risks posed by the shipments and publish the reports of such evaluations in accordance with art 205? At the moment it seems that there has been no compliance with this article by the states concerned.

On the other hand, some states have passed laws prohibiting the entry of such vessels into their territorial seas or Exclusive Economic Zones. The master of a ship carrying nuclear waste entering the Nigerian EEZ without lawful authority faces life imprisonment under the Harmful Wastes (Special Criminal Provisions) Act 1988. But whether that law is valid in international law remains to be seen. Certainly it is now contrary to art 24.1 of UNCLOS which prohibits coastal states from imposing requirements on foreign ships which have the practical effects of denying or impairing the right of innocent passage, although it is in line with the principle behind the Basle Convention.

CONCLUSION

This issue will have to be resolved at international level. But given the scale of the potential risk it would seem right that states should not be subjected to this risk without their consent. If the Kuala Lumpur Declaration of April 1992 that called for "a new global partnership based on respect for sovereignty and the principles of equity and equality among states for the achievement of sustainable development" is to have any meaning, coastal states must have the right to prohibit extra-hazardous cargoes from entering waters under their jurisdiction. ❑

THE CROWN IN COUNCIL AND ULTRA VIRES

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considers the reviewability of delegated legislation made "in Council"

In earlier times the Courts were bound by an antiquated doctrine that the King could do no wrong, and could not be sued in his own Courts. This was obviously a statement of principle better suited to earlier times, but its legacy affected the development of the law of judicial review well into this century. In the area of delegated legislation it resulted in a situation where Orders in Council and other vice-regal regulations ("orders") have been largely immune from judicial review. So although the acts of Ministers and statutory bodies became more susceptible to examination by the Courts, this did not happen, at first, to the acts of the Crown in Council. The purpose of this paper is to examine the common law developments that have occurred. In doing so a fuller picture emerges that clearly shows the changing attitudes of the Courts over the years and the fall of illusory distinctions that previously impeded the review of orders. It should be noted that the following discussion is directed specifically at delegated legislation and is not concerned with the exercise of prerogative powers.

The literal interpretation of the term ultra vires still has modern application, but it is not as important now as it once was. In times gone by it was only if an order was outside the scope of words of the empowering statute that a Court could declare it ultra vires.

In *Commonwealth v Progress Advertising and Press Agency Co* (1910) 10 CLR 457 at 465 Isaacs J said:

> So far as any matter or thing falls within the scope of [the empowering provision] ... it would be a most exceptional and extraordinary case which would warrant the interference of the Court, or enable it to declare that what the executive and the two Houses of Parliament considered necessary for the public benefit was not so. But it is a quite different question whether the matter is within or without the possible limits of the power itself.

In *Duncan v Theodore* (1917) 23 CLR 510 Barton J, at 524, held that giving the Governor the power to make Proclamations for the purpose of "giving full effect" to the Act:

> ... mean[t] Proclamations within the powers conferred by the Act. It cannot mean Proclamations assuming to operate outside the powers. If it did, the Proclamations might extend to anything and everything, and such a construction of the power is quite unthinkable.

The Courts have also declared orders invalid where failure to do so would be impliedly taken as allowing the legislature to give the Governor-General the power to amend the general law: *Scott v The King* (1908) 11 GLR 16 at 24. Upon this rests the doctrine of repugnancy. It was also apparent at an early stage that the Courts would declare invalid an order that was uncertain. See, for example, *R v Watt* [1878-1880] O B & F 175.

However, in the past it is clear that as long as an order was within the bounds of the empowering provision, the Courts were precluded from reviewing its veracity on any other grounds. Isaacs J in *Progress Advertising* (above) excluded any notion of the Courts being able to examine whether the regulation was in fact "necessary", as required by the statute. Concepts of improper purpose or bad faith were also ruled out. Mala fides could not be imputed the King or his representative: *Duncan* (above) at 544.

It seems the only true control on such regulations was the responsibility of the Ministers, who advised the Governor to make the regulations, to Parliament. The inadequacy of that is obvious. Furthermore, not only was unreasonableness, or otherwise, an impermissible means of questioning acts of the Sovereign's representative, neither was the question of irrelevant considerations. In *Victorian Stevedoring and General Contracting Co v Dignan* (1931) 46 CLR 73 the High Court was clearly of the opinion that the considerations the Governor-General did, or did not take into account were no business of the Court.

This reluctance did not extend to by-laws made by local bodies. See, for example, *Maude v Bourke* (1888) 6 NZLR 753 where a by-law that gave no time to achieve compliance was considered unreasonable. Furthermore, a regulation made by a Minister, rather than the Governor, could be invalidated as unreasonable. In *R v Broad* [1915] AC 1110 (PC) this was so, for the regulation made by the Minister for Railways was not only ambiguous, it was also unreasonable.

In the dying days of the First World War the Courts of this country began, almost unintentionally, to add a concept of reasonableness. In *Jorgensen v Ridings* [1917] NZLR 980 at 981 Stringer J said a "regulation, like a by-law, must be reasonable". That case concerned a regulation made by the Governor-in-Council, but His Honour concluded that it was intra vires, so little weight can be given to this statement. The Judge cited no authority for his introduction of a reasonableness concept. It is possible he simply overlooked the distinction that existed between such orders and lesser regulatory instruments, such as by-laws. However, in *Southland Acclimatisation Society v Otago Acclimatisation Society* [1918] GLR 425 at 428 Stout CJ also implied there was some kind of reasonableness criterion. His Honour, like Stringer J, did not go so far as to define what this possible test of reasonableness was.

This brief insurrection had to give way again to the requirements of "national security" with the onset of the Second World War. In *R v Comptroller-General of Patents* [1941] 2 KB 306 (CA) the Court reaffirmed the traditional position. At 311-312 Scott LJ said:

> Be that as it may, in my opinion, the effect of the words "as appear to him to be necessary of expedient" is to give His Majesty in Council a complete discretion to decide what regulations are necessary for the purposes named in the sub-section. That being so, it is not open to His Majesty's Courts to investigate the question whether or not the making of any particular regulation was in fact necessary or expedient for the specified purposes. The principle on which delegated legislation must rest under our constitution is that legislative discretion, which is left in plain language by Parliament, is to be final and not subject to control by the Courts.

In the post-war years the Courts continued to pull away from any attempts to question the necessity or reasonableness of orders. In *Hewett v Fielder* [1951] NZLR 755 at 760 a full Court of the Supreme Court confirmed this.

Furthermore, members of the High Court of Australia were still resisting expanding the grounds under which delegated legislation made by the Governor-General could be questioned. In *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 178 to 179 Dixon J reaffirmed the view that:

> In the case of the Governor-General in Council it is not possible to go behind such an executive act done in due form of law and impugn its validity upon the ground that the decision upon which it is founded has been reached improperly, whether because extraneous considerations were taken into account or because there was some misconception of the meaning or application, as a Court would view it, of the statutory description of the matters of which the Governor-General in Council should be satisfied or because of some other supposed miscarriage ... The good faith of any of his acts as representative of the Crown cannot be questioned in a Court of Law.

The Privy Council returned to this in *Attorney-General for Canada v Hallett & Carey Ltd* [1952] AC 427 (PC). Lord Radcliffe delivered the opinion of Their Lordships and confirmed, at 444 to 445, that the Courts cannot question what the Governor-General has thought "necessary" or the considerations that have been taken into account in reaching that conclusion. However, His Lordship did say that the Courts could intervene in cases of "bad faith", that is, where the power has not been used for the purpose given. As will be seen, this dicta opened the way for further developments in this area. The reason for this is perhaps obvious. Lord Radcliffe, perhaps inadvertently, went further than saying that the regulations must be within the ambit of the power given by Parliament, but also that if they are not this may be bad faith on the part of the Governor-General. "Bad faith" may equate to improper purpose and to decide whether the purpose behind a regulation is improper the Courts must, by necessity, examine peripheral matters such as any extraneous considerations. Again, it is submitted that this is a "can of worms" that Lord Radcliffe did not intend to open, for the context of his judgment shows this, but future Courts did seize upon his comments in this regard to justify the innovations they were to make.

The turning point here came in the case of *Reade v Smith* [1959] NZLR 996. As has been discussed, the jurisprudence that had emerged by this point seemed clear that whether particular regulations were "necessary" was not a question that was justiciable. Lord Radcliffe's judgment in *Hallett* appeared to be adequate recent confirmation of that principle. However, Turner J thought that cases that involved the examination of regulations made in time of war were not particularly good precedents, given the states of national crisis that existed in those instances, and that other cases where the main issues to be determined by the decision maker were questions of fact were also distinguishable. Accordingly, His Honour held (at 1000 to 1001):

> In the case before me, the question whether the due administration of the Act can necessitate the making of the regulations is purely or mainly a question of law ... In my view, any question of law which the Governor-General is required to decide as a basis for his opinion must always be examinable by the Court, and if it can be shown that the regulation has been based upon a wrong opinion by him as to a question of law, it must fall, since its foundation has been removed.
>
> Moreover, the Court may, in my view, always inquire, in any case, whether the Governor-General (or the Minister as the case may be) could reasonably have formed any opinion, on law or on fact, which is set up as a foundation of the regulations ... Then the Court will inquire simply whether the conclusion as to the law which the Governor-General must have formed as a foundation for the regulations is one which is tenable. If it is not, then he could not reasonably have been of the opinion which was necessary to justify the regulation.

It is arguable that this decision was wrong in law. Turner J seems to have ignored any distinction that may have arisen between delegated legislation by the Sovereign's representative and Ministers and local authorities. However, this judicial revolution could be said to have been long overdue. For, as Turner J himself pointed out (at 1002), if the Courts could not examine the correctness of the conclusion that a regulation was necessary, what could stop the enactment of orders that could be absurd and potentially dangerous?

Hardie Boys J adopted the view, also relying on *Hallett*, that the Courts could consider whether an Order in Council was necessary in terms of the empowering statute: *Bhana Nana v Chesney* [1960] NZLR 690 at 693. His Honour did, however, perpetuate the theory that the Court could not consider the considerations that were, or were not, taken into account. The inherent fallacy with this is the contradictory nature of the views expounded. It seems somewhat absurd to be able to decide whether an action was necessary, yet not be prepared to address the considerations that led the actor to that conclusion – or the considerations that were not taken into account and yet which might go to the validity of that conclusion. The High Court of Ontario seems to have recognised this in *Re Doctors Hospital and Minister of Health* (1976) 68 DLR (3d) 220 at 232. The divisional Court held that an Order in Council would be invalid if extraneous considerations outside the object and policy of the empowering statute were taken into account.

The High Court of Australia was confronted in *R v Toohey* (1981) 151 CLR 170 with the question as to whether the Crown's representative could be questioned for improper purpose. There is, of course, early authority that the Courts could not question the bona fides of the Crown, or its representative. Gibbs CJ recognised that this line of authority existed, but also noted the emergence of a new approach to the question, as evidenced by *Hallet*, *Reade v Smith* and *Re Doctors Hospital*, amongst others. His Honour therefore held that it was open for the question to be decided afresh. He said, at 192:

> [I]f the Crown in Council makes a regulation which appears on its face to be made for a purpose that was

> not authorised by the statute under which it purports to be made, the regulation will be invalid. It would be anomalous if a regulation which bore the semblance of propriety would remain valid even though it should be shown in fact to have been made for an unauthorised purpose; that would mean a clandestine abuse of power would succeed when an open excess would fail.

Stephen J opened his reasoning by acknowledging that it was now well-established that a Minister of the Crown could have his, or her, actions questioned on a number of grounds, including improper purpose. His Honour proceeded to also review the case law on the issue and concluded, at 215, that an Order in Council can be reviewed for improper purpose. He went further and held that in this context there is no distinction between acts of the Crown's representative and those of a Minister of the Crown.

That latter conclusion went much further than was required by the case before the Court, but Stephen J recognised the logical basis for such a position, that is, the political reality that Ministers advise the Governor-General to make delegated legislation.

Mason J agreed with Stephen J and both Aicken and Wilson JJ also held that the motives of the Crown's representative could be examined. Aicken J's judgment is particularly interesting in that he clearly accepts, at 260-261 that improper purpose inherently contains an examination of irrelevant considerations.

About the same time the High Court of Australia was expanding the grounds of review in that country, the Court of Appeal here was also becoming more proactive, but perhaps also more confused in its own stance on the issue. In *CREEDNZ v Governor-General* [1981] 1 NZLR 172 (CA) the Court accepted that irrelevant considerations were a legitimate ground for reviewing an order. It actually went so far as to say that an order might be invalid if it could be shown that the advising Minister(s) had taken into account irrelevant considerations at the point of advising the Governor-General to make the order. The Court also, per Richardson J at 197, confirmed that invalidity could result from failure of the Executive Council to take relevant considerations into account. The failure of the council is thereby attributed to the Governor-General and the validity of the order made.

The Court also introduced a means whereby orders might be challenged by way of bias or predetermination. The bias or predetermination could not be that of the Governor-General personally (although under the recently adopted doctrine of improper purpose in *Toohey*, presumably it could be). The Court held, per Cooke J at 179, that at the point the Executive Council advised the Governor-General the advising body must have been free from any predetermination. That is, it must have genuinely addressed itself to the relevant statutory criteria and have been satisfied that those criteria were satisfied. It is submitted that the effect of these decisions has been to strip away any pretence that it is the Governor-General who in fact makes the relevant decisions, but instead the responsible Minister of the Executive Council. That this closer reflects the actuality cannot be disputed, but it does raise the question whether the approach adopted properly recognised the distinctions that existed between an administrative and an executive or legislative act.

Almost contemporaneously, however, members of the Court were endorsing the orthodox view that had prevailed. In *Brader v Ministry of Transport* [1981] 1 NZLR 73 at 80 (CA) McMullin J reaffirmed the view expressed in *Carroll v Attorney-General* [1933] NZLR 1461 at 1478:

> The Courts have no concern with the reasonableness of the regulation; they have no concern with its policy or that of the government responsible for its promulgation. They merely construe the Act under which the regulation purports to be made giving the statute ... such fair, large, and liberal interpretation as will best attain its objects. They then look at the regulation complained of. If it is within the objects and intention of the Act, it is valid.

It is submitted, however, that this principle no longer reflected the contemporary view. In the same case Cooke J (with whom McMullin and Vautier JJ both agreed) confirmed that it is for the Court to ask whether the regulations are capable of being regarded as necessary of expedient within the terms of the Act: at 78. It seems difficult to escape the conclusion that to answer the question posed by Cooke J a concept of reasonableness has been sustained.

Despite the liberalising effect that *CREEDNZ* and *Toohey* might have had, that dicta of McMullin J permitted a brief return to some more orthodox thinking. In *Cossens & Black Ltd v Prebble* (HC Wellington, AP 318/84, 11 August 1987, Heron J) the Governor-General was empowered to make regulations thought necessary or expedient for giving effect to the Act. *CREEDNZ* was not cited to Heron J, nor for that was *Toohey*, and the Court returned to the view that the making of regulations by the Governor-General is an executive act; that the "scope for looking behind such regulations is very limited" and "for reasons of certainty and good administration" ought not to be widened. His Honour held that to inquire into the reasonableness of the regulations in issue would be "contrary to the Court's function in considering these regulations".

However, the Court was more progressive in *Gallagher v Attorney-General* (HC Wellington, CP 402/98, 28 July 1988, Ellis J) – a case where it did seem to have been made aware of *CREEDNZ*. In that case the Court looked to both *CREEDNZ* and also the classic statement in *Bushell v Secretary of State* [1980] 2 All ER 608 at 613 (HL) to the effect that constitutional fictions should be put aside and the practical reality recognised. Ellis J held that a right to be heard by the Governor-General in Council could not be implied to exist. However, in some cases, a legitimate expectation to be heard by the advising government department, that is, those who advise the Minister who in turn ultimately advises the Governor-General might exist. That is, such an expectation might legitimately arise if the individual affected by the regulations would be so to an extent significantly different from the public generally: *Fowler & Roderique v Attorney-General* [1987] 2 NZLR 56 at 74 (CA).

Gallagher is also interesting in that Ellis J accepts that "unreasonableness" is not a widely accepted means of reviewing delegated legislation, but intimated that such may be accepted in a proper case. It is submitted that His Honour is correct to the extent that "unreasonableness" has seldom been referred to in this context, but it has in fact been alluded to in a number of cases. Support for that view can, respectfully, be derived from *Turners & Growers v Moyle* (HC Wellington, CP 720/88, 15 December 1988) where McGechan J said, after referring to both *Cossens & Black* and *Gallagher*:

> With respect, I prefer to put the matter a little differently, although in the end it may be a matter of words. In principle I prefer the view that regulations can be attacked as ultra vires an empowering statute if the

> regulations are so unreasonable that their making would not have been contemplated by Parliament as empowered by that statute.

Subsequently the Courts might be seen to have retreated from the expansive attitude adopted in *CREEDNZ*, but there could be no doubt that the distinction between legislative and other acts has been extinct from that point on, subject only to brief resurrection in *Cossens & Black*. In *Hawkins v Minister of Justice* [1991] 2 NZLR 530 at 534 (CA) Cooke P said:

> Of course the Governor-General, the Minister and the Commission had to direct themselves to the right tests and comply with the ordinary obligations of an authority in whom a statutory discretion is vested.

By regarding the three parties to this Order in Council as equal entities it is submitted that His Honour has regarded them all as part of one administrative act.

Richardson and Hardie Boys JJ, on the other hand, did impose a restriction on the reviewability of delegated legislation to an extent. Richardson J said at 536:

> Although often cast in the terminology of jurisdiction, collateral or precedent fact, the first issue, at least in New Zealand terms, is better viewed as a straightforward question of statutory interpretation. This is for the obvious reason that the principles on which the exercise of a statutory discretion may be reviewed by the Courts must turn on a consideration of the particular statutory provision under which the power is exercised. That requires an assessment of the nature and subject-matter of the decision under challenge set in its broad legislative context which necessarily involves consideration of the object of the statutory grant of decision-making power, and the role under our system of government of the body entrusted with the exercise of that power ....
>
> The larger the policy content and the greater the room for the exercise of judgment by the statutory decision maker, the less scope there is for a conclusion that the legislature intended that the Courts by way of judicial review should determine whether the statutory criteria were established as a precondition to the exercise of the statutory power. To put it another way, the legislature may implicitly entrust the jurisdiction to determine whether the criteria are present. In some cases the statutory analysis will lead to the conclusion that the identification and weighing of relevant policies and considerations is for the decision maker alone, and in that sense is not justiciable at all. In others the conclusion will be that it is for the Courts to determine by way of judicial review whether there was material before the Minister on which the Minister could properly have concluded that the statutory criteria were present. In the end it is a question of statutory interpretation whether, and if so on what principled basis, judicial review of the exercise of the particular statutory power is available.

This might be seen as more restrictive than the approach Cooke P adopted. However, it is perhaps only slightly regressive, as it is in accord with the view of the House of Lords in *CCSU v Minister for the Civil Service* [1985] AC 374 (HL). In that case Their Lordships held that it is not the source of the power that determines its amenability to review, but its subject matter. Furthermore, the majority did not reject any of the developments of recent times. Hardie Boys J, for instance, expressly preserved the concept of unreasonableness (at 540).

As can be seen the extent to which Courts have been prepared to examine delegated legislation made in council has increased dramatically over the years. That development has at times been sporadic and at times retarded. However, it is submitted that we no longer have a position where orders will be reviewed based only on "their face". By this it is meant that it is no longer necessary for a plaintiff challenging an order to look only at it and ask, as a matter of statutory interpretation, whether it is within the literal ambit of the empowering statute. It is now also possible to ask whether that regulation is not within the contemplation of Parliament because it could not reasonably be considered so. Further, decisions such as *CREEDNZ* and *Hawkins* have opened the way for the procedure behind the making of that order to be examined. The Courts have recognised the practical reality that it is in fact ministers that are the moving force behind orders, therefore it is their considerations, processes and motives that are relevant – thereby stripping away any distinction between executive and administrative acts. On this basis a situation has arisen where orders, regardless of the fictional status of their author, are as reviewable as any other rule or regulation. Further, it is now arguable that all of those grounds that can be raised in favour of review of any other decision might now be raised in support of a challenge to an order. This is subject only to the nature of the decision making body, that is, the Executive Council and the policy considerations that *Hawkins* referred to.

It might be asked whether such expansionism has necessarily been helpful to executive government and certainty of result in terms of regulating. The question might be raised that when Parliament has bestowed a regulation-making power on the Governor-General whether it is appropriate for the acts of the relevant minister, to whom that power might equally have been given, to be examined. The answer to that, it is suggested lies somewhere in the following view expressed in *Inland Revenue Commissioners v National Federation of Self-Employed* [1981] 2 All ER 93 at 107 (HL):

> It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a Court of justice for the lawfulness of what they do, and of that the Court is the only judge.

They are worthy sentiments, in which the rule of law is paramount. If the Courts were to maintain the fiction that traditionally existed, that would enable a particular public body, that is the executive, to avoid the rule of law through the making of orders which the Courts would review only on very limited grounds. The change that has come about was necessary and, therefore, inevitable.

Judicial review of Orders in Council is still an area of law in which further judicial development and clarification is necessary. The foregoing examination of the historical basis behind the present state shows that it is an area upon which Courts vary from enthusiastic to reluctant, from innovative to regressive. Accordingly, it is submitted that this is an area in which certainty has yet to be reached, but the progress that has been made must be regarded as a victory for the rule of law. ❑