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COURT STRUCTURE–AGAIN

It is evident that there are far more pressing problems in the structure of the Courts than whether appeals to the Privy Council should be discontinued. Other issues actually impact on the quality of justice being meted out every day to everyday litigants.

The Chief District Court Judge attracted attention when, at the time of the announcement of his appointment to the High Court Bench, he said that the time had come for the replacement of Justices of the Peace by professional magistrates.

Every debate in this country tends to get personalised as it will concern relatively small numbers of identifiable people. Predictably, the current JPs got cross about what they took as an attack upon them, but the fact of the matter is that the average age of JPs is rising rapidly and little new blood is coming in. The question is not so much replacing JPs with professionals, as the newspapers put it, as filling the void left by the lack of JPs with professionals.

Chief Judge Young's comments in fact raise the question of the structure of the District Courts and indeed of the criminal system generally.

This page has called for the replacement of JPs with Stipendiary Magistrates before. Instead what we have seen is the introduction of so-called Community Magistrates. This was done by a Minister of Justice who demonstrated an increasing detachment from reality as his period in office progressed after, apparently, visiting in England a member of the only group that thinks that Justices of the Peace there work well, namely Justices of the Peace.

If Stipendiary Magistrates were to be introduced they would rightly wish to deal with more than is currently dealt with by JPs. This would be desirable. On the face of it, District Court Judges are currently recruited both to turn the handle on the sausage machine of summary criminal cases and to hear substantial civil cases involving sums which would represent most people's entire worldly wealth. This is absurd, and is not helped by the fact that 90 per cent of the workload of the District Courts is criminal.

The obviously sensible structure is that Stipendiary Magistrates should deal with all summary criminal cases. District Court Judges should then deal only with trials on indictment and with civil cases within the jurisdiction of the District Court. This would mean that civil cases would be a substantial part of their workload and they would have the chance to develop greater skills in handling such cases.

The civil equivalent of JPs are of course Disputes Tribunal Referees. Urban legends abound about Referees and their attitudes. Suffice to say that it is unsurprising if their standards vary widely. It is also unsurprising if more than a few have confused making litigation over small claims cheap and simple, purely procedural matters, with the effective abolition of law in these cases. For many people and businesses, a claim up to $7500 can be important and there is no reason why they should be abandoned to a process which many see as palm tree justice. Disputes Tribunals should be resorted to only where both parties agree, where one party wishes to stand on its legal rights it should be entitled to insist on trial by a District Court Judge, perhaps with a costs penalty in the event that it loses.

Doing away with JPs' Courts does not necessarily mean doing away with JPs. The status could be retained for two reasons. One is witnessing signatures on documents. The title JP means that the person is traceable and regarded as reliable. But the second relates to criminal trials on indictment. The jury system is in crisis. A ludicrous ten per cent of trials result in a hung jury, a far higher figure than caused the introduction of majority verdicts in England.

But jury selection is becoming a circus. Self-employed people have always been able to get excused. Increasingly employers send form letters to Registrars asking for employees to be excused. Even unpaid leave for a few days is not easy if one's employees are not interchangeable pullers of levers on a production line. The result is that juries are increasingly dominated by people in the commoditified sectors of the labour market and by beneficiaries. To many of these people, no one is a criminal except a self-employed business person who invariably is.

Little can confidently be said about juries except that everyone thinks jury service a valuable public service until they receive a jury summons and that almost the only people who speak passionately in defence of juries are lawyers who have never served on them.

A logical replacement for juries seems to be two or four JPs who sit with and retire with the Judge. In this way participation in trials would be by people who have agreed to take part and who develop some experience of doing so. Whether changing the nature of the work would cause more volunteers under the age of 60 to step forward would have to remain to be seen.

Chief Judge Young's elevation to the High Court Bench raises another issue. We have now had two successive Chief District Court Judges elevated to the High Court Bench and two successive Chief Justices selected from the High Court Bench. It is unclear whether the politicians making the appointments were aware of the tradition against promotion and the reasons for it, a tradition as important as the tradition that the President of the Court of Appeal is simply the most senior member of the Court. This is another issue that needs to be debated, rather than going by default, but without reference to the personalities involved. ❑

BATTERED DEFENDANTS

Karen Belt, The Law Commission

introduces the Commission's report on criminal defences

In 1999 the Law Commission undertook a project to look at how the law applies to those who commit criminal offences as a reaction to domestic violence. After approving the terms of reference, the Minister of Justice requested that the discussion be related to the proposed Evidence Code and cover the latest scientific thinking on battered woman's syndrome.

In August 2000 the Commission published a preliminary paper, *Battered Defendants: Victims of Domestic Violence who Offend*, and called for submissions. The Commission now publishes its report: *Some Criminal Defences with Particular Reference to Battered Defendants.*

The report begins with a discussion of the nature of battering relationships and the effect of battering on the victims. The theory of "battered woman syndrome", developed by Dr Lenore Walker, is discussed. The Commission considers that the theory does not adequately or comprehensively describe the nature of battering relationships or the effects of battering and recommends that the term "battered woman syndrome" not be used. Instead the Commission recommends that reference be made to expert evidence on the nature and dynamics of battering relationships and the effects of battering, and notes that such evidence will often be relevant and substantially helpful in cases involving battered defendants. (This is the test for expert opinion evidence under the proposed Evidence Code. The government has announced its intention of introducing a Bill based on the Code.)

The report then looks at self-defence, the partial defences to murder, and proposals for a new defence geared to the particular circumstances of battered defendants.

The law of self-defence is set out in s 48 of the Crimes Act 1961:

> Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

In determining the reasonableness of the force used, juries frequently have been directed to consider whether the danger was imminent and if the defendant had a reasonable alternative to the use of force. This may be problematic for battered defendants because the danger they face may not be imminent, but may nevertheless be considered inevitable, if a realistic view is taken of all the circumstances including the ability of the police and other agencies to offer effective protection from their abusers. The Commission recommends that s 48 of the Crimes Act 1961 be amended to make it clear that the use of defensive force may be reasonable where the danger, although not imminent, is inevitable. The Commission also recommends the section be amended so that in a jury trial, whenever there is evidence capable of establishing a reasonable possibility that a defendant intended to act defensively, the question of whether the force used was reasonable is always a question for the jury.

Some victims of battering relationships may kill their abuser in circumstances where they cannot argue a complete defence. Currently, such defendants – like all others – will incur a mandatory life sentence unless they can fit within the narrow confines of the partial defence of provocation. Provocation has been a continuing source of difficulty for Judges and juries. The Commission recommends abolition of the partial defence of provocation and does not advocate the adoption of any other partial defence. Instead the Commission recommends the introduction of a limited sentencing discretion for murder to apply where strongly mitigating factors exist that would render a life sentence clearly unjust.

Battered defendants may have committed crimes against third parties. For example, they may have sold drugs for fear of a beating if they refused, or they may have driven without a licence to escape from a beating. The defences of compulsion and necessity are available to excuse some defendants who commit offences in order to avoid death or serious bodily harm. The Commission recommends that a defence of duress by threats be introduced to replace the current defence of compulsion in s 24 of the Crimes Act 1961. The proposed defence is based on the defence of duress in cl 31 of the 1989 Crimes Bill as amended by the Crimes Consultative Committee. It requires a threat of immediate death or serious bodily harm from a person who the defendant believes is immediately able to carry out that threat. The Commission concluded that strict limitations are necessary for a defence that potentially excuses harm to innocent third parties. The Commission also recommends that a defence of duress of circumstances be enacted to codify the current common law defence of necessity. (The Commission recommends explicitly preserving as part of the common law that form of necessity which is exemplified in *Re A (children)(conjoined twins)* [2000] 4 All ER 961.) The proposed defence is largely based on the defence of necessity in cl 30 of the 1989 Crimes Bill as amended by the Crimes Consultative Committee. It essentially provides a defence for offences committed in circumstances of emergency where the defendant believed that committing the offence was immediately necessary to avoid death or serious bodily harm to that person or any other person. Both of the proposed defences are qualified by a requirement that the emergency or threat is such that in all the circumstances (including any of the defendant's personal circumstances that affects its gravity) the defendant cannot reasonably be expected to act otherwise. Neither defence will apply where a defendant has voluntarily assumed the risk of the apprehended danger. Neither will apply to the offences of murder or attempted murder. ❑

TAX UPDATE

Jan James and Charlotte Fox, Simpson Grierson, Auckland

discuss GST and warranties, tax simplification and the retrospective GST grab

SUZUKI NEW ZEALAND LTD v CIR

This case was an appeal (CA 160/00, 7 May 2001) by Suzuki New Zealand Ltd ("SNZ") on whether warranty payments received from Suzuki Motor Company Ltd ("SMC"), a non-resident company, could be zero-rated for GST purposes. The Court of Appeal held that the warranty payments could not be zero-rated.

The impact of this decision is that there could be a direct cash cost to taxpayers who receive reimbursement payments from a non-resident company. Importers and distributors particularly will need to re-examine their current business practices or they may be liable to pay GST on these payments. While taxpayers may have interpreted payments they receive as compensation for defective materials, the Courts may perceive these payments as being consideration for a supply of repair services in connection with property located in New Zealand, and accordingly these payments will be subject to GST.

SMC (based in Japan) sold vehicles to SNZ with an accompanying warranty. This warranty covered repairs and maintenance required on the vehicles. SMC would not itself complete the repairs, but would reimburse SNZ for the cost of any such repairs.

SNZ sold vehicles to local dealers, and gave its own warranty, as required by SMC. This SNZ warranty covered repairs and maintenance for customers of the dealers, for a more extensive period than the SMC warranty. The practice was for the dealer to arrange for the repair of the vehicles if required and invoice SNZ for the cost of the repairs. SNZ would pay the dealer the cost of the invoice and, if the repairs and maintenance were covered under the SMC warranty, SNZ would then invoice SMC for the amount. SMC would reimburse SNZ for the cost of the repairs.

In order for GST to be imposed on SNZ, payments received by it from SMC would need to constitute consideration for a supply by it of goods or services. GST would be at zero per cent if the supply was of services to a non-resident, not being services supplied directly in connection with personal property in New Zealand.

The Court of Appeal

The Court of Appeal held that the payments were consideration for a supply of repair services by SNZ, which could not be zero-rated for GST purposes.

The arrangement was that SNZ would undertake repair services that would otherwise be required to be completed by SMC and SNZ would be paid for the repairs. SNZ was obligated to repair or replace the vehicles in New Zealand as it was not practical to return the vehicles to Japan for the repair. The Court rejected the argument that the payments were financial compensation for the defective vehicles, as there was a connection between the repairs and the consideration. Although the repairs may have been done under SNZ's warranty they were also in reality done for SMC under the SMC warranty. The repair services were supplied in relation to vehicles which were situated in New Zealand, and therefore the supply could not be zero-rated.

Argument for SNZ

This argument was based on the assertion that SNZ had not specifically contracted with SMC to complete the repairs on SMC's behalf. To clarify SNZ's obligations cl 5 of the SMC warranty (below) needed to be read in conjunction with the entire warranty policy. In a note accompanying the warranty policy it was noted that SMC would reimburse SNZ for warranty claims "by payment of money only, and only after repairs have been completed". SNZ asserted that when the warranty and accompanying notes were read together there was no obligation to SMC to undertake the repairs.

Clause 5: WARRANTY;

(a) Suzuki warrants that the products sold under this contract are free from defects, suitable for purpose intended, and produced in good workmanlike manner.

(b) Suzuki's obligation under said warranty shall be limited to repairing or replacing at Suzuki's option, any product or part thereof, which under normal and proper use and maintenance, proves defective in material or workmanship; provided that notice of any such defect and satisfactory proof thereof is promptly given by buyer (SNZ) to Suzuki. No other warranty, whether expressed, statutory or implied shall apply to said products, and, in no event whatsoever, shall Suzuki be liable for consequential indirect or special damages.

(c) This warranty is not intended to and shall not include defects resulting from ordinary wear and tear, or improper or negligent handling by buyer, his customers or others.

SNZ interpreted the warranty as compensation from SMC for defective parts. SNZ argued that it was doing no more than arranging for the repairs to be carried out. Based on this interpretation, SNZ asserted that there was no connection between the repairs and the payments that would justify treating the payments as consideration for a supply of goods or services, and therefore no liability to GST.

Argument for the Commissioner

The Commissioner argued that the repair of the vehicles by SNZ was part of an obligation under the SMC warranty. The Commissioner argued that there was a supply for GST purposes when the vehicles were repaired. The payment received by SNZ was therefore a payment made directly in connection with personal property located in New Zealand.

Conclusion

The Suzuki decision may have wide implications for New Zealand businesses, in particular importers of electronic equipment and machinery. Every business which receives a reimbursement payment from a non-resident will now need to examine whether or not this payment is consideration for a GST-able supply. This case highlights the fine distinction between compensation payments and payments for the supply of services. Payments that compensate a taxpayer for the provision of defective parts may not involve a supply which is subject to GST, whereas payments that are consideration for effecting repairs of that equipment will.

Businesses will need to examine the wording of their warranties and ensure that the nature of the payments they receive is compensatory and could not be construed as consideration for the provision of services. Where there is doubt as to the nature of a payment, redrafting of agreements may be necessary. Any invoices that are supplied to the non-resident reimburser should refer to compensation for defective parts, and not repair and maintenance services.

The Suzuki case has highlighted the fact that a belief that payments are compensation is not sufficient. This should be clarified in the warranty agreements and to the extent possible there should not be an obligation on the taxpayer to perform a service in New Zealand that could be attributed to payment by the non-resident.

MORE TIME FOR BUSINESS?

Tax simplification document

The government has recently released a discussion document outlining various proposals to combat the concerns of small businesses (with annual turnover of less than $1.3 million) about the cost of compliance and inherent complexity of the current tax system. The document examines a wide range of areas and is an attempt to reduce administration costs and to increase flexibility for small businesses that do not have a steady stream of income at all times during the year. Some of the proposals are discussed below.

Provisional tax

Provisional tax involves payments spaced evenly throughout the income year, based on an estimate of income for the year. Businesses with variable income streams over a year can have trouble estimating their provisional tax liability accurately. Underestimation can lead to significant interest costs. The discussion document proposes two optional methods to alleviate this difficulty.

The first involves a voluntary withholding tax on business income. Under this proposal a business nominates a withholding tax rate, its bank deducts this amount periodically from deposits, and forwards the withholding directly to the IRD. The rationale behind this is that it matches cashflow to tax payments.

The second involves aligning GST and provisional tax payments. Businesses would be required to pay as income tax a percentage of their GST sales for the GST period. Again, this allows for variability of income and cash flow.

Another method is to allow small businesses to pool their provisional tax payments with other businesses. The pooling of payments would allow underpayments to be offset against overpayments made by others within the pool. This option would allow a taxpayer who has underpaid provisional tax effectively to borrow from a taxpayer who had overpaid, presumably at rates more favourable than the Tax Act imposed rates. This would require an intermediary to arrange the pooling and compensation mechanisms.

It is also proposed that if a small business calculates provisional tax based on a 5 per cent uplift from last year's liability, and payments account for 90 per cent of current year liability, there will be no use of money interest payable or receivable.

Whilst the goal of tax simplification is to be applauded, in the case of withholdings by banks and intermediary involvement, compliance obligations have simply been shifted from small businesses to banks or other institutions. This could raise concern as to whether these obligations could be funded through increased costs to consumers of services of these banks or other institutions.

Other proposals

Other proposals include a significant reduction in exposure to penalties and interest for employers who use a recognised payroll firm to calculate and pay PAYE, and a reduction in the costs associated with end-of-year tax adjustments – for example a small business that has trading stock worth less than $5000 will not be required to value that stock, and businesses may be provided with internet based tools to aid with the calculation of depreciation.

The need for contractors from countries with which we have double tax agreements to obtain a certificate of exemption from non-resident withholding tax if they are in New Zealand for less than 62 days will be removed. In addition, the $20 threshold below which banks are not required to send RWT information will be raised to $50.

It is also proposed that fewer returns would be required to be filed – for example in the case of trust beneficiaries if sufficient tax has been paid on his or her behalf, and persons acting on behalf of certain deceased persons.

RETROSPECTIVE GST LEGISLATION

Legislation applying from 20 May 1999 limits the zero-rating of services supplied to non-residents who were outside New Zealand when the services were performed, if the services are received by a person in New Zealand. This legislation affects in particular tourism operator and educational institutions. The government has recently announced that it will backdate this amendment so that is applied from 1 October 1986.

Many taxpayers who were not zero-rating such supplies from the period 1 October 1986 through to 20 May 1999 have put claims in with the IRD for refunds. The scope of the potential refunds is upwards of $100 million.

Arguably by retrospectively legislating to avoid paying out such refunds, the very nature of the tax system is being undermined. Certainly unequal treatment will result. Taxpayers who have already received refunds of the GST they paid have been told that they can keep their refunds. However, those with claims currently in will not be receiving their refund. This has provided two distinct classes of taxpayers, as those that correctly zero-rated during this period are not required to pay GST when the legislation is enacted, but those who are trying to claim a refund for GST paid are not entitled to their money back.

The retrospective proposals came to the attention of the public after submissions on the Taxation (Annual Rates, Taxpayer Assessment and Miscellaneous Provisions) Bill had closed. This has been seen to deny taxpayers the right to be heard. As a result of media attention and strong public feelings on this matter the Select Committee will give taxpayers the opportunity to make submissions. ❑

WORLD TRADE BULLETIN

Gavin McFarlane of Dechert and London Guildhall University

reviews activity in the world of international trade

NEW ZEALAND LAMB VICTORY

The earlier victory of New Zealand and Australia against the US before the WTO dispute resolution panel has just been upheld on appeal by the WTO appellate body. The reference had been made because of a tariff quota which Washington had imposed on importations of lamb from the two countries for a three year period; the US International Trade Commission had found that an alleged upsurge in these imports gave rise to a threat of serious damage to American lamb producers. This internal American commission is a watchdog on behalf of US industry. On a reference being made to it by a particular industry, it may certify that a risk of serious injury exists, following which the US administration usually proceeds with what are known as safeguard measures. But as is usually the case in disputes of this nature, the "necessary safeguards" undertaken by one state are often perceived as unfair protectionism by the countries which are seeking to export their products into the first state's home economic markets. It is this type of complaint which has been decided in favour of Australia and New Zealand. The WTO has upheld their view that the actions of the US had been illegal. The appellate body decided that Washington had failed to demonstrate either that importers from the two complainant states had been responsible for a threat of serious injury to American producers of sheep meat, or even that such a threat existed. Representatives of the US sheep industry are attempting to persuade the US government to modify the so called safeguard measures in a way which might subsequently meet with some kind of endorsement from the WTO. But on the basis of past cases, they do not seem to have a strong chance of success. Australia and New Zealand had argued that the troubles of the US sheep farming industry were the result of its failure to undertake the same kind of modernisation which the two complainants had themselves implemented, and that poor US marketing by the Americans was also to blame. A sixty day period is allowed to Washington to state how it intends to act on the decision. If it fails to do so in a satisfactory manner within this time limit, then the two complainant states would be able to introduce sanctions against the US, probably taking the form of substantial import duties.

WHITE KNIGHT FOR TAX HAVENS?

For some time the OECD club of advanced economic nations has been conducting a campaign to reduce the impact of tax havens. Recently the pressure on these tax havens has been stepped up quite sharply. The prime reason is that the OECD member states are major industrialised powers which also operate substantial welfare programmes. The electors who make up these populations seem to demand continued high provisions from their governments in respect of health services, pensions, education and so forth, but are increasingly reluctant to pay for these benefits through tax. This creates pressure for finance ministries, who have become increasingly irritated by what they perceive as their rightful tax revenues being lost through tax havens offering low or nil rates of tax on business and high worth individuals placing their funds there. Last year the OECD attempted to name and shame 35 of the tax havens, in an attempt to pressurise them into being more compliant. But a hard core of around a dozen tax havens are still declining to comply with the OECD demands for greater openness. A substantial proportion of these small states are ex colonies of the same European countries which are now leading the call for an end to their activities, or at least a reduction in the attractions which they offer. In some cases the tax havens claim that they were actually advised by the withdrawing colonial power to develop a specialisation in the financial services industry, to make up for a lack of resources on which they could build up their economies.

But Don McKinnon, the Secretary-General of the Commonwealth, has stepped into the arena. A good number of the tax havens enjoy membership of the Commonwealth on the basis of their former position as British colonies. Mr McKinnon has called on the OECD to stop trying to act as prosecutor, Judge, jury and jailer of small states operating tax havens which were not falling into line with the OECD demands. He also described the OECD as attempting to be the world's financial policeman. The OECD has been taken aback by these unusually strong words from the head of one of the other major international organisations, and has muttered defensively that it is only attempting to eradicate harmful fiscal practices which it claims act to everyone's disadvantage. But another body blow has hit the OECD position. The United States, which under President Clinton had supported the OECD campaign, has become decidedly lukewarm. Recent indications point to a move to a neutral stance by Washington; this may be connected to the major dispute between the EU and the United States over foreign sales corporations (FSCs). The present scheme under which exports from America pay reduced business taxes by moving their goods through FSCs located in tax havens has been held by the WTO to amount to illegal subsidisation. This decision has gone down very badly in the American business world; as the sums involved dwarf any previous international trade dispute, the change in American attitude may be understandable.

BANANA DISPUTE SETTLED

The longest running of all the trade disputes which have come before the dispute resolution body of the WTO is the struggle over bananas. The EU had traditionally operated

a quota system for importation of the fruit into the European single market. This favoured the banana producing former European colonies, to the detriment of the interests of banana producer states in Latin America which exported their produce through the Chiquita corporation. A series of complaints by the US and its allies was upheld in the WTO forum, and in this case a series of sanctions by the US against exports from the EU was endorsed by the WTO scheme under its rules. This was because the EU prevaricated, and sought to adjust the scheme in a way which would maintain a benefit to its former colonies. But under the carousel system which operates in respect of WTO endorsed sanctions, the US would have been entitled to impose one hundred per cent duties on to a new list of products. Some of these would have been highly damaging to UK interests, particularly whisky and cashmere knitwear. It is fortunate from their point of view that the US and the EU have finally agreed terms. With effect from 1 July of this year, the US will discontinue its trade sanctions on exports from the EU. In return, Brussels will on the same day introduce an interim scheme for the import of bananas, centred on import licences issued on the basis of historic patterns of past trade. This is an interim period during which the EU will expand its quotas for the access of Latin American bananas. Then on 1 January 2006, a tariff only system will be introduced, which will finally sweep away the quotas. Bananas from the former European colonies and from Latin America will then be able to compete on the same terms in the European market.

FREE TRADE AREA OF THE AMERICAS

Commentators on international trade matters are still attempting to work out exactly what the stance of the new US administration is going to be on these subjects. The meeting in Quebec City in April of no fewer than 34 states in the western hemisphere could mark a deep shift in the relationships of states in international trade, if not eventually an alteration of the standing of independent states which adhere to a very large economic block. The topic of the Quebec meeting was the Free Trade Area of the Americas (FTAA), and President Bush has signified that this is an issue to which he is fully committed. Only Cuba was not there, apparently on the ground that it was not sufficiently democratic. One of the planks in the agreement reached at Quebec was political rather than economic. This is the so-called democracy clause, under which any state joining the FTAA which subsequently overthrows democratically elected leaders would be expelled from the organisation. President George W Bush is an enthusiast for the North American Free Trade Area, and seems to harbour an ambition to extend something along those lines throughout north, central and south America. The fact that this would be merely a free trade area as opposed to a Customs union with a single market and a common external tariff barrier is neither here nor there. The intention is to have the FTAA up and running by 2005, and no doubt President Bush would like to be able to point to an imminent start for the new organisation in his campaign for re-election the previous year. If by then the FTAA is a going concern, it will dramatically alter the negotiating position of states which are not part of such a grouping. By that time the EU should have expanded to over 20 members. China may also have become a WTO member, despite the current setback following the downing of the American reconnaissance plane, so that Beijing would be negotiating for over one quarter of the world's population.

FOOT AND MOUTH

Yet another major trade dispute between the EU and the US is on the horizon, and like several of the others, it arises in the food production sector of the economy. The new tension follows on from the foot and mouth outbreak which struck this year in the UK, and to a lesser extent Ireland, Holland and France. Understandably the US Department of Agriculture is determined to do everything possible to prevent any outbreaks of "hoof and mouth" breaking out in North America. One proposal mooted by the US farming sector is the restriction of importation to the US of a range of dairy products from Europe, which it has been alleged might carry the virus. In particular the focus is on cheeses and casein. As so often the case with agricultural questions, the true science is elusive. While the American farm lobby wishes to act on a safety first basis, European dairy farm interests contend that the true objection of US dairy producers is to stem the substantially increased imports of such produce into America since the last round of GATT revisions allowed these goods to enter the United States at a very low rate of duty. It is significant that the American producers are calling for the imposition of tariffs rather than a prohibition on importation.

MORE DISPUTES IN PIPELINE

International trade disputes are becoming a fertile field for the currently rather select band of lawyers practising in the area. The steady increase in the number of potential cases makes this very clear. Yet another EU/US spat could well arise over steel. As a result of a complaint from the American steel industry, the US administration is considering placing restrictions on the quantities of steel which can enter America. These proposals for safeguard measures have aroused opposition in the European Commission. As a labour intensive industry, steel has the potential for substantial job losses when conditions turn down. The pattern is familiar in disputes of this nature. America claims that foreign steel is undercutting its own industry. The exporters retort that the American industry has failed to modernise. But the GATT agreements do permit these safeguard measures where a sudden surge in imports has taken place.

There is more potential for trouble over subsidies in the aircraft industry. European governments have agreed to provide loans of nearly £3 billion to the European aerospace consortium for the development of the new Airbus superjumbo – the A380. The US government is concerned that this might in reality be a series of illegal subsidies, and if agreement is not reached this would almost inevitably lead to another reference to the dispute forum of the WTO. Brussels hopes that a recent presentation which it has made to Washington on the subject will take the sting out of the matter. The EU claims that the allegation that the funding constitutes a subsidy is unfounded, it is rather a series of competitive loans.

The EU is involved on another front, following a mission of inquiry to investigate allegations of illegal subsidies in the Korean shipbuilding industry. It has been claimed that debts have been written off and that government has taken over equity which Korean banks had held as security for loans to shipbuilders. If the European Commission considers these subsidies to breach WTO rules a formal complaint will be lodged with the WTO, and the commission will put into operation its own defence mechanism for the European shipbuilding industry, in the form of its own subsidies. ❑

DUTY OF CARE TO CO-COUNSEL

Mary-Anne Borrowdale of Allen Allen & Hemsley, Brisbane

assesses the implications of an intriguing decision from Victoria

A decision of the Victorian Court of Appeal (*O'Doherty v Birrell* [2001] VSCA 44) addresses the original proposition that co-counsel instructed on a litigious matter owe duties of care, one to another, to avoid acts or omissions that may preclude co-counsel recovering fees for their work.

O'DOHERTY v BIRRELL

The dispute between O'Doherty and Birrell arose from their joint conduct of an earlier proceeding in South Australia. Both counsel were members of the Victorian Bar and were each retained to act for defendant companies in proceedings issued by the liquidator of a group of companies, to recover moneys allegedly misapplied within the group.

O'Doherty was retained by the companies, but as his specialty was "white-collar crime" he suggested that counsel competent in commercial law should be retained. The companies agreed, and Birrell too accepted a retainer. It was agreed that Birrell would have the conduct of the action, and that O'Doherty would lend his particular expertise only as required and subject to availability.

The liquidator applied for summary judgment. The South Australian Supreme Court fixed a timetable for the filing of affidavits and the like and ordered that the application be heard on 13 January 1997. Neither Birrell nor O'Doherty were in Court. Afterwards Birrell (but not O'Doherty) was told of the orders by his clients' solicitor.

The liquidator's affidavits were to be filed in October 1996, followed by the companies' affidavits the following month. It fell to Birrell to prepare these affidavits and submissions in opposition. Several times subsequently Birrell advised O'Doherty that he intended to strike out the summary judgment application. More generally, whenever they met Birrell spoke to O'Doherty of "progress" with the defence.

During December, with the trial due to commence in January, O'Doherty happened upon Birrell in his Chambers. Birrell then revealed that he had insufficient time to go through all the exhibits before the hearing date. O'Doherty offered assistance, which was accepted. O'Doherty expressed concern as to whether Birrell would be ready by 13 January. Birrell assured him that he would be.

On 10 January they met again, and Birrell revealed that he had done nothing toward filing affidavits in reply. An "angry confrontation" took place between them. O'Doherty, fearful for his clients' chances of opposing summary judgment and mindful of the orders of which he now learned, set to drafting the affidavits. Birrell was unable to offer any notes to assist O'Doherty, who spoke to the three deponents and cobbled together their testimony.

Nonetheless, the companies' opposition remained unfinished by 13 January.

On 13 January, O'Doherty applied to adjourn the hearing on the basis that the defendants' case was hopelessly unprepared.

The application was a difficult one. During the course of argument Birrell's retainer was terminated and he was called to the witness box by O'Doherty. Birrell accepted responsibility for his clients' non-compliance.

The Court agreed to the adjournment, but only after extracting from counsel some unconventional under-takings, including that the defendants' legal advisers would not seek costs from their clients for work done in opposing the summary judgment.

O'Doherty issued proceedings against Birrell in the Victorian County Court, claiming $49,600 for unpaid professional fees in relation to the South Australian litigation. O'Doherty claimed that Birrell had negligently breached a duty of care not to cause him financial loss through the execution of their common retainer. The Judge at first instance was not persuaded that Birrell owed any relevant duty of care to O'Doherty. O'Doherty appealed.

No causal link

The Court of Appeal largely eschewed case-law. In the absence of any useful precedent, the Court described the claim as "extra-ordinary". The Court found against the existence of a duty primarily on the ground that there was no "causal link" between Birrell's conduct and O'Doherty's loss. The immediately proximate cause of the loss was counsel's provision of an undertaking, and not the intransigence of Birrell.

There is small reason to fault the Court's analysis of causation. Although O'Doherty's claim was not far-fetched, it was bound to falter at the causation hurdle. On a straightforward "but for" analysis it is clear that but for Birrell's default there would have been no predicament, and no undertaking. But as the Court observed:

> O'Doherty did the work on the affidavits not because of any request from Mr Birrell; indeed, as between the two barristers, it was not even the former's province to prepare the defendant's case on the application for summary judgment. O'Doherty did that work because, as he saw it, he might thereby bail the clients out of a difficulty which Birrell had created by failing to act. (para34.)

O'Doherty was free to give or not to give the undertaking as he chose. To some extent this falsifies the position,

because, although the request was not characterised as an order, it had the essential quality of an order – it could hardly be refused. To his credit, O'Doherty did not cavil at the Judge's request, no doubt out of a sense of duty to his clients. But generous as this impulse was, it proved fatal to his claim for compensation from Birrell.

It is also noteworthy that O'Doherty's pleadings contained no mention of the undertaking he had given regarding his fees, as if he completely failed to acknowledge that the undertakings themselves were the direct cause of his loss or were at least of material relevance to his claim.

Foreseeability

The Court could additionally have held that there was no duty because it was not reasonably foreseeable that neglect of the Court timetable by Birrell would be likely to cause harm of this nature to O'Doherty.

What consequences were reasonably foreseeable? Quite possibly that O'Doherty might volunteer to draft the affidavits. Or that the adjournment might be refused, raising the potential for complaint or claim by the disadvantaged clients. Or possibly costs orders against the defendant companies and their legal advisers. These consequences were arguably reasonably foreseeable. But it is not commonplace for a Court to intrude into the lawyer-client relationship so as to preclude the legal advisers – including those not at fault – from claiming fees from their clients. This was an unlooked-for and improbable consequence.

The Privy Council in *Harley v McDonald* (10 April 2001) discussed the Courts' powers to discipline errant counsel. Whilst the Court's power was not at issue in *O'Doherty*, the Committee's comments are pertinent. Lord Hope affirmed in *Harley* that misconduct or abuse of process by barristers will often raise the parallel issue of negligence towards their own client. In such circumstances, the matter would ordinarily be handled by way of a complaint to the relevant professional body. Such complaints may be instituted by Judges as well as by clients and opposing counsel.

Lord Hope noted that any question of negligence toward a client should be the subject of separate proceedings, where the practitioner is given a full and fair opportunity to respond to the client's claim, rather than being dealt with within the Court's summary jurisdiction as to costs.

The Courts' reluctance to intrude into the counsel-client relationship serves indirectly to confirm that Birrell could not have owed a duty to O'Doherty in conducting the proceedings – Birrell had no way of reasonably foreseeing that the Court would extract undertakings in respect of counsels' fees.

DUTIES TO THIRD-PARTIES

O'Doherty v Birrell does not of course prohibit the Courts recognising a duty between co-counsel. The Court of Appeal was troubled by the potential, if a duty were recognised, for co-workers generally to owe duties not to lose each other wages by negligent performance of their tasks. But the Court was starting at shadows, in a case where the claim was resisted for sound reasons of principle and without need to consider policy concerns. As McHugh J noted in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 (at 212), broad questions of judgment do not invariably fall to be decided.

In *Kelly v London Transport Executive* [1982] 2 All ER 842 Lord Denning MR passed obiter remarks leaving open the possibility of a barrister's duty to third persons. The issue at hand concerned the potential liability of counsel for costs paid out of a legal aid fund:

> counsel have a special responsibility in these [legal aid] cases. They owe a duty to the area committees who rely on their opinions. They owe a duty to the Court which has to try the case. They owe a duty to the other side who have to fight it and pay all the costs of doing so. If they fail in their duty, I have no doubt that the Court can call them to account and make them pay the costs of the other side.

Later Courts have been quick to distance themselves from the sentiment behind these remarks, and to confine their scope to wasted costs orders alone (see *Orchard v South Eastern Electricity Board* [1987] 1 All ER 95).

Nonetheless, it is possible to envisage a duty of care between co-counsel. If counsel's dereliction of duty is so gross that the Court intervenes to require undertakings, and if counsel are unable to agree to allocate responsibility between themselves, there is no reason in principle why the same Court should decline to impose the burden upon the defaulting party. Allocation of responsibility is the task of the Courts, where a duty can be identified.

ASSESSING NOVEL DUTIES

The Courts exercise caution in assessing novel duties of care, particularly in cases of pure economic loss. Particular guidance in this task is provided by *Perre v Apand Pty Ltd.* McHugh J describes a two-stage approach. With a claim that falls outside the established categories of negligence, one begins by asking whether the harm suffered by the plaintiff was a reasonably foreseeable result of the defendant's conduct. If so the further inquiry is undertaken, whether the defendant in pursuing the course of conduct that harmed the plaintiff should have had the interests of the plaintiff in contemplation. If the answer to that question is yes, the law will impose a duty.

There are plain policy reasons for denying a duty in some cases irrespective of the nature of the loss, such as where the plaintiff and the defendant were engaged in some joint illegal enterprise. No such policy imperatives applied in O'Doherty's case. As the House of Lords decided in *Arthur J S Hall & Co v Simons* [2000] 3 All ER 673, barristers no longer enjoy special protection at law.

McHugh J in *Perre* summarised the correct approach towards acts and omissions causing economic loss (at 220):

> What is likely to be decisive, and always of relevance, in determining whether a duty of care is owed is the answer to the question: "How vulnerable was the plaintiff to incurring loss by reason of the defendant's conduct"?

There is normally no sound reason to impose a duty upon a defendant to protect a plaintiff who was capable of taking steps to protect himself, unless the defendant has somehow induced the plaintiff's failure to act.

O'Doherty was not vulnerable to Birrell although Birrell kept from him until too late what remained to be done on their clients' case. O'Doherty was not obliged to prepare the outstanding affidavits. This response was perhaps sufficiently foreseeable not to constitute a novus actus interveniens. Less foreseeable, however, was that O'Doherty would be unable to claim fees for his efforts. This was the direct result of the Court's unconventional attitude to Birrell's intransigence, and was in itself both an unforeseeable event and the direct cause of the loss. These building blocks of the duty of care – causation and foreseeability – told against a duty, not any broader policy imperatives. ❑

SETTLEMENTS OF EMPLOYMENT DISPUTES

Graham Rossiter, Massey University

ponders the status and enforceability of settlements in the employment arena

This article examines the status and effects of agreements to settle employment disputes. The discussion that follows includes some examination of the rights and remedies of one party where the other breaches the agreed terms of a settlement.

The general principles of relevance are discussed by David Foskett in his text: *The Law and Practice of Compromise*, 4th edition, 1996 (Sweet and Maxwell). Foskett defines a "compromise" as "the settlement of a dispute by mutual concession, its essential foundation being the ordinary law of contract" and the "complete or partial resolution by agreement of differences before final adjudication by a Court or tribunal of competent jurisdiction" and that "since a compromise is merely a contract, the ordinary principles of contract law apply with as much force as in other contractual contexts". It is clear that a settlement properly formulated will operate as a bar to any proceedings commenced or potentially capable of being initiated with respect to the dispute to which the agreement relates including other causes of action arising from the fact situation in question.

The application of the general principle stated in an employment context can be seen in the case of *Gawthorne v A-G* [1996] 2 ERNZ 68. This was an action for damages alleging negligence and breaches of specified statutory duties with respect to safety in the workplace. There had previously been a personal grievance alleging action by the employer to the employee's disadvantage and constructive dismissal. The basis of the personal grievance and common law actions was the same, namely that the Department for Courts had not taken adequate and proper steps to protect the plaintiff from occupational overuse syndrome. The agreement entered into with respect to the personal grievance said that it was "in full and final settlement of all claims arising out of the employment". Master Thomson granted the Crown's application to strike out the action filed in the High Court. He held that "the present claims (were) so closely related to those in the Employment Tribunal that they should have been addressed at that stage. It would be an abuse of process to allow them to be raised now". The plaintiff was said to be estopped from arguing matters that should have been raised in the earlier proceedings. The Court held that "the settlement agreement was reached by the defendant giving good consideration ... to allow claims which could reasonably have been made at the first proceeding to be brought now ... would completely undermine the value to the defendant of the final all-encompassing settlement".

While the basic rule evidenced by the decision in *Gawthorne* is reasonably clear and straightforward, what is somewhat problematic is the matter of the exceptions to the normal operation of the "accord and satisfaction" doctrine ie in what circumstances will an apparent or purported settlement not act as a bar to continued litigation relating to its subject-matter. The following may be gleaned from relevant decisions of the Employment Court in recent years as possible answers to this question.

Proceedings not strictly covered by the settlement

Whether a possible cause of action is within or outside the scope of a settlement agreement is, of course, as with any contract, a matter of interpretation. In *Marlow v Yorkshire New Zealand Ltd* WEC 109/98, WC 9/00, Chief Judge Goddard, 1 March 2000 a redundancy settlement was held to be not a bar to a common law action for damages for breach of implied terms of the contract relating to the employer's obligations to maintain a safe workplace. The Chief Judge held that there was no evidence that the claim before the Court "was in the contemplation of the parties at the time of the redundancy settlement". His Honour held that "unless an actual or potential dispute can be discerned as existing before an agreement between the parties is made, that agreement will not be taken to have compromised the issue". It might be noted that the settlement agreement did include in addition to redundancy compensation provision for an "ex gratia" payment for the plaintiff's "support and contribution" towards the activities of the defendant as well as an acknowledgment by her that she would "have no further claim" upon Yorkshire in respect of her employment contract.

Absence of effective consideration

The decision of Chief Judge Goddard in *McHale v Open Polytechnic of New Zealand* [1993] 1 ERNZ 186 illustrates the application of the principle that there is no accord and satisfaction in the absence of any effective consideration. There had been at the time of the termination of his employment a lengthy absence of the plaintiff due to accident and injury. Following discussions relating to the continuance of his employment or otherwise, he was paid a sum of money for which he signed a release recording that the payment was "in full and final settlement of all claims which (he) may have against the Open Polytechnic in connection with or arising out of (his) employment contract". The Employment Tribunal held that there was an effective accord and satisfaction which prevented McHale from pursuing the personal grievance he had submitted. McHale's appeal was allowed on various grounds, the principal one being that no consideration had passed from the employer because the amount

paid was equivalent to what the employee would have been entitled to receive in a situation of enhanced early retirement which was what the Court accepted were the circumstances of this case.

In explaining his decision, the Chief Judge said that "generally speaking, if a person is already bound by contract to do something, a promise of an additional payment to that person for doing what he or she is already bound to do would not be enforceable as a contract because it is no consideration to undertake to do something that the person giving the undertaking is already bound to do".

Undue influence or duress

This aspect was considered in *F v Attorney-General* [1994] 2 ERNZ 62. The plaintiff had, for the last six months of her employment, frequently been ill, was constantly under great stress and in the last two months often in a visibly distraught state. This was the direct result of frustration and unhappiness in her work situation.

The plaintiff tendered her resignation but at the same time suggested that she had been constructively dismissed. As a result of the discussions that followed, the plaintiff agreed to accept three months' salary "in full and final satisfaction and discharge of all remuneration due to her under her employment contract" and also to "release and discharge" the Crown "from all claims and demands arising out of her employment and resignation from it". The Court accepted that the settlement agreement was binding on the plaintiff and accordingly dismissed the personal grievance and wrongful dismissal proceedings that had been commenced by her. With respect to the plaintiff's arguments attacking the settlement agreement and contending "undue influence", it was suggested that the crucial question was whether her "will was overborne by the department's conduct in the circumstances" or she had rather been "driven by personal imperatives to enter into the transaction" which she had been advised was against her long-term interests. It was concluded that the latter was the case. Considerations taken into account by the Court in rejecting the arguments based on duress and undue influence included the fact that she had received independent legal advice as well as her significant delay in challenging the settlement.

Non-fulfilment of express or implied condition

In *Knight t/a Kallista Convalescent and Rest-home v Gates* AEC 71/97, A 183/96, Judge Colgan dealt with an appeal against an award of compensation by the Employment Tribunal as a result of a finding that the respondent-employee had been unjustifiably dismissed following an absence due to illness. The issue once again was the efficacy or otherwise of a claimed settlement agreement, in this case verbal and to the effect that the employee would be paid two weeks' wages. This sum was not, in fact, paid until approximately four and a half months after the discussion between the parties. For the employer, it was argued that there had been a full and final settlement of the employee's grievance and it was irrelevant that it declined to make payment of the sum agreed on for several months. It was, on the other hand, contended for the employee that her agreement to accept two weeks' wages in full and final settlement was conditional on her receipt of the amount agreed on within a reasonable time. The Employment Tribunal found that there was no accord and satisfaction, sustained the personal grievance and awarded compensation for humiliation of $4000. Judge Colgan, on appeal, found that the failure of the employer to make payment of the sum agreed on "caused the understanding or agreement that had been reached to lapse for want of fulfilment of the condition of payment attaching to it".

However, His Honour went on to say that "the Tribunal took insufficient account of the subsequent events" (following the termination) and that it was inequitable for it to have ignored completely the positions adopted by the parties after the dismissal and to have substituted for these entirely an award of $4000 compensation. The Court accordingly allowed the appeal on the question of remedies and substituted an order that the former employer pay to the grievant a sum equivalent to the two weeks' wages originally agreed on. It might be suggested that there is a difference between a Court exercising an appellate function taking into account, as part of its equity and good conscience jurisdiction and as one factor in the assessment of remedies, an earlier agreement between the parties and on the other hand simply re-imposing the terms of an accord which it was accepted had been vitiated because of serious default by the former employer. It is possible that the latter is what happened in this cause.

REMEDIES IN THE EVENT OF BREACH

Default in the performance of a settlement agreement might, as with any breach of contract, give rise to resort by the innocent party to the usual and general remedies including claims for damages, injunction or possibly an order for specific performance.

In the employment context, a party aggrieved at a breach of a settlement agreement might be able to apply for a compliance order (s 55(1) Employment Contracts Act 1991, s 137 Employment Relations Act 2000). This is on the basis that the settlement would operate as a variation or "addition" to the terms of the employment contract or agreement: *Shaffer v Gisborne High School Board of Trustees* [1995] 1 ERNZ 94.

Both members of the Employment Tribunal under the ECA and the Mediation Service under the ERA have the power to sign a settlement agreement. There is some question, however, as to whether such action has genuinely added to the enforceability of such an agreement. In particular, does the fact that a settlement agreement is signed by a mediator enable a party to enforce such an accord on the basis that it is equivalent to a judgment or order? Section 58 ECA provided that "any order or judgment given under (the Act) by the Tribunal or the Court ... may be filed in any District Court and shall then be enforceable in the same manner as an order made or judgment given by the District Court". A record of settlement under the ECA, notwithstanding that it may have been signed by a member of the Employment Tribunal and had the seal of the Tribunal affixed to it did not, however, constitute an "order or judgment". This lacuna is now addressed by s 151 of the ERA which provides that an agreed settlement signed by a member of the Mediation Service may, where it provides for payment of a monetary sum, be filed and enforced in the District Court as if it were an order of the Employment Relations Authority.

CANCELLATION OF SETTLEMENT AGREEMENT

While it is clear that non-compliance with a settlement may entitle the innocent party to pursue available enforcement remedies, the question of whether an accord may be cancelled and the original causes of action revived has been

somewhat at large. Foskett makes the point (p 123) that "the purpose of a compromise is to put an end to the disputation in which the parties had been engaged. Such causes of action as each had or may have had prior to the conclusion of the agreement are discharged". As to whether a breach by one party can entitle the other party to cancel the accord and pursue the original cause of action, the learned author suggests that the answer to this question turns on the interpretation of the compromise arrived at. It is contended by Foskett that if the forbearance to pursue the claim is in return for the promised performance of some act by the other party, such promise will be regarded as one involving the immediate discharge of the claim. Where, however, the forbearance is in return for the actual performance of some act by the other party, "this claim forborne will not be discharged until such performance takes place". With respect to the latter situation, reference is made by Foskett to the decision of the Supreme Court of Victoria in *Fraser v Elgan Tavern Property Ltd* [1982] VR 398. In this case, a claim for damages was settled upon terms which provided for a certain sum to be paid "within 21 days, time being of the essence". The sum was not paid on the due date. The plaintiff's solicitors gave notice that this non-payment constituted a repudiation of the settlement agreement and that their client was no longer bound by it. Late tender of the agreed on sum was refused. The Court held that since time had expressly been made of the essence and that condition had not been fulfilled, the plaintiff was no longer bound by the settlement.

In New Zealand, *Knight v Gates* is authority for the proposition that non-fulfilment of a condition to which a settlement is subject may lead to the agreement being no longer binding on plaintiff.

Somewhat more recent authority is the judgment of Judge Shaw in *Hunt v Forklift Specialists Ltd* WC 30A/00, WEC 100/99. In this case, plaintiff and defendant had settled a submitted personal grievance on the basis of an agreed arrangement for the payment of $8000 by monthly instalments. No payments were made under the original accord which was re-negotiated by the parties on slightly different terms. One instalment only was paid under that revised arrangement and following the issue of demand notices, the settlement agreement was cancelled by the plaintiff.

The plaintiff attempted to revive the personal grievance action and requested an adjudication hearing from the Employment Tribunal which was declined. A wrongful dismissal action was thereupon commenced in the Employment Court. As a preliminary issue, the Court had to consider whether the "settlement" of the personal grievance was a bar to the common law claim. This issue was resolved in favour of the plaintiff. Judge Shaw found that the mediated settlement was a variation of the employment contract. The alternatives available to the plaintiff on the breakdown of the settlement were:

- to apply for a compliance order; or
- to treat the contract as at an end and cancel it.

The latter was said to be "less usual but possible within the law". The plaintiff was held to be "not estopped from suing the defendant for damages". On the substantive claim, the Court ultimately awarded two months' lost wages and $10,000 general damages for breaches of the implied terms regarding trust and confidence and fair treatment. The total award, inclusive of costs was more than twice the amount of the original settlement in the Employment Tribunal mediation.

CONCLUSIONS

The effect and application of the settlement of an employment dispute, as with the compromise of any litigation is, in essence, a matter of contract interpretation. With respect to any subsequent proceedings between the same parties regarding an existing or former employment relationship, the question will be whether the prior settlement extends to the issues being currently raised. Grounds on which an agreement has been held to be inoperative as a binding accord have included the absence of effective consideration because the employer's side of the "bargain" has basically meant no more than compliance with already existing and clear contractual obligations and the lapse of a settlement as a result of non-observance of the commitments entered into.

As with any contract, a breach of the terms of a settlement agreement may entitle the innocent party to pursue a range of remedies including, in the employment context, an application for a compliance order. In the past, non-compliance with a settlement has invariably required the issue of further proceedings for enforcement. However, an agreement signed by a mediator under the Employment Relations Act and providing for payment of a monetary sum may now be filed in the District Court as if it were a judgment or order of the Employment Relations Authority.

The options open to a party faced with a breach of a settlement may, depending on the circumstances including the nature of the terms agreed on, involve cancellation of the accord and the commencement of fresh proceedings. ❑

ACCESS, BARGAINING, STRIKES AND LOCKOUTS

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assessed the impact of the new ERA at the IIR Industrial Relations Conference

The "essential policy" of the Employment Relations Act (the "ERA") is the "promotion of employees' collective rights through unions, and the establishment of union rights". So said the majority of the Employment and Accident Insurance Legislation Committee, in reporting back to Parliament on the Employment Relation Bill.

The same majority also stated that the ERA introduces a new legislative framework for the conduct of industrial relations, "founded on the promotion of collective bargaining and good faith – that is mutual trust and confidence and fair dealings between employees, unions and employers – in employment relationships".

Those two statements clearly illustrate that collective bargaining, good faith, and the promotion of the role of unions, lie at the very centre of this legislation.

The aim of this paper is to look at what this new legislation actually provides, for collective bargaining, union access and strikes and lockouts. In some of these areas, the changes are quite dramatic. The paper then concludes by looking at some recent high profile industrial disputes, and whether the ERA has had any direct bearing on how those disputes have been conducted. In making that analysis, a comparison will be drawn with how those disputes would have been dealt with under the Employment Contracts Act (ECA).

BARGAINING

Collective bargaining is one of the corner-stones of the Act. Section 3(b) of the Act states: "that an object of the Act is to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively".

Interestingly, neither of those conventions specifically refer to a right to strike. Rather, they focus more on the rights of employees to establish unions; to not be discriminated against because of union activity; and to ensure the recognition and independence of those unions.

Under the ECA, those conventions could not be ratified as unions received no specific recognition. Employees were entitled to decide to bargain collectively, but whether they elected to use an advocate, a union, or to negotiate themselves, was entirely a matter of their choice. Unions were given no specific encouragement or promotion under the legislation nor indeed was collective bargaining. The emphasis was totally on freedom of contract and freedom of choice.

The ERA works in completely the opposite direction and the justification for doing so is the "inherent inequality of bargaining power in employment relationships" (see s 3 of the ERA) and the need to promote observance with the ILO conventions.

In total contrast to the ECA, the ERA sets out in detail how unions are to be formed, how they must operate and how collective bargaining is to occur. In particular there is a detailed procedure established for the initiation and conduct of bargaining which is radically different to that which has occurred in New Zealand over the last ten years.

When bargaining can be initiated

If there is no applicable collective agreement in force then bargaining can be initiated by either party, at any time.

If a collective agreement already exists; a union may initiate bargaining within 60 days of the collective agreement's expiry; and an employer may initiate bargaining within 40 days of the collective agreement's expiry.

If there is more than one applicable collective agreement binding more than one union or more than one employer:

- a union may not initiate bargaining earlier than the later of either 120 days before expiry of the last applicable collective agreement or within 60 days of expiry of the first applicable collective agreement; and
- an employer may not initiate bargaining within 100 days of the expiry of the last applicable collective agreement or within 40 days of the expiry of the first applicable collective agreement.

These provisions give unions the first opportunity to initiate the process and set initial parameters for discussion.

How to initiate bargaining

Under s 42, the initiating party must give written notice of its intention to conduct bargaining to the other parties with which it wishes to bargain. The notice must:

- be in writing and signed by the union or employer giving the notice;
- identify each of the intended parties to the agreement; and
- identify the intended coverage of the agreement;

Unlike the original Bill, the union does not need to name its members for whom it wishes to act in the negotiations, nor does it need two members to be employees of the employer before it can serve its notice.

Employer must inform employees

An employer that initiates bargaining or receives a notice initiating bargaining must, not later than ten days after either

issuing or receiving such notice, draw the existence and scope of the bargaining and the intended parties to it, to the attention of all of its employees (whether or not they are union members) whose work would be covered by the intended coverage clause if the collective agreement is entered into.

Potentially, this is a very onerous provision on employers. Any union (including one which has no members on site) can serve a bargaining notice on an employer providing that union's own membership rules cover that type of operation. The employer then must advertise the fact to all its employees that this union wishes to negotiate a collective agreement.

Multi-party bargaining

A union, or more than one union, may also initiate bargaining with two or more employers by giving notice in the form described above.

However, agreements with more than one employer can be initiated only after a secret ballot of the unionised employees of each employer concerned.

Good faith bargaining in the collective context

The ERA specifically provides that the "duty of good faith" applies to collective bargaining. The meaning of "good faith" is a topic covered in other papers so the concept is reviewed here only in brief. The core requirements of the duty in relation to bargaining for a collective agreement can be summarised as:

- using best endeavours to enter into an agreement about the process for conducting bargaining as soon as possible after the initiation of bargaining;
- meeting each other from time to time;
- considering and responding to each other's proposal;
- recognising the role and authority of the other party to be a representative, and not bargaining, "directly or indirectly" with employees for whom the union acts, nor doing anything that is likely to undermine the authority of the union in the bargaining process; and
- providing each other on request, information that is "reasonably necessary" to support bargaining claims or responses.

Once bargaining has been initiated, crucially, an employer cannot refuse to meet, and cannot enter negotiations adopting a "take it or leave it" stance (although "hard" bargaining is permissible). The duty of good faith requires the parties to meet, consider and respond to proposals, to justify positions and make every reasonable effort to reach common ground.

The ERA places a ban on direct or indirect bargaining between an employer and its staff while the union is negotiating, as well as a ban on undermining the union.

The original Bill contained a much wider ban than this by limiting all communication from an employer with its employees about the bargaining when a union was in negotiations. However, while the final wording in the ERA seems less encompassing, it should not be assumed that this is tantamount to a return to the position under the ECA where factual information could be provided to staff (even if it had a major impact on the bargaining). In the writer's view, it is quite possible that providing factual information to employees could be done in a way which amounts to bargaining (directly or indirectly), with employees, or which could undermine the role or authority of the union. Litigation in this area seems inevitable.

There is also the controversial duty to provide "information that is reasonably necessary" to support or substantiate claims or responses. In many cases, highly sensitive financial information will be relevant to support or substitute a bargaining position, at least to one side. Relevance to one side is likely to be enough to warrant disclosure.

However, if the union or employer believes the information requested is confidential, it can refer the information to an "independent reviewer". That reviewer must be appointed by mutual agreement but there is nothing in the ERA which explains what happens if agreement cannot be reached, nor who pays the costs of the independent reviewer. The independent reviewer must decide whether the information is confidential and if so, to what extent the information supports a bargaining position. That in itself will often be a very difficult exercise.

While the ERA now provides that the information provided must be treated as confidential by the persons conducting the bargaining (and not disclosed to those who would be bound by the collective agreement that is being bargained for) there are still major confidentiality issues that are inevitably going to arise, particularly for publicly listed companies. Again, disputes may become commonplace.

Of concern (especially to employers) is that the only statutory remedy for the disclosure of confidential information is a compliance order. Penalties cannot be sought. However, a common law claim for damages may still be possible.

Code of good faith

The ERA provides for the Minister of Labour to establish a committee to develop one or more codes of good faith. As reviewed in other papers, an interim code of good faith has already been published. The new Institutions under the ERA can have regard to any code in determining whether or not parties have dealt with each other in good faith. As such, these codes are very important, particularly because there is so much uncertainty surrounding the concept of good faith, both generally and in bargaining.

It must be said however, that at least to this writer's mind, the interim code is very disappointing. Clause 1.1 of the interim code says its purpose is to "give guidance to employers and unions in the application of good faith to bargaining for a collective agreement or variation to a collective agreement". However, on close analysis, large parts of the code do little more than repeat that which is already set out in the ERA, while other sections set out practices which inevitably occur in bargaining, as a matter of common sense.

There are some practical guidelines in the code about developing an agreed bargaining process but employers and unions who are looking for some detailed information on what good faith really means in a collective bargaining context, will inevitably be disappointed by the current code.

Who is bound by a collective agreement

By virtue of s 56, collective agreements apply to and bind:

- the union and employer that are parties to the agreement;
- the employees who:
  - are employed by the employer; and
  - who are or become members of the union that is a party to the agreement; and
  - whose work comes within the *coverage* clause in the agreement.

The concept of coverage will become of paramount importance under this ERA. The wider the coverage clause, the greater the impact the collective agreement will have on a work place. That is because every member of a union that has negotiated a collective agreement, who does work that falls within the coverage clause, must be automatically covered by that collective agreement. Furthermore, employees who are not union members but who come within the coverage, can at any time, join the union and automatically make the collective agreement their terms and conditions of employment.

What is more, new employees who are not union members but who do work within the coverage clause must be employed on the same terms and conditions as the collective agreement for the first 30 days of employment, during which time, they must be advised of their ability to join the union, and so make that collective agreement their permanent terms and conditions.

Transitional provisions

It is important to note that the rules relating to bargaining do not directly impact on existing collective employment contracts ("CECs"). By virtue of s 243 of the ERA, any CEC negotiated under the ECA continues in force "according to its tenor" through to its expiry date. For most purposes, that CEC is not treated as a "collective agreement" so issues such as coverage, union membership and the 30 day rule have no application to those CECs. It is only when that CEC expires that issues relating to bargaining for a collective agreement will arise.

However, employers with existing CECs should note the potential impact of s 246. That section allows for employees who are covered by an existing CEC who are union members, to conduct a secret ballot for the purpose of determining whether a majority of those employees wish to bring the date of the expiry of the CEC forward to 1 July 2001 or some other date thereafter. If that occurs, the CEC will be deemed to have expired for the union members only, at the new date they have selected.

It will be interesting to see how may CECs have their expiry dates brought forward by virtue of s 246.

ACCESS

As noted earlier, a key objective of the ERA is to promote unions and collective bargaining. Consistent with this objective, the ERA specifically recognises unions as the only lawful representative of employees' collective interests. The ERA entitles unions to represent their members in relation to any matter involving their collective interests, and it also allows unions (and other representatives) to represent employees in relation to their individual rights (for example, unions can represent employees at mediation and in Court actions), provided that they have the employee's authorisation.

Access rights

In order to facilitate unions' rights to represent employees, s 20 substantially increases unions' rights of access to workplaces. The ECA provided for access in two situations only, namely where (subject to an employer's permission) a representative was seeking access to represent employees (s 13); and where the authorised bargaining representative wished to discuss matters relating to negotiations with relevant employees. To justify that type of access, negotiations had to be occurring.

Under the ERA, the purposes for which union representatives can enter workplaces are very broadly defined as purposes relating to: their "members' employment"; and "union business".

The ERA gives specific examples of the types of circumstances where union representatives will be entitled to access workplaces. For example, union representatives may access a workplace to:

- provide employees (including non-union member employees) with information about the union;
- recruit employees to join the union;
- participate in bargaining for a collective agreement;
- deal with matters relating to an individual or collective employment agreement; or
- to monitor compliance with a collective agreement.

The only real limit on when a union representative may enter a workplace is the requirement that it is at "reasonable times" during any period when employees are working. The Union official only has to have reasonable grounds to believe:

- a union member is working or normally works there; or
- if attending, for "union business", that a person covered by the membership rule is working or normally works there.

The ERA does not detail when "reasonable times" will be. In reality, an employer will only be able to refuse access if it can be shown that work will be disrupted to such a significant extent that it is unreasonable for the representative to be on-site. Employers should be cautious about refusing access, as the ERA provides that every person who unlawfully refuses access to a union representative to enter a workplace or obstructs him or her from doing so is liable to a penalty of up to $5000.

Employers need to be aware that an "unreasonable" time for access does not equate to an inconvenient time. It also is crucial for employers to understand that they cannot simply impose limits on access. Instead they should be looking to discuss the protocols and procedures around access with union officials, rather than unilaterally stating when access can occur. Even under the ECA, the Courts made it clear that it expected employers to act very fairly in this regard.

As an example, in *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corp* [1993] 2 ERNZ 513, the Employment Court rejected an attempted by two managers of a hotel to refuse union representatives access except on two conditions – that the representatives waited in an assigned room while the managers ascertained whether the employee could be released, and that all discussions had to be held in that room. The managers claimed in Court that this was justified because of health and safety concerns. They also claimed that access rights did not allow a union representative the opportunity to randomly go throughout the premises seeking out employees to discuss matters relating to the negotiation of a contract.

However, the Court found considerations of health and safety were not advanced as reasons for denying access at the time, and there were no existing procedures in place. The Court also held that it was not fair to limit access to one particular room and that discussions could be with more than one employee at a time. Interestingly, fines in that case where imposed against the company and against the individual managers.

Under the ERA, union officials must comply with "existing reasonable" safety, health and security procedures

and have regard to normal business operations. Union officials will also not be able to enter dwellinghouses and may be denied access on religious grounds.

There is an obligation on union representatives to inform the employer of their purpose for entering the workplace, and to produce evidence of their identity and their authority to represent the union concerned. However, if the employer is not on-site at the time the representative is seeking access, the representative only has to leave in a "prominent place" in the workplace (for example, at reception), a written statement setting out these things.

STRIKES AND LOCKOUTS

The right to strike is regarded as a fundamental right in international law (see for example the UN Convention on Economic Social and Political Rights) and is considered an "intrinsic corollary of the right of association". The ERA recognises the rights of employees to strike and of employers to lock out, but those rights are subject to a list of constraints.

Key features

The ERA largely maintains the rules and constraints on strikes and lockouts under the ECA but with some important modifications.

- as the ERA restricts the negotiation of collective agreements to unions, lawful strikes are therefore restricted to union members only. It is unclear at this stage as to what extent unions will become parties to a strike action;
- participation in a strike or a lockout is unlawful if it occurs while a collective agreement binding on the employees participating in the strike or lockout, is in force. The strike or lockout must also relate to the bargaining for a new collective agreement;
- a strike or lockout cannot occur during bargaining until the parties have been negotiating for a new collective agreement for at least 40 days. While this is a new provision, it is important to note a union can initiate bargaining for a collective agreement 60 days out from expiry, which means a strike would then be possible as soon as the collective agreement expires;
- it will no longer be unlawful to strike for a multi-employer collective agreement (although "sympathy" strikes are still unlawful);
- as was the case under the ECA, a strike or lockout cannot relate to a personal grievance, a contractual dispute, a freedom of association issue, or take place in an essential service unless certain notice requirements are met.

The ERA makes an important change to the law on essential services. While employees who are striking (or employers who are locking out) must still give three or 14 days' clear notice of the industrial action (depending on which category of essential service they fall into), that notice has to be given only if the proposed strike or lockout will affect the public interest including public safety or health. Therefore, every time a party wishes to take industrial action in an essential service, it has to make an assessment of whether the public interest will be affected and, if it decides it will not, it will not have to give any notice. This means that strikes or lockouts in essential industries could occur without warning and the onus will then be on the other party to get an urgent injunction from the Courts, if it believes the public interest is compromised.

The ERA also provides that during a lawful lockout or strike, an employer cannot require non-striking workers to perform the work normally performed by strikers nor employ another party to perform the work of the striking or locked out employees, unless that can be justified on grounds of safety or health. This option was available to employers under the ECA and was considered a key reason as to why there was a scarcity of strikes and lockouts between 1991 and 2000.

This change stops an employer bringing in new employees, or casuals or contractors to keep a business running during a strike or lockout and it prevents an employer from requiring other workers to do the work of the strikers. The new legislation significantly increases the impact of a strike by introducing the possibility that the strike could shut down a business completely. It also makes a lockout significantly less attractive for an employer because outside labour cannot be engaged during the lockout.

The employer can, however, use employees who agree to do the work of striking or locked out employees. The only exception to this provision is that an employer may engage new employees or contractors in the event that there is a threat to health and safety.

Under s 99 of the ERA the Employment Court has a new exclusive jurisdiction to hear and determine any action or proceeding founded on tort related to a strike or lockout or in respect of any related picketing The Court must dismiss those proceedings if they are founded on a lawful strike or lockout.

Generally the ERA is consistent with ILO principles with regards to strikes and lockouts. However, perhaps surprisingly, the ERA may not go far enough to satisfy the ILO. The ILO Committee on the Freedom of Association is of the view that sympathy strikes should be permitted whereas the ERA treats sympathy strikes as unlawful. The Alliance and Green Parties promote an extension of the law to allow sympathy strikes.

ANALYSIS OF RECENT DISPUTES

Since the passing of the ERA, there have been a number of high profile industrial disputes. The Opposition parties lay the blame for this squarely at the feet of the ERA. However, an analysis of those disputes suggests the ERA has only had an indirect impact on most of the strikes and lockouts that have occurred. Most of these disputes could just have easily occurred under the ECA. Having said that, some of the changes introduced by the ERA are making strikes, in particular, far more powerful tools to advance employee claims.

The meat industry

"Labour must front up and accept total responsibility for the mounting disarray within industrial relations that is threatening our lucrative export sector ... Labour only too readily dismissed our predictions of returning union domination and crippling strikes when the Employment Relations Act was passed last year. But now, less than five months on, thousands of meat workers are off work and New Zealanders are outraged that the $1.4 billion Easter lamb trade is now in serious jeopardy". So said the Rt Hon Jenny Shipley MP in a release by the National Party, 20 February 2001.

"It is disappointing to see the Opposition claim that the dispute is a consequence of the new employment law. The dispute began under the old employment law. Strike action was taken under the old employment law. There were at least 39 strikes and lockouts in the meat industry under

the ECA. NUPE itself has acknowledged that it was easy to strike under the old law and much harder to do so under the new law" so said the New Zealand Government in a press release on 15 February 2001.

The government and the Opposition were actually talking about the same dispute, namely the decision by MAF vets to strike in support of a new collective agreement seeking a substantial pay increase. That strike led to the suspension of thousands of freezing workers throughout the country, as freezing works could not provide their employees with work to perform. The strike is estimated by the National Party to have cost meat workers, farmers and New Zealanders $35 million. But is the strike a consequence of the ERA? The reality is that it is not.

Under the ERA, strike action cannot occur if there is a collective agreement in force. That was also the case under the ECA. If the collective agreement has expired, then under both Acts, employees could strike for a new collective agreement. Indeed under the ERA, that strike can only occur if there have been at least 40 days of negotiations, whilst that requirement did not exist under the ECA. But the key point to note is this strike could have taken place under either Act.

However, there is one aspect of the ERA that has had a significant impact on this dispute. If this strike had occurred under the ECA, then MAF would still have the opportunity to go out and find other vets to perform the certification work needed to keep the freezing works operating. While the writer has no knowledge of whether such employees would have been available in the open market, that was certainly an option that would have been open to the company under the old law. The ERA renders that an impossibility under s 97, by only allowing replacement workers to be brought in on health and safety grounds. ACT leader, Richard Prebble noted this in a press release on 15 February 2001 when he stated:

> The sole reason freezing works are forced to close is that under s 97 of the ERA, for the first time, employers cannot order employees to do the work of strikers or hire staff to do the strikers' work. This means that MAF Management vets can not be instructed to issue export certificates and new vets cannot be hired to keep the export works going.

As noted earlier, s 97 can make a strike extremely powerful because a small number of employees in a strategically important role, can bring an entire business (or even an industry) to a halt by taking part in a lawful strike. It is predicted that s 97 will have a major impact on future industrial relations.

Stevedoring

The dispute between the Waterfront Workers Union, Mainland Stevedoring, and Carter Holt Harvey has attracted even more political comment than the meat industry strike. Again the ERA has been blamed as the reason for the dispute. However, that accusation does not withstand close scrutiny. This is essentially a dispute amongst unions. The Waterfront Workers Union (supported by the CTU), objects to the use by Mainland Stevedoring of employees who are members of another union and who are employed on terms traditionally not acceptable to the Waterfront Workers Union. That union considers the employer is bringing in outside labour on a casual basis, to undermine terms and conditions of local employees. They have organised nation-wide protests and pickets and there have been several confrontations with the police.

Put simply, all of these events could just have easily occurred under the ECA as under the ERA. Under the ECA, employers could still employ whomsoever they chose and other employees and unions could object to those practices via pickets and other forms of protest. Perhaps the only thing that can be said about the ERA is that in the past when casual workers have been engaged at the ports, the subsequent disputes have not been anywhere near as protracted or aggressive as has occurred in this case. It may well be that with the passing of the ERA, unions are more willing to engage in such strong protest activity and are more confident of obtaining political support. However this is not a dispute based on or driven by the ERA.

Catering

A third high profile dispute has recently emerged involving the catering company, Spotless Services and members of the Service and Food Workers Union. About 100 catering staff from three hospitals planned a series of rolling strikes after agreement could not be reached with Spotless Services over pay increases to be given in a new collective agreement. The union subsequently called off the first three days of the strikes to allow for further talks but the company decided to lock out staff indefinitely. It explained that its rationale for doing so was that it had been given a "take it or leave it offer" which it could not accept and that it was not prepared for patient health and safety to be compromised. Therefore it felt a lockout was the appropriate step to take and indicated it was "well equipped to manage with volunteer staff".

This action has come in for widespread criticism from unions and some politicians. In terms of the legislation, because there is no existing collective agreement in force and the parties are negotiating for a new agreement, strikes by the employees and a lockout by the employer will be lawful under the ERA and would have been lawful under the ECA. Again, the change in legislation has had no direct bearing on the dispute.

However, perhaps the most interesting part of this dispute is the fact that the company believes it can still continue to provide catering services despite s 97 because it has sufficient existing staff who will "volunteer" to do the work of the locked out employees. It is likely that will be closely scrutinised by the union to see if there is any element of compulsion applied to non-striking staff and/or to see if any outside labour is introduced.

Overall comment

These three high profile disputes all could just have easily occurred under the ECA and it is wrong to blame any of them on the new Act. However, that is not to say that the industrial relations climate is not altering significantly. There does seem to be a much greater confidence amongst unions to confront employment practices they object to. That confidence, together with the effect of s 97 and the ability from 1 July 2001 to bring forward the expiry dates of CECs, may lead to a significant number of disputes this year.

The National Party claims that "the ERA raised wage expectations and gave excessive power to unions" (press release by National Party, 23 February 2001). However, whether or not that is true, many more confrontations are likely. ❑

PROPERTY (RELATIONSHIPS) AMENDMENT ACT 2001

TRANSACTIONS

with

Jane Anderson

Kristina Andersen

This article discusses the main changes arising from the Property (Relationships) Amendment Act 2001, and the advice that practitioners may want to consider giving to clients in relation to the Act.

The Act will radically change the financial implications of being involved in a de facto, or matrimonial, relationship. The Act will come into force on 1 February 2002. Transitional provisions will apply from 1 August 2001. In this article, the terms partner, partners or relationships refer to both married and de facto relationships unless otherwise stated.

Key changes

The Act aspires to achieve equality of outcome for former partners (married or de facto), rather than the present focus of matrimonial legislation, which is one of equality of division of matrimonial property at the time of the property split. The Act makes the following broad changes to existing matrimonial property legislation:

- married and de facto relationships (including same sex relationships) are covered by the Act;
- all relationship property will be divided equally unless extraordinary circumstances make equal sharing repugnant to justice;
- the Court will have greater powers to postpone property sharing where postponement is necessary to avoid undue hardship to a custodial parent;
- any increase in the value of separate property arising directly, or indirectly, from the non-owning partner's actions will be treated as relationship property;
- the Court will have the power to vary the presumptive 50/50 split by awarding a lump sum payment, or ordering a transfer of property, if post-relationship economic disparity arises from the division of functions in the relationship;
- the Act renames the Matrimonial Property Act 1976 as the Property (Relationships) Act 1976, and extends its coverage to relationships ended by the death of a partner;
- the Court will be able to take account of any dissipation of relationship property;
- the Act is retrospective: it applies to relationships commenced prior to the Act coming into force.

De facto relationships

In general the qualifying period before a de facto relationship is caught by the Act is three years. The three year period was chosen for consistency with existing time rules in respect of marriages of short duration, and despite evidence being given to the Select Committee that 75 per cent of de facto relationships end within four years (and thus just over the qualifying period). However, relationships are caught sooner if there is a child of the relationship (the child does not have to be the biological child of either partner), or if one of the partners has made a substantial contribution to the relationship and failure to make an order for division of relationship property would result in serious injustice. Similar provisions apply to marriages of short duration.

One difficulty will be determining when a de facto relationship started and ended for the purpose of calculating whether the qualifying period has been reached. Some clients may think ahead and record the start date of their relationship in a contracting out agreement. However, there will be many couples who drift into a de facto relationship, unprotected by agreement. In these cases there may be no clear beginning, or agreement on what this date should be.

Another difficulty is determining what types of relationships will be deemed to be de facto relationships for the purposes of the Act. Essentially, the Act provides that a de facto relationship is a relationship between two people (of either sex), who are both aged 18 years or older and who live together as an unmarried couple. Although this definition appears straightforward, the Act then provides a list of factors that may be taken into account by the Court in determining whether or not a couple live together including the:

- duration of the relationship;
- nature and extent of common residence of the partners;
- whether or not a sexual relationship exists;
- degree of financial dependence or interdependence;
- ownership, use and acquisition of property;
- degree of mutual commitment to a shared life;
- care and support of children;
- performance of household duties;
- public aspects of the relationship.

It is noteworthy that "the nature and extent of common residence", is only one of the factors which the Court may, but is not obliged to take into account.

It is quite possible that the definition of a de facto relationship will capture a broad range of relationships. For example, sex is only one of the factors that may be taken into account in determining whether or not a de facto relationship exists. A non-sexual flatmate type arrangement could fulfil most of the other criteria and be deemed to be a de facto relationship. Because the Act, the Family Protection Amendment Act 2001 and the Administration Amendment Act 2001, extend

inheritance rights to surviving de facto partners, there will be a financial incentive for the unscrupulous to wrongly claim a de facto relationship with the deceased. If the parties had lived together (not as de facto partners), or had shared some other form of close personal relationship, some of the criteria for a de facto relationship would be satisfied. Such a claim could appear quite credible without anyone to contradict it.

In contrast, closeted same sex relationships may lack a public aspect and there may be a great degree of financial independence. In such cases, a de facto relationship might not be found to have existed. The Act also specifically contemplates the existence of one or more contemporaneous de facto relationships, or a contemporaneous marriage and de facto relationship.

Problems that may arise from the definition of a de facto relationship, or the mechanistic difficulties that may arise in situations of contemporaneous, or successive, relationships could be avoided with a contracting out agreement. Even where there is no de facto relationship, in appropriate circumstances, clients should be advised to consider making a written record that no such relationship exists.

Contracting out

Couples will be able to enter into an agreement to contract out of the Act on or after 1 August 2001. Section 21P of the Act provides that de facto partners (or persons contemplating entering into a de facto relationship) may make a property sharing agreement prior to 1 August 2001 and such an agreement, to the extent that it is valid, will take effect as if the Act had not been passed. Section 21Q provides similarly for spouses, or intending spouses, wishing to make an agreement providing for the division of property on death. It is likely to be in the best interests of a person with greater present, or likely future, property, than his or her partner, to enter into an agreement prior to 1 August 2001. Such an agreement will have the advantage that property included in the agreement will not be divided, or interpreted, according to the Act and should be harder to overturn than agreements made on, or after, 1 August 2001. However, no agreement can be made unless both partners agree. If a person enters into an agreement, under pressure, perhaps in order to prevent the relationship ending, there is a danger that the agreement could later be set aside on the grounds of duress.

In general, the poorer partner should be advised not to enter into an agreement before 1 August 2001, or at all, if they are likely to be better off with a relationship property division under the Act. If the poorer partner refuses to enter into an agreement, the richer partner will have to choose between ending the relationship, or being unable to protect property from claim. Even if property is disposed of to a trust, the Court will have the power to order one partner to pay money to the other; or to order a transfer of property from one partner to the other; or to order the trustees of a trust to pay all or part of the trust's income to the other partner, in compensation.

An agreement made on or after 1 August 2001 will be void unless both parties have received independent legal advice, it is in writing and signed by both parties, and it is witnessed and certified by a barrister or a solicitor. Agreements made in terms of the Act will only be set aside if the Court is satisfied that giving effect to the agreement would cause serious injustice. This is a higher threshold than the current "unjust" test pertaining to matrimonial property agreements. The threshold is further strengthened by the Court, in considering whether or not an agreement made under the Act should be set aside, being required to have regard to the fact that the partners entered into the agreement in order to achieve certainty in respect of property.

Lawyers can assist their clients by strongly recommending that an agreement, and any associated changes to wills and trusts, be considered at the outset of a relationship, and by recommending that any major change within the relationship should lead to a review of the couples' contractual needs. An example of such a change could include an unrelated child coming to live in the home occupied by the couple, or one partner giving up employment opportunities for the benefit of the other's career. Such a decision is likely to increase the chance of a successful economic disparity claim being made by the sacrificing partner.

Summary

The Act has dramatic implications for all couples. Lawyers must be in a position to advise all clients in a relationship of the steps that should be taken to secure the best possible future outcome if the relationship ends (by death, or separation). Often this will involve entering into an agreement under the Act, similarly in respect of wills and family trusts. Failure to be alert to these issues will increase the chance of being sued for professional negligence. A subsequent article will explore the effect of the Act, and related legislation, on inheritance rights.

NIAK v MACDONALD

Jane Anderson

Niak v MacDonald CA 97/00, 5 April 2001 arose out of an acrimonious matrimonial break up. It concerned a dispute between S and N as trustees of a family trust and the Bank of New Zealand over proceeds of sale of a yacht purchased with trust funds by S's husband (M).

The trust formed part of a sequence of complicated trust and company structures, which had been set up by M and his wife S on advice of their solicitor, W, after S inherited a substantial sum. W, S and M all became trustees. The trust funds were held offshore and were transferred from time to time to the trust's account in New Zealand, and appear to have been used by the couple primarily for major purchases and investments.

There were two issues:

- whether the yacht had been purchased by M, as trustee, by the unauthorised use of trust funds;
- whether the BNZ had imputed to it knowledge of this unauthorised use of funds at the time when it acquired a chattel security over the vessel so that the Trust's claim to the yacht took priority over BNZ's security interest;

In the High Court, John Hansen J held that although BNZ had imputed knowledge of the trust's claim, the use of the funds was authorised so the chattel security was valid. The Court of Appeal reversed both findings with the effect that BNZ's claim to the proceeds of the yacht was upheld.

The Judge found that S gave her husband a general authorisation to deal with trust money and businesses, and had given express agreement to him to make decisions on behalf of the trust. She was aware that M was buying the yacht. He found that while there was no specific request by M or agreement by W to the purchase of the yacht, W had given general authority to S and M to effectively manage the affairs of the

trust and transact business in the way that they did.

The general principle is that a trustee must act personally, and is not permitted to delegate his or her duties or powers, even to co-trustees. There are exceptions where delegation is specifically permitted in the trust instrument or by statute. Even at common law, delegation is permissible in circumstances where it is practically unavoidable (Garrow and Kelly's, *Law of Trust and Trustees* (5th ed at 256).

Section 29(2) of the Trustee Act 1956 provides that:

> A trustee may appoint any person to act as his or her agent or attorney for the purpose of ... managing ... or otherwise administering any property, real or personal, movable or immovable, subject to the trust in any place outside New Zealand, or executing any discretion or trust or power vested in him in relation to such property ....

The trial Judge considered that this section entitled trustees to employ an agent to transact business and that S and W had given M authority to manage the affairs of the trust. The Court of Appeal held that s 29(2) does not empower trustees to make a general delegation of their powers:

> It is an empowering section which enables trustees to appoint agents to implement decisions once the trustees have ... made the appropriate decisions (para 16).

The law required the trustees in this case to unanimously make a decision (there being no applicable delegation power in the trust instrument) and any general delegation to one of their number was not permitted. The general delegation to M was therefore invalid.

At first instance the Judge accepted BNZ's alternative submission that the trustees, by their actions, were estopped from denying that M was entitled to use the Trust funds. The Court of Appeal rightly overturned this finding. First, a representation by one trustee to another cannot amount to an estoppel relieving the trustee from breach of duty (owed to the beneficiaries). Second, there can be no assumption of powers that are ultra vires.

The Court went on to consider whether knowledge of the Trust's claim could be imputed to the BNZ. This was based on the fact that M's solicitor in relation to his matrimonial affairs also acted for the BNZ in relation to the chattel security, and learnt of the Trust's claim prior to receiving instructions from the bank. Notice acquired by an agent is only imputed to a principal if the agent was at the time employed on the principal's behalf (*Jesset Properties Ltd v UDC Finance Ltd* [1992] 1 NZLR 138). The Court of Appeal held therefore that knowledge acquired by the solicitor prior to receiving instructions from BNZ could not be imputed to it. Moreover, the solicitor's duty of confidence to M precluded her from passing the information on to the BNZ.

The Court's treatment of s 29(2) is baffling. It is hard to see how the section could possibly have applied even assuming a specific authority given to M. It applies only to property "subject to the trust in any place outside New Zealand". But the yacht was purchased in New Zealand with moneys that had been transferred from overseas into the Trust's bank account here.

Accordingly, the finding that s 29(2) does not entitle a trustee to give a general authorisation to manage the affairs of the trust is correct, not because it precludes delegation of decision-making power, but because it relates only to property of the trust outside New Zealand. However, to the extent that property is outside New Zealand it is submitted that the intent of the section was to allow the widest of powers of delegation and would extend to a general authority. The reference in s 29(2) to "executing any discretion, trust or power" on its face permits the delegation of judgment and discretion.

The section can be contrasted with s 29(1) which is not so broadly worded and is regarded as permitting delegation of ministerial acts only (Nevill, *Trusts and Wills* (1985) at 157; Garrow and Kelly's, *Law of Trust and Trustees* (5th ed at 257)). The ability to give a general authority in relation to property situated overseas in s 29(2) sits alongside s 31 which entitles a trustee to fully delegate the trust where he or she is going to be absent or physically incapable of performing.

Moreover, the sub-section was largely declaratory of the common law which entitled trustees to appoint an attorney to act for them in a foreign country, even in matters of judgment and discretion, being an instance of necessity (Underhill and Hayton, *Law of Trusts and Trustees* (15th ed at 626)). Thus, in *Re Dunlop* (1925) SR (NSW) 126 it was held (applying *Stuart v Norton* 14 Moo PC 17), that trustees in Ireland had power to delegate to an attorney the power to manage a mix of real and personal property situated in New South Wales.

Interestingly, S (as one of the plaintiff trustees) was arguing for a position that placed her in breach of trust for failing to act personally. Although this aspect was not considered, in principle she would be prima facie liable together with W and her husband for the loss suffered by the Trust.

Family trusts are widely used as part of a tax or financial planning strategy. Because the trust is often a device set up on the advice of accountants and lawyers, the layman may not fully appreciate the effect of settling property in a trust on their freedom to treat property as their own. This case highlights the importance of explaining the trust concept and its attendant limitations to clients. More specifically, it is a prompt to consider whether the trust deed should include express powers of delegation and/or a power to act other than unanimously.

PROPERTY

Roger Fenton

De Richaumont Investment Company Ltd v OTW Advertising Ltd (HC Auckland, AP 158-SW00, 13 April 2001, Priestley J)

The successful appellant in this case was the owner of land which formed the only access to a billboard on the wall of a four storey building. The respondent was the lessee under a two year lease of the wall of the building permitting the billboard to be placed on the wall. Unfortunately the only access to the billboard (apart from by abseilling) was over the appellant's land which consisted of four car parks. An agreement between the appellant and previous owner of the billboard to provide access had expired. To change the sign it was necessary to fix a "skin" to the frame of the billboard. The billboard was 19 x 6 metres approximately, and the skin could only be changed by using a cherry picker from the adjoining land. Entry to the car park land would be required five or six times a year. The two year lease was solely for the commercial purpose of renting the advertising space provided by the wall. Priestley J, invoking the underlying legislative purpose of the section, allowed an appeal from a decision of the District Court which had made orders under s 128 authoris-

ing entry for the purpose of servicing the billboard. Priestley J held that s 128 was not intended to apply in this type of commercial situation.

The judgment provides an interesting legislative analysis based on the history of the section. It appears that there has been only one other reported judgment under the section (*Blackburn v Gemmell* (1981) 1 NZCPR 389). The predecessor to s 128 was passed in 1950, as an amendment to the Property Law Act 1908 (s 16A, as amended by the Property Law Amendment Act 1950), and permitted the Magistrates Court to authorise entry for erecting or repairing buildings. Section 128(1) of the Property Law Act 1952 is in identical terms and reads:

> The owner of any land may at any time apply to a District Court for an order authorising him, or any person authorised by him in writing in that behalf, to enter upon any adjoining land for the purpose of erecting, repairing, adding to, or painting the whole or any part of any building, wall, fence, or other structure on the applicant's land, and to do on the land so entered upon such things as may reasonably be considered necessary for any such purpose as aforesaid.

When the Bill was reported back from Select Committee it was recommended that the original words "repairing or painting any part of any building situated ..." be deleted, and the words now found in the Act were substituted. This substitution was to enable orders to be made not only in respect of buildings, but also walls, fences or "other structure". When the Amendment Bill was read in the Legislative Council it was described by the Hon C G White, as quoted in the judgment:

> The new provision enables an owner of property adjoining other land to erect, repair, add to or paint a building or other structure belonging to him which is close to the boundary line. The idea of the provision is to get over an awkward position which sometimes occurs when buildings are very close to a boundary line. When an owner wants to effect repairs or do some painting on such a building he is often to go on to the adjoining land to carry out this work. Some neighbours are neighbourly and would allow such work to be done, but others are fussy and in such cases the owner of the building concerned may now go to the Court and obtain the necessary permission.

The Bill was read a third time without further debate. The opposition agreed to the legislation. The judgment contains further references to *Hansard*, including a tale related by The Rt Hon Walter Nash (then Leader of the Opposition) about timber stacked by a neighbour on land "without by your leave or anything", which demonstrate that the intention was to enable Court permission to be granted when buildings or fences are close to a boundary and it is necessary for a neighbour to go onto an adjoining property to carry out repairs or other work. The point to be drawn from the story related by Mr Nash was that property rights are not to be infringed lightly.

Priestley J found that the intention was to enable "access to buildings which were close to boundaries where the necessary access could not be obtained as of right". He emphasised that without a Court order the respondent would be a trespasser. In the Judge's view, the "correct" interpretative analysis of s 128 requires the Court, as its starting point, to regard the appellant's property rights as inviolate. The Court must recognise that the respondent is only entitled to an order if it is for the purpose specified by Parliament. Priestley J referred to the "unmistakable commercial nature" of the billboard, and pointed out that the billboard is not an essential part of the structure of the building. He concluded:

> The activity which orders under s 128 are intended to permit relates to the maintenance and enhancement of structures close to a boundary which might otherwise be inaccessible. The orders obtained by the respondent in the District Court are in sharp contrast to that purpose. Those orders are designed to permit the ongoing use of part of a wall for a commercial purpose and envisage an unspecified number of incursions for an indefinite period. Such a purpose and the orders necessary to achieve it, in my judgment, go well beyond what Parliament intended.

Priestley J upheld the legislative intent of s 128, as he discerned it to be, and ruled that the order in the District Court should not have been made.

The appeal was allowed on a subsidiary ground – that the respondent was not an "owner" for the purposes of ss 128(1) and 128(4) and lacked status to bring the application. Priestley J accepted that the respondent is clearly a lessee or tenant in terms of the lease dated 25 June 1999. However, "owner" carries a special definition under s 128(4), and the only category in s 128(4) which might cover the respondent is "... any tenant of the land bound by any express or implied covenant to keep any building thereon in repair". Priestley J held that the respondent is the tenant of the south wall and under the agreement has an obligation to repair "... all advertising structures and devices erected or connected to [the wall]". The agreement negated the provisions and covenants under the Land Transfer Act 1952 and the PLA in so far as they are contradictory or inconsistent with the provisions of the lease. Priestley J held that the obligation to repair in s 106(b) of the PLA had not been negated or modified so that the respondent had an obligation to maintain and repair if not the wall, at least the billboard site itself. He said he did not consider that "either of those lease obligations to repair metamorphose the respondent, in its capacity as a tenant of the south wall of the building, into a tenant of 'the land' bound by a covenant to keep 'any building thereon' (the entire four storey building) in repair". This may be the only portion of the judgment with which issue may be taken. This interpretation may be too restrictive, particularly in light of the definition of "land" under the PLA which includes all estates and interests, whether freehold or chattel in real property. The words "any building thereon" in s 128(4) may not necessarily mean the entire building.

In this principled judgment, Priestley J has upheld the underlying purpose of s 128. Property rights should not lightly be overridden, and s 128, like other sections in the PLA which permit judicial interference in property rights, fulfils a need but should be confined to its true function. Priestley J emphasised the commercial element in the application and that it did not involve a dispute between neighbouring owners of the type envisaged when the section was enacted. This is a good decision on a property statute, and one that contributes significantly to an understanding of s 128. The practical lesson for the practitioner acting for a purchaser or lessee of rights to billboards is to ensure there is adequate access to enable the billboard to be properly serviced and signs replaced. ❑

UPDATES TO YOUR MATERIALS

STUDENT COMPANION

edited by

Richard Scragg

LEGAL ETHICS

R J Scragg

Harley v McDonald Privy Council, 10 April 2001, Lords Hope, Clyde, Hobhouse, Scott and Dame Sian Elias

This was an appeal from the New Zealand Court of Appeal which had confirmed an award of costs against the respondent's legal advisers. The case arose out of the collapse of the firm of solicitors of Renshaw Edwards. M, the respondent, lost a substantial sum of money which he was unable to recover from the former partners of the firm, owing to their bankruptcy. M sued FAI, the firm's professional indemnity insurers and also made a claim against the Solicitors' Fidelity Guarantee Fund, which led to a claim against the NZLS. The High Court dismissed M's claim against FAI and awarded costs of $115,606 to FAI against M. The High Court ordered the appellants, M's solicitors and barrister, jointly and severally, to pay personally to M, $65,000 as a contribution to those costs. The Court of Appeal upheld the order for costs, awarded on the grounds of the conduct of the case by M's legal advisers. Essentially, the conduct amounted to pursuing a hopeless case and failing to advise the client so that he could make a fully informed decision about whether to proceed with it. Lord Hope delivered the Advice of the Board.

The first question before the Privy Council was whether the High Court had jurisdiction to make a costs order against a barrister. M's solicitors accepted that there was jurisdiction under R 46 High Court Rules for an award of costs against them. The Privy Council held that the inherent jurisdiction of the New Zealand Courts to make a costs order against a client's solicitor rests upon the principle that, as officers of the Court, solicitors owe a duty to the Court while the Court has a duty to ensure that its officers achieve and maintain an appropriate level of competence and do not abuse the Court's process. In New Zealand barristers are also officers of the High Court and all practitioners are qualified and admitted as both barristers and solicitors. The same rights of audience before any Court or tribunal apply to all practitioners. Barristers owe the same duties to the Court as solicitors. For these reasons the Privy Council held that it is desirable in the public interest that the High Court should have power to award costs against a barrister personally.

The Board then had to consider the principles on which the jurisdiction to make a costs order against a barrister should be exercised. The purpose is to punish the practitioner for a failure to fulfil his or her duty to the Court and to compensate the client for costs that would not have been incurred but for the failure of duty. As a general rule allegations of breach of such duty should be confined to questions apt for summary disposal by the Court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of the hearing by gross repetition or extreme slowness in presentation of evidence or argument are examples. In these circumstances the facts are within judicial knowledge or can easily be verified. It is not appropriate when considering a costs order from the Court to rule on whether there also has been a breach of the rules of professional conduct nor to say whether the client has a cause of action against his or her barrister or solicitor for negligence.

The Privy Council held that the test for the exercise of the common law jurisdiction in New Zealand is that which applied in England before the wasted costs jurisdiction under s 51 Supreme Courts Act 1981 came into effect. A simple mistake or oversight or a mere error of judgment will not of itself be sufficiently serious to fall into that category. Something more is required. In *Myers v Elman* [1940] AC 202,291-2, Viscount Maugham indicated that the test was whether the conduct amounted to a serious dereliction of duty, and that negligence could be so described if it was at a sufficiently high level. The New Zealand Court of Appeal held that serious incompetence resulting in a failure to appreciate that a claim is untenable is capable of amounting to a serious dereliction of duty to the Court. The Privy Council agreed that a duty rests on officers of the Court to achieve and maintain appropriate levels of competence and care and that, in the event of serious dereliction of duty, the officer may suffer an award of costs against him or her. The Privy Council continued, however, that care must be taken not to assume that just because it appears to the Court that the case was hopeless there was a failure by the barrister or solicitor to achieve the appropriate level of competence. "The essential point is that it is not errors of judgment that attract the exercise of the jurisdiction (to award costs), but errors of a duty owed to the Court."

The Privy Council held that the case had not been made out against the appellants and it reversed the Court of Appeal. First, the High Court had acted in breach of the principles of natural justice by considering matters not properly before it. The High Court took into account matters relating to the conduct of the proceedings which took place prior to the trial and this went outside the summary nature of the jurisdiction.

Second, the "serious dereliction of duty" to the Court which the Court of Appeal found established was that H prosecuted "a hopeless case, not appreciating how hopeless the case was". The Privy Council held that the conduct did not amount to a serious dereliction of duty. Up to the date of trial, H was conducting the case in accordance with instructions, the claim had not been struck out and there was no suggestion that H's conduct was malicious or dishonest, or that she deliberately persisted in an action which was an abuse of process. In addition, the Privy Council considered "unsound" the proposition that a barrister who pursues a hopeless case, not appreciating it to be hopeless, displays such a degree of incompetence as to amount to a "serious dereliction" of the duty owed to the Court. As a general rule

litigants have a right to have their cases presented to the Court and to instruct practitioners to present them. Although exceptional steps may have to be taken with vexatious litigants, on the whole it is in the public interest that litigants who insist on bringing their cases to Courts should be represented by legal practitioners, however hopeless the case may appear. Something more than the mere fact that the case is hopeless is required. In this case the Court of Appeal was wrong in holding H was in serious breach of her duty to the Court and it follows that it was wrong in making the same finding against the instructing solicitors.

MEDICAL LAW

Nicola Peart

Penney v ACC DC Auckland, 43/2001, 6 March 2001, Judge Beattie

This case highlights the importance and the difficulty of proving causation in an accident compensation claim for medical misadventure resulting from medical mishap. The claim under the ARCIA 1992 was initially approved and later declined by ACC because of lack of causation.

The applicant child was born with cerebral palsy following an uneventful pregnancy and a normal delivery. No foetal distress was noted during labour but the baby was born in poor condition and required resuscitation. It was accepted that the injury suffered was both rare and severe as required by the definition of medical mishap in s 5 of the Act. The issue was whether the injury was the adverse consequence of treatment. While the Court accepted that there was evidence that the baby's cerebral palsy was caused by asphyxia during the birth, there was no evidence that an act or omission of the registered health professional assisting at the birth caused the asphyxia. The applicant having failed to satisfy the onus of proof, the Court concluded that her condition occurred as a consequence of events over which no one had control. Compensation was thus properly declined.

Stocker v ACC DC Rotorua, 73/2001, 27 March 2001, Judge Beattie

This case also concerns a claim for accident compensation for medical mishap. Its importance lies in the type of evidence required to prove rarity of an adverse consequence of medical treatment when there is no scientific information. An adverse consequence is rare, according to s 5(2) ARCIA 1992, "if the probability is that the adverse consequence would not occur in more than 1 per cent of cases where that treatment is given". S's small bowel was perforated during surgery to remove an ovarian cyst, resulting in long term post-operative complications. The severity of the adverse consequence was not contentious, but the rarity of this complication occurring in the type of surgery which the applicant underwent was disputed. ACC declined her claim based on a medical opinion from a specialist that bowel trauma was a significant possibility in the applicant's case. The specialist offered no basis for that opinion.

The applicant appealed and obtained leave to introduce further evidence on the question of rarity. The surgeon at Rotorua Hospital who dealt with the complication had done some research in the meantime. In his search through the Index Medicus and the worldwide web he found no paper containing information about the incidence of small bowel perforation during this type of surgery. He reviewed the Rotorua hospital records of all similar surgical procedures over the preceding 13 years and out of 105 cases he found only one of small bowel perforation, an incidence of 0.95 per cent. A similar review of records was done at National Women's Hospital in Auckland for the period 1 September 1999 to 31 August 2000 and out of 121 operations no cases of ruptured bowel were found.

In the absence of reasoned opinion to the contrary, the Court accepted these findings as the best information available in New Zealand on the incidence of this adverse consequence occurring. The Court thus concluded that the adverse consequence was rare and that the applicant's claim for medical misadventure should be granted. It would seem that in the absence of scientific data an informal review of local hospital records will suffice as evidence of rarity of an adverse consequence.

Ministry of Health v Pacific Pharmaceuticals HC Auckland, A165/00, 16 February 2001, Anderson J and Priestley J

This was an appeal by the Ministry of Health against the sentences imposed on the respondent for breaching sections of the Medicines Act 1981. The Ministry contended in particular that the fine of $5000 for breaching s 20(2) was manifestly inadequate. The offence arose out of the sale and distribution of Lyprinol, an extract from green lipped mussels, accompanied by media publicity that it might provide a "cure" for cancer. There was no scientific evidence to support that therapeutic claim.

Section 20(2) prohibits the sale, distribution and advertising of any medicine without ministerial consent and notification in the *Gazette*. A medicine is defined as an article for administering to human beings for a therapeutic purpose. A company convicted of this offence is liable to a fine not exceeding $100,000.

The respondent acknowledged that the therapeutic claim of Lyprinol brought it within the scope of the statutory definition of "a medicine" and that it did not have the requisite consent. It was not, however, directly responsible for making the therapeutic claims. They were made in an offshore media campaign. Nor did the packaging make any therapeutic claims. The respondent cooperated with the Ministry of Health by promptly withdrawing the product from the market. It made virtually no profit. The Court nonetheless held that the $5000 fine was manifestly inadequate and increased it to $15,000. The respondent crossed a critical line by permitting the product to be sold in a package which contained a website reference where therapeutic claims were made and by arranging for the sale of Lyprinol to coincide with the media release which contained unmistakable therapeutic claims.

Their Honours said that the purpose of the Medicines Act was to protect consumers against wrongful exploitation and health risks from unproven therapeutic claims of products. "The need for deterrence and the need to ensure that breaches of the Act do not become a route to commercial profit are important factors for the Courts to weigh." (p 9) Had the respondent contested guilt, the fine might well have been higher.

FAMILY LAW

John Caldwell

Butler v Queen HC Christchurch, AP 39/00, 2 April 2001, Panckhurst J

This appeal from the Family Court concerned the future country of residence of three boys aged under ten. The mother wished to return to her country of birth, Ireland, and sought to take the boys with her. The Judge declined the mother's application to relocate, and instead made a joint custody order in favour of both parents, with a condition that the boys were to remain resident in Christchurch. Pivotal to the Judge's decision, was his finding on the evidence that the mother would remain in New Zealand if her application to remove the children was refused. Following the judgment, the mother went back to Ireland for two months, with the father exercising custody for that period, and she reached the emphatic decision to return permanently to Ireland, with or without the children.

On appeal, Panckhurst J declined to follow the cautious approach laid down by the English Court of Appeal as to the admission of fresh evidence. His Honour stated that in most, if not all, appeals concerning guardianship, custody and access, updating evidence would be properly received, since

almost invariably in cases concerning children there would have been cogent and material developments subsequent to the earlier hearing. The Judge was persuaded that the new evidence showed the mother had made a firm decision to return to Ireland regardless, and thus the premise upon which the Family Court decision was reached no longer obtained. The Judge was satisfied that the mother was genuinely motivated in her desire to return, and that her position was not simply tactically based.

Panckhurst J also examined English case law suggesting that the effect of a Court's refusal to allow relocation on the primary caregiver's psychological and emotional stability was the most critical factor in relocation applications. Although refraining from holding there was an actual presumption in favour of the custodial parent, these English cases had tended to indicate that a custodial parent's application to relocate would be granted unless the Court concluded it was incompatible with the welfare of the children. Overall, Panckhurst J considered that the English case law displayed a more prescriptive approach to relocation cases than New Zealand cases. Nevertheless, His Honour said help could be obtained from some observations in the most recent English Court of Appeal decision, *Payne v Payne*, provided those observations were not applied in a mechanical manner.

The Judge reached the view that the best interests of the boys would be promoted if they accompanied their mother to Ireland, and the mother's appeal was allowed. Orders and directions as to access and travel were to be later determined.

TORTS

Rosemary Tobin

Caie v A-G HC Auckland, CP 334-SD99, 6 April 2001, Fisher J

Compensatory, aggravated and exemplary damages are recoverable for false imprisonment. *McGregor on Damages* (16th ed, 1997, para 1850) confirms the principal heads of damage as injury to liberty, injury to feelings and any pecuniary losses which are not too remote. This note concerns the principles to be applied when assessing damages.

In this case the Judge rejected all the principal complaints. He did, however, conclude that there was a fortuitous error in the procedures followed by police in the process of arresting and charging. The period of wrongful imprisonment in such a case begins with the arrest and ends when the plaintiff is given a sufficient description of the alleged offence, when a judicial officer intervenes by exercising an independent discretion to remand the plaintiff in custody, or when the detention ends, whichever is the earliest. The error meant the plaintiff could succeed in his claim for damages.

Here the plaintiff had claimed both for false imprisonment and for a breach of the Bill of Rights. The Judge concluded that where there was a breach of s 24 Bill of Rights Act (failure to explain nature of charge) in the course of a continuing false imprisonment, it was usually sufficient to confine damages to the false imprisonment.

As a preliminary point the Judge had to consider the effect the plaintiff's conduct might have on any award for compensatory damages. There are New Zealand decisions where compensatory damages otherwise payable for false imprisonment have been reduced to reflect the plaintiff's own conduct, where the conduct had, for example, provided the police with good cause to suspect, or had otherwise been open to criticism. The Judge observed that it was unfortunate that these decisions did not articulate the legal rationale for the reduction. Not only that but they were arguably contrary to English authority.

The Judge agreed that, where there were grounds for the arrest, this reduced the likelihood that an award of exemplary damages was appropriate. Could a reduction of damages due to the plaintiff's conduct be justified? His Honour considered that one possible rationale for reducing or refusing compensatory damages where the arrest was substantively justified was if there was no causal nexus between the procedural wrong done and the harm suffered. That is, if the deficient procedures would have made no difference to the period and nature of the detention. This, however, depended on the way in which the wrong done to the plaintiff is identified. The argument that it was permissible to go behind the concept of false imprisonment to see whether procedural improprieties caused any damage was rejected by the English Court of Appeal in *Roberts v Chief Constable of Cheshire Constabulary* [1999] 2 All ER 326. The Court was quite clear that the wrong was not the procedural impropriety, but the false imprisonment. Imprisonment is either lawful or false; questions of degree do not arise.

The Judge himself considered that there was an unattractive doctrinalism in using the label false imprisonment as a reason for declining to consider the precise nature of the wrong done to the plaintiff. He also considered, however, that major questions of policy and principle need to be assessed before the traditional approach was departed from. Similar considerations also arose where the question was whether contributory conduct by the plaintiff should reduce the damages awarded to him or to her. Although the law had demonstrated a willingness in other fields to reduce damages for injuries to which a plaintiff had contributed, the position was still unsettled in the intentional torts. The Judge therefore decided that this was a question better left until it was specifically argued. Similar concerns applied to any failure of the plaintiff to mitigate his loss.

The Judge thus concluded that on the present state of the law compensatory damages were not to be reduced on the ground that the police were entitled to arrest and that the arrest was merely vitiated by procedural error. He also noted that damage to feelings can be either exacerbated or diminished by the subsequent conduct of the defendant. That is, the conduct of the defendant after the unlawful detention ends can aggravate or mitigate damages. Where there was reprehensible conduct on the part of the defendant additional exemplary damages could be appropriate, but only if compensatory damages alone would not be a sufficient punishment for the conduct. Every case depended on its own facts, but the Judge thought that in a case where there were no special factors in aggravation or mitigation, compensatory damages for a false imprisonment lasting 20 hours could well be in the region of $10,000.

COMPANY LAW

Lynne Taylor

Voidable Transactions – "ordinary course of business"

Waikato Freight and Storage (1988) Ltd v Meltzer CA 164/00, 5 March 2001, Tipping, McGechan and Salmon JJ

At issue was whether two payments received by the appellant from a company now in liquidation, Excel, were voidable under s 292 Companies Act 1993. The appellant argued, the onus being on it to do so, that the payments were saved because they were made in the ordinary course of business. (see s 296(2).) The payments were made after Excel had terminated its relationship with the appellant on the ground that it wanted to save costs. The two payments were lump sum payments that could not be reconciled with any particular invoice or group of invoices. The payments were made by cheque and one of the cheques was dishonoured on initial presentation with the answer "present again" but was subsequently honoured. Evidence was given and accepted that late payment in the freight payment was not unusual.

In *Countrywide Banking Corporation Ltd v Dean* [1998] 1 NZLR 385 the Privy Council said that the "ordinary course of business" must be assessed objectively

against the actual setting in which the transaction took place. The Privy Council also adopted a statement made by Fisher J in *Re Modern Terrazzo Ltd (in liq)* [1998] 1 NZLR 160 that a transaction must be such that it would be viewed by an objective observer as being in the ordinary course of business. Here the question was how much an objective observer could be taken to know about the circumstances in which a transaction takes place. The approach in the High Court judgments on this issue (see *Re Anntastic Marketing Ltd (in liq)* [1999] 1 NZLR 615; *Re Excel Freight Ltd* (1998) 8 NZCLC 261,827) was described as "over-complicated and over-refined". The Court of Appeal identified the Court as the objective observer. The Court's task, it said, is to look at the circumstances that are objectively apparent at the time of the transaction. The Court of Appeal noted that general business practices were relevant as were particular customs of the industry in question and the previous commercial relationship between the parties. It was also accepted that the objectively apparent mental approach of the parties would sometimes be relevant to the Court's assessment – subject to the provisions of s 292(4).

The Court of Appeal's conclusion was that on the facts of the matter the two payments in issue did fall within the ordinary course of business and so were unable to be avoided by the liquidator.

Powers of Court on approval of an arrangement

Greymouth Petroleum Mining Company v Fletcher Challenge Ltd CA 60/01, 30 March 2001, Tipping, Thomas and Keith JJ

Section 236 Companies Act 1993 gives the Court the power to approve an arrangement, amalgamation or compromise and order that it be binding on the company and other persons or classes of persons. Section 237 allows the Court to make additional orders in respect of an arrangement, amalgamation or compromise approved under s 236. The appellant had successfully applied for an order approving an arrangement in the High Court. The appellant, a shareholder in the respondent, appealed against its unsuccessful application for an order pursuant to s 237 modifying the arrangement. The Court held there was no jurisdiction to make the order sought by the respondent pursuant to s 237. The wording of s 237(1) gave an indication that the principal purpose of s 237 is to give the Court ancillary powers for the purpose of giving effect to an arrangement approved under s 236. The natural meaning of giving effect to an arrangement, said the Court, does not suggest a power to materially alter it. Further, once approval has been given to an arrangement then it is likely that transactions would have taken place in reliance on its sanctity. This supported the view that it was not intended that s 237 powers could be exercised at a later date to materially alter the existence of an approved arrangement.

EMPLOYMENT LAW

G Rossiter

Baguley v Coutts Cars Ltd EC, AC 25/01, ARC 2/00, 3 April 2001, Chief Judge Goddard, Judges Travis and Shaw

B was dismissed on grounds of redundancy. He brought a personal grievance action which was dismissed by the Employment Relations Authority and, from that decision, he pursued a "challenge to determination", which was heard by the Full Court of the Employment Court. The case is of interest at a number of levels:

(a) the Court's approach to challenges to determinations of the authority;

(b) the law regarding employer obligations in a situation of contended redundancy including, in this regard the impact of the Employment Relations Act 2000 (ERA) on the authority of the Court of Appeal decision in *Aoraki Corporation v McGavin* (1998) 1 ERNZ 601; and

(c) the significance of the "good faith" provisions of the ERA as they relate to the individual employment relationship.

Coutts Cars, wished to reduce its complement of car groomers from four to two and use, as necessary, a firm of contractors to assist with this work. The personal grievance focused on the fairness and adequacy of the consultation and selection procedures of the employer. The employee's case was that there had, prior to the only relevant meeting with management of the 29th September 2000, already been a decision about the selection of staff for redundancy, that there was accordingly "pre-determination" of the outcome and the purported "consultation" was a charade. The case was supported by the fact that only two of the groomers had been called to meetings with the manager.

The Court reviewed the provisions of the ERA relative to the consideration of challenges to determination of the authority including s 183 in terms of which it is directed in any such case that it "must make its own decision on the matter and any relevant issues". Their Honours stated that it was unnecessary for them to "rehearse the authority's determination. Rather it (was) enough to say that the Court (had) before it the personal grievance that the authority investigated". With respect to the substantive matter itself, the Court made the point that, "a markedly different regime has been established in place of the [ECA]". It went on to refer to and discuss the "key provisions" of ss 3 and 4 of the ERA. With respect to the question of an employer's consultations with employees in a redundancy situation, the Court said that the duty of good faith applies when such processes are in progress. "If an employer chooses to consult, even if not bound to do so, it must observe the duties of good faith expressly required by the Act to be observed when consultation is being undertaken or a proposal is being made that can possibly impact on the employer's employees."

The Court of Appeal in *Aoraki*, in effect, held that whether there is an obligation to consult in a redundancy situation will depend on the particular circumstances. Such a duty may not, for example, arise in a situation of mass redundancies (presumably because such a process might not make any difference to the outcome). In *Baguley*, the Full Court said that "it is not necessary or permissible to speak in terms of consultation being mandatory in all cases or never being required. Usually it will be. The Employment Relations Act 2000 strongly suggests so". The difference of language is clearly more than one of just emphasis. An employer who now fails to consult with an affected employee in a redundancy situation will probably, apart from exceptional circumstances, do so at its own risk.

The Court found that Coutts Cars had, with regard to the issues arising, engaged in "not a genuine process but a mockery". There was a specific finding of a breach of good faith. The employer was said to have been required by s 4 ERA to refrain from misleading or deceiving its employee. On the contrary, Coutts Cars had engaged in "deceptive conduct in pretending that the assessment (of Baguley) lay in the future, refusing to disclose the selection criteria being used and concealing adverse conclusions already reached".

Having found the dismissal to be unjustified, the Court dealt with remedies. Although reinstatement was sought, it was declined because it was found to be "not practical". Compensation for humiliation etc was granted in the sum of $10,000. This was the full amount sought but the Court described the claim under this heading as being "modest". Interestingly, the Court awarded as compensation for a lost benefit the equivalent of three months' wages on the basis that B had been disabled for finding work for that period because of the way he had been treated. A doctor's certificate was produced which supported the contention that due to his "state of mind" he was unable to look for work. ❑

CONTINGENCY FEES

ALTERNATIVE DISPUTE RESOLUTION

edited by
Carol Powell

EFFECT ON MEDIATION

The announcement by Justice Minister Phil Goff on 22nd May that he will support the Law Commission recommendations that contingency fees be given legal status in New Zealand with appropriate safeguards, raises some important issues in relation to mediation.

While this innovation in New Zealand has clear benefits such as helping parties who would otherwise be unable to pursue legal arguments, such as those who earned too much to be able to qualify for legal aid but insufficient to fund major litigation, it may also create ethical problems for counsel advising in a mediation.

The recommendation specifically excludes proceedings from which there would be no "fund" to win, thereby eliminating family, criminal and immigration matters. It may also benefit from excluding certain processes such as mediation.

Mediation is a process which aims for a "win-win" situation. While this is not always possible in pure terms, the process does aim to get the parties to move away from their positions and to negotiate on the basis of each party's needs and interests.

Part of this stage in the process involves "enlarging the pie", which can involve creating new possible settlement options, many of which may be "money's worth" such as the use of one party's holiday home – which has value to the user but costs the offerer little or nothing. Some of the options will also address other needs of the parties such as the need to have the effect of the dispute acknowledged, perhaps by way of an apology or an acknowledgment of the quality of one party's work.

These types of options enable a settlement agreement to provide for the needs and interests of all parties in innovative ways, without always involving a pure agreement that a sum of money be paid by one party to another.

The role of counsel during the mediation is to advise on legal issues and to provide a baseline to compare what is currently on offer in the negotiation with what might be available in another forum. The strength of a party's legal rights and the time and cost of the litigation process will be factors in this analysis.

Lawyers are also very useful in the option generation phase, as they have an understanding of their own client's needs and interests and have significantly less emotional interest in the overall outcome, enabling them to put forward useful options which address the needs of other parties as well.

If a lawyer, acting for a party in a mediation, were acting on a contingency basis, much of this would potentially change. The lawyer would become personally interested in the outcome and may therefore shy away from a settlement offer that contained elements that took the place of the payment of money. This would particularly be the case where the legal rights of a party were strong, even if the process of enforcing those legal rights was for other reasons not desirable to that party, such as a situation where timing was important or where a continuing commercial or personal relationship between the parties was at stake.

The simple answer to this dilemma may seem to be to simply say that counsel engaged in mediation should not act on a contingency fee.

But what then happens to a dispute where proceedings have been issued and one, or more, of the lawyers are engaged on a contingency basis? Do the lawyers simply ignore the benefits of mediation or any other ADR process, including possibly even straightforward settlement discussions or settlement conferences?

A way forward could be for a second counsel to be instructed, on a normal fee paying basis to act in relation to settlement discussions or mediation. However, there are still pitfalls with this scenario. First, the second counsel will incur time and cost getting up to speed with the dispute, which is a cost the instructing party will have to bear. Second, the counsel originally instructed will still have an interest in the outcome and may well be very unhappy with a settlement reached in mediation or by negotiation, which results in the money paid to his or her client being less than that counsel believes would have been recoverable in Court. Indeed, if the contingency arrangement is that the lawyer will only be paid in a "win" situation, there is an issue as to what is a win in mediation and whether it is possible for both or all parties to win.

Lawyers may well resist passing a case on, after having put in significant amounts of work on a contingency basis, for fear of not recovering in a settlement what they may have recovered in Court proceedings.

There is no simple answer to this dilemma but it is one that will have to be addressed by counsel every time a contingency brief is accepted. It is recommended that this issue be discussed directly with the client at the outset. Clients and counsel will need to be very clear on what is a "win" which would enable the contingency fee to become payable and the way in which settlement discussion, mediation or other ADR processes will be handled in the future. The outcome of the discussion should then be recorded as part of the initial contingency fee agreement.

NEW SOUTH WALES – GUIDELINES FOR ENVIRONMENTAL DISPUTES

One of the difficulties of managing environmental disputes is dealing with the large number of interests involved. Any environmental issue will potentially affect thousands of people, or more, and finding a means of consulting with every affected person, or even every representative group of interests, as well as keeping them involved as part of the dispute resolution process, has always been extremely difficult. The role of local authorities within this process is also complex as a council will have decision-making powers but will also in some cases be one of the parties to the dispute.

New South Wales has a newly created Environmental Disputes Mediation Service, and the NSW Law Society issued its *Best Practice for the Management of Environmental Disputes: a guide for Local Government*, and its guide for the community on the newly established service, in April of this year.

The Guidelines include recommended policies that are able to be adopted by local bodies. The Guidelines recommend that any environmental disputes policy adopted should incorporate the following aims:

- to establish an environment disputes management programme which is effective and equitable to all parties;
- to offer dispute resolution methods which empower both objectors and applicants to resolve their disputes in a mutually satisfying way;
- to widely publicise the environmental disputes management programme, in order to raise the level of community awareness;
- to identify the council's separate roles as the provider of a dispute resolution service and as the consent authority for development;
- to improve the council's consent procedures by taking into consideration the mediated agreement or facilitation report, prior to determining an application;
- where the applicant agrees, to provide for an extension of time for dispute resolution to take place;
- to avoid litigation in Land and Environment Court through the use of mediation wherever appropriate;
- to establish the function of environment disputes manager for case management and regular programme reviews; and
- to adequately fund the programme.'

They also recommend the appointment of a dispute resolution manager who would have sole responsibility for the operation of the programme, whose functions would include:

- to deliver a high quality dispute resolution service; to educate the community on the opportunities for participation in dispute resolution; to determine appropriate dispute resolution process for each dispute, in consultation with the council's development control unit; to identify those persons who have an interest in the disputed development, including objectors and application, again, in consultation with the council's development control unit;
- to facilitate a preliminary meeting with each party to a mediation, ensuring that they sufficiently understand the application, the relevant development controls, and how the parties will participate in the mediation;
- to arrange for the selection of the mediator or facilitator, the venue set-up, and all pre-mediation documentation; and
- to maintain statistics on the environmental disputes resolution programme, reporting regularly to the council on the programme's effectiveness.'

The Guidelines to Council then go on to discuss the council's role as provider of the dispute resolution service and as consent authority. Effectively these two roles must be distinct within the council. The guidelines suggest that the outcome of a dispute resolution process would be one of no agreement, but possibly a set of issues to be resolved, total agreement on all issues or partial agreement, with clarification issues remaining unresolved. The outcome may include:

- agreement to submit amended plans;
- requests for the council to include certain conditions in the development consent;
- withdrawal of objections.

The process may also result in private agreements between the parties which are not relevant to the consent authority's decision.

The Guidelines clarify that any agreement reached between parties during a dispute resolution process will not absolve the council from its duty to determine the application in accordance with its statutory duties. However, the dispute resolution agreement will afford the council the benefit of considering the objectors' and applicants' agreed positions before making its consent decision.

The guidelines also deal with the situation where the council is a party to the mediation. In that case they suggest that authority of the council to reach agreement in the mediation be delegated to an individual who would attend the mediation. Notwithstanding any agreement reached at mediation

AMINZ UPDATE

AMINZ has recently published a new edition of its Members' Handbook. The purpose of the publication is to assist members in their professional work by providing them with a convenient tool to use in mediation and arbitration processes. The handbook covers general member information such as lists of members and panels, rules and regulations and education information. It also has copy of each of the mediation and arbitration processes and includes model agreements and dispute resolution clauses.

The breakfast seminar programme is now on track and seminars are scheduled monthly from April through to November in several locations throughout the country.

The AMINZ AGM and Annual conference will be held at the Novotel Tainui Hotel in Hamilton on Friday 27 to Sunday 29 July. There will be presentations from keynote speakers on a number of topics coupled with workshop sessions which will cover topics such as Confidentiality Issues in Arbitration and Mediation and Strategic Planning for the Institute. ❑

the mediated agreement would still have the same standing as any other mediated agreement, requiring the council to determine the application.

The guidelines touch on the issue of confidentiality and suggest that the confidentiality provisions of an agreement to mediate would bind councillors and other council officials who elected to attend the mediation as observers, which could create future conflict situations. They also recommend that the council not give an indication of the likely outcome of the council's determination during the mediation process, although council staff could be available to provide technical advice.

The NSW Law Society has produced guidelines for use by local authorities and also a set of guidelines for public use. In addition to the recommendations referred to, the guidelines discuss alternative processes and factors to consider when making the choice of process, and provides a useful synopsis of the processes available. They then go on to provide a methodology for the integration of the environmental disputes programme with the developmental control system, with a nine-step process.

This process begins prior to the lodgement of the application identifying potential conflict at an early stage and encouraging direct negotiation. Notification of the application is to include notification of the council's dispute resolution service. Objections and submissions are to be received at the same time as requests for the dispute resolution service.

The decision as to whether to refer the dispute to the service and if so which process is to be used is to be made by the dispute resolution manager in consultation with the development control unit.

Where mediation is selected there is a pre-mediation process of education and information about process. The mediation then takes place before the development control unit assesses the application. The mediated agreement or facilitated report is then made available to the council which then determines the application taking into account that agreement along with the other factors it is required to consider.

Effectively the Law Society has developed a disputes system design for adoption by local bodies in New South Wales. This initiative is a promising step, which hopefully will result in more satisfactory outcomes from environmental disputes.

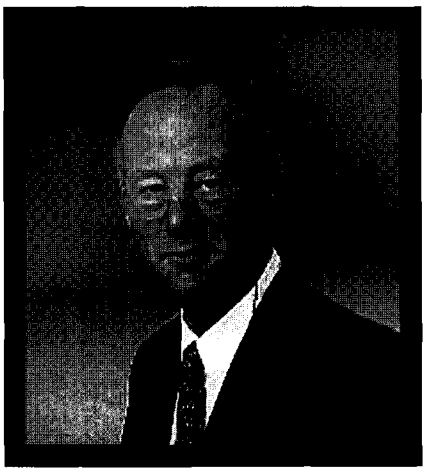
The Resource Management Act in New Zealand provides the option of a pre-hearing meeting at the discretion of the authority for the purposes of clarification, facilitation or mediation. There is therefore power to incorporate a similar process into New Zealand's local authority process. Adopting similar guidelines and policies at local authority level in New Zealand would be a positive step and the NSW precedent can be monitored with interest to assess its effectiveness.

MEDIATOR PROFILE
EDDIE MANN HR PRACTITIONER

Eddie is an HR practitioner working with approximately 130 clients throughout the Auckland region. He has a corporate background and is now working in his own practice. He is the author of Businessworks, a practical handbook about employment issues.

Eddie could be termed a troubleshooter and part of his role with clients is to work with disputes. In most cases he is instructed by one of the parties to the dispute and develops a process to suit the needs of the particular dispute. As part of his role he is involved in a lot of work place mediation and has some strong views about it. He also acts as an independent mediator in some situations and has developed his own mediation process to suit the needs and issues of his particular clients.

Eddie initially trained as an aircraft engineer and then developed an interest in mediation via his background and training in negotiation. He holds a degree from Canterbury in philosophy and religious studies. He has a strong interest in clear logical analysis of ideas, disputes and social issues. Combined with this is a strong belief in fair play. In his business career he was involved in negotiating some major commercial contracts and received negotiation training as part of this.



Eddie completed postgraduate work in HR practice at Auckland University with Gene Johnson. His early business career was mainly in technical sales, market development in New Zealand and Asia, operational and general management in New Zealand. He therefore has an intensely practical background.

Eddie moved into private practice about seven years ago. Since going into private practice as an HR practitioner, Eddie's focus is on fixing things for owners and managers of small business. He becomes involved in mediation to resolve disputes in the work place, to negotiate an employee out of a position, to try to prevent a resignation and to settle personal grievances.

Eddie has had very little formal mediation training and has created a process using his practical experience and earlier training in philosophy and negotiation. He endeavours to use a combination of his training in philosophy, some strategic thinking and a desire for a fair deal while recognising commercial realities in this process.

He has been involved in many dismissals, disputes and mediation sessions. Frankly, Eddie says that this is not work which he actively seeks out or enjoys, but he does want to do it well. He therefore undertakes a careful review of the process following mediation, particularly if he believes that there were elements of the mediation that could have been handled differently. When appropriate he uses a peer revision technique with his employment lawyer Kevin Muir form Morgan Coakle.

Eddie believes that most personal grievance mediations are initiated by a desire for revenge and are settled because of commercial realities. His view is that this is having a negative effect on employment relations in New Zealand and is part of the disincentive for employers to employ more employees.

As part of his process in dealing with this type of dispute, Eddie has a strong interest in establishing the facts as far as possible before starting any negotiation. This process may involve interviewing witnesses and others associated with the problem. He believes that confronting a party in an assertive manner is a legitimate strategy to draw out as many facts as possible. He is also keen to try to establish each party's motives. Eddie finds that his many years of experience and logical approach are attributes that he believes assist him in this process.

LEADR NZ UPDATE

The Employment Relations Act 2000 has contributed to a noticeable increase in the interest in mediation and ADR across the professions. LEADR NZ is forging links with the Mediation Service and has provided advanced skills workshops for the mediators within the service.

There has been a general increase in interest in LEADR's in-house workshops and several have been provided for government departments dealing with amongst other things "managerial" and "preventative" mediation. LEADR NZ has also just completed a very well received in-house workshop for the litigation department of a large national law firm entitled "Smart Counsel in Mediation". LEADR is encouraged by continuing to work with advocates who recognise the growth in the area and are keen to develop skills working with the mediation process.

The second four-day workshop will take place in Wellington later this month, with two others scheduled for later in the year. One in Auckland and one in Christchurch, which is the first time LEADR, has held a workshop in the South Island for several years.

An advanced Workshop for mediators was held in Auckland in May, with Jo Kalowski and Sue Duncombe as trainers. This was well received by a mixed group of mediators and is part of LEADR's continuing effort to provide skills training for its members who are actively in mediation practice.

LEADR NZ is also looking at members' individual issues around accreditation and panel advancement, which will include an opportunity for video assessment.

Local Committees continue to be active providing peer revision, role play activities and group discussions. Auckland recently held a very successful symposium with Margaret Wilson. ❑

WHAT'S HAPPENING

2001

June 12
AMINZ breakfast meeting –the enforcement of mediated agreements
Various

June 13-16
LEADR NZ – four day mediation workshop
Wellington

July 3
Mediation Training Centre workshop – advanced skill development

July 10
AMINZ breakfast meeting – guidelines for expert witnesses
Various

July 27-29
AMINZ conference 2000
Hamilton

August 14
AMINZ breakfast meeting – environmental mediations
Various

August 15-18
LEADR NZ – four day mediation workshop
Christchurch

September 11
AMINZ breakfast meeting – appointment of an Arbitral Tribunal
Various

September 18
Arbitration in the 21st century – NZLS – CLE
Dunedin

September 19
Arbitration in the 21st century – NZLS – CLE
Christchurch

September 20
Arbitration in the 21st century – NZLS – CLE
Wellington

September 25
Arbitration in the 21st century – NZLS – CLE
Hamilton

September 25
Mediation Training Centre workshop – fundamentals of mediation

September 26
Arbitration in the 21st century – NZLS – CLE
Auckland

October 9
AMINZ breakfast meeting – family mediations/relational disputes
Various

October 23
Mediation Training Centre workshop – advanced skill development

October 31, November 1-3
LEADR NZ – four day mediation workshop
Auckland

November 13
AMINZ breakfast meeting – arbitration – decision making and award writing
Various

INTERPRETING APPROPRIATIONS

David McGee QC, Clerk of the House of Representatives

raises a constitutional point in Waikato Regional Airport Ltd v Attorney-General

An important constitutional point is reiterated in *Waikato Regional Airport Ltd v Attorney-General* (Wild J, HC Wellington, 14 February 2001) – the principle that Parliament makes appropriations of public money, not the government.

The Ministry of Agriculture and Forestry (MAF) charged fees for biosecurity inspections carried out on international arrivals at "regional" airports (Hamilton, Palmerston North and Dunedin) while continuing a longstanding policy of making no such charges at "metropolitan" airports (Auckland, Wellington and Christchurch) and at two air force bases. Orders quashing the charging decisions and restitution of amounts in excess of $1 million already paid were sought. MAF counterclaimed for extensive amounts for charges invoiced for but remaining unpaid.

Wild J found that such charges could be made by the Director-General of MAF only under s 135 of the Biosecurity Act 1993. Section 135 requires that costs for such activities as biosecurity inspections are recoverable to the extent that they are not provided for out of parliamentary appropriation. But charges must be imposed "in accordance with the principles of equity and efficiency". Wild J held that there was no effective decision to charge made by the Director-General at all until 1998 despite such fees having been levied for four years. His Honour further found that the 1998 decision was unlawful on a number of grounds, including that to impose fees on regional airport inspections while exempting metropolitan airports entirely (despite evidence that metropolitan airport arrivals were the major generators of biosecurity risk) was not equitable within s 135.

There are a number of elements to Wild J's judgment which it is not proposed to comment on in this note. But one factor which influenced MAF's approach to levying fees differentially was its officers' belief that Parliament had appropriated funds for inspections at metropolitan airports but not at regional airports. Thus as long ago as 26 June 1995, a MAF official stated "The Crown funding provided for the clearance is for AKL, WLG and CHC" (para [29] of the judgment). In affidavit evidence presented to the Court, officials reiterated their contention that parliamentary appropriations did not contain funding for inspection services at regional airports (see in particular para [86]). Consequently, MAF assumed that no public funds had been appropriated for regional inspections and that the appropriation had been provided solely for metropolitan inspections. But, as Wild J pointed out, Parliament in making its appropriations for border inspection services (in the annual Appropriation Acts rather than by s 4 of the Public Finance Act 1989 as cited by the Judge) did not tie these appropriations to any specific airports (para [111]). How then had MAF made its assumption?

At the time the Biosecurity Act was enacted in 1993 there were no regional airports at which international flights arrived. The existing international airports (all metropolitans) and two air force bases were listed in a schedule to the Act as automatically approved ports of first arrival. But over the next few years other, regional, airports achieved this status too. Instead of spreading its public funding rateably over the expanded number of international airports at which it was now required to carry out inspections, MAF continued to carry out inspections without charge at the metropolitans and charged on a cost recovery basis at the regionals. The amount recovered by MAF in this way was roughly half of the total amount it spent on border control services at all airports. The remainder was covered by the parliamentary appropriation.

While this might explain the historical mindset, how could it, on reflection, justify continuing to exempt metropolitans from any charges at all and charging regionals full cost recovery? Yet MAF persisted with its view that no appropriation had been made for regional airports even in the arguments addressed on its behalf to Wild J.

MAF had the support of the department at the centre of the appropriations process – the Treasury. In an affidavit made by the Treasury's Chief Accounting Officer the undiscriminating nature of the appropriation is acknowledged, but it is then stated:

> However the *government's action* [emphasis added] in not increasing its own funding of MAF's services at the new airports, as noted in [the former Director-General's] affidavit, and confirmed in the Estimates of Appropriations themselves, shows that MAF was expected to fund these services by charging the users, that is the airports or airlines concerned. (Quoted at para [111].)

The Judge rejected this view. An equally valid interpretation of the government's action, in his view, was that it expected MAF to recover any costs that exceeded appropriations from the users of all services, existing or new.

I respectfully agree. Parliament, not the government, makes appropriations of public money. The government may choose not to use the full appropriation authority it has received, but it is not for the government to countermand a general appropriation (if that is what Parliament has made), by confining it to particular objects and claiming that no appropriation exists for other objects within the scope of that appropriation. There is power to transfer appropriations from one class of outputs to another (s 5 of the Public Finance Act) but no issue of this nature arose here – the class of outputs was border inspection services and regional as well as metropolitan airports were within it as lawful objects of public expenditure on inspection services.

In particular the praying in aid of a government decision to justify the claim that no appropriation had been made for inspection services at regional airports (although it seems doubtful that any such conscious decision had ever been made) is entirely unjustifiable. If this position had been accepted by the Judge the government would be making the appropriation, not Parliament.

It may well be, as Wild J surmised contrary to the Treasury view, that the government expected MAF to recover any appropriation shortfall from all airports. However, it does not matter what the government expected when one is determining the extent of an appropriation. What has to be determined is what Parliament had provided in the Appropriation Acts. That is not to be read down by the government's "expectations". The parliamentary appropriation was unarguably clear. It was not liable to variation by any government decision or expectation and one is surprised to see the view that no appropriation had been made for border inspections at regional airports persisted in at as late a stage as this matter has reached.

What if there was no appropriation?

The fact that there was an appropriation that encompassed regional as well as metropolitan airports knocked a plank out of the Crown's argument justifying the imposts on regional airports under s 135 of the Biosecurity Act. But if there had actually been no appropriation covering regional airports, would MAF have been justified in confining inspection charges to metropolitan airports? It is suggested that if this had been the case it would have made no difference to the result at which the Judge arrived.

The incorrect assumption that inspection services at regional airports were not covered by parliamentary appropriation, was only one of a number of factors which the Judge held vitiated the decision to impose charges. In fact, the first "decision" to charge, made as MAF claimed in 1995, was not, Wild J held, a decision under s 135 at all as it was not made by the Director-General. In respect of the second decision prayed in aid by MAF, and made in 1998, the Judge held it was unlawful for a number of reasons unrelated to the assumed lack of appropriation.

The primary duty on the Director-General, if inspection charges were to be imposed under s 135, was to comply with s 135 itself. A number of methods of levying charges are described in subs (3) of that section but the overriding requirement that the Director-General has to observe under s 135 is that any charges have to observe the principles of equity and efficiency. Would Parliament's non-appropriation of funds for regional airport inspections justify a charging regime under s 135 that was not otherwise equitable? It is submitted not.

A parliamentary appropriation has only a limited effect. It provides authority for money to be expended (or for expenses or liabilities to be incurred) but it does not authorise an illegality (*Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 224-25 (per Isaacs and Rich JJ); *Victoria v Commonwealth* [1975] 134 CLR 338 at 396 (per Mason J); *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 All ER 244, proposition accepted by the Crown in argument per Lord Browne-Wilkinson at 256). Conversely, where Parliament has declined to make an appropriation or has made an appropriation that does not cover the full cost of discharging an obligation (MAF's position in *Waikato*) this does not repeal any statutory obligation that may exist to discharge it (*Fisher v R* (1901) 26 VLR 781) or, one might add, remove an obligation to exercise a power in accordance with any statutory requirements.

The Director-General's obligation to comply with s 135 in imposing any inspection charges remains regardless of the appropriations that Parliament made or did not make for border inspection services. It is implicit in Wild J's judgment that any charging regime that loads the whole cost of their inspections on regional airports and provides inspections at metropolitan airports entirely at public expense cannot be equitable and therefore cannot comply with s 135. The lack of any appropriation (if such had been the case) could not remove this basic defect.

The quantum to be reimbursed

The Judge's decision on the quantum to be reimbursed by MAF raises particular difficulties. The Judge held that unlawfully demanded fees were refundable in so far as they were excessive – that is, not levied in accordance with s 135 (para [192]). His Honour gave the parties some weeks to see if they could agree on an appropriate refund. In the absence of agreement His Honour proposed to determine the quantum to be refunded. He indicated (so as to assist the parties) the basis on which he would approach this task. This was to allocate the available parliamentary appropriation to each airport (regional and metropolitan) pro rata to the number of incoming international passengers and tonnage of international freight requiring border control services that the airport handled (para [196]).

The difficulty is that this is equivalent to the Judge imposing, retrospectively, a charge under s 135 – a charge which can only be imposed by the Director- General. Furthermore, it is still only regional airports that are subject to the Judge-imposed charge, albeit at a lower level than under MAF's formula. If it was inequitable for s 135 charges to be imposed only at regional airports it cannot be equitable now to apply a charge retrospectively only on those users who were unfortunate enough to have paid it in the first place. If the Judge assumes the role of the Director-General in determining the quantum of refund in accordance with s 135 principles, those principles themselves require that regional airports be treated on a basis that is equitable as regards metropolitans. Reducing a charge to regionals that has never been applied to metropolitans renders the situation less unfair than it was, but still does not make it fair. As the Judge is purporting to apply s 135 principles to his determination, this should be a fatal objection.

Surely it is now too late to apply s 135 at all. If as the Judge has found there was no lawful decision to charge under s 135 and restitution principles justify return of money paid under the unlawful demands that were made, restitution should be effected without regard to s 135. It is impossible to apply that section retrospectively for to do so metropolitan airports would need to be made subject to it. No one has suggested that the Court could retrospectively order that. The solution is to return the money and leave the Director-General to apply s 135 prospectively, equitably and efficiently.

CONCLUSION

Regardless of this caveat, *Waikato* is a salutary reminder that the prerogative of making appropriations of public money lies with the Legislature rather than with the executive and that it is not for the executive to vary appropriations except in the limited and transparent circumstances permitted by the Public Finance Act. ❑

A NEW ZEALAND HABEAS CORPUS ACT

D F Dugdale, The Law Commission

discusses the new Habeas Corpus Act

It is easy grandly to proclaim, as does the New Zealand Bill of Rights Act 1990 s 22, that "everyone has the right not to be arbitrarily arrested or detained". The really exacting task is to devise a procedure appropriate to ensure that in practice and reality those wrongfully detained are promptly released. In England that process has for many centuries involved the issue of a writ known from the Latin words with which it once commenced as a writ of habeas corpus ad subjiciendum.

Under R 606 of the old Code of Civil Procedure the New Zealand practice, pleading and procedure in relation to writs of habeas corpus was required to be "the same as in England". The 1984 Bill annexing the new High Court Rules enacted as the Judicature Amendment Act 1985 included in those rules as Part VIII a procedure for habeas corpus applications, but that part of what was proposed proved controversial. This ought not to have surprised the proponents of the Bill because its effect was to undo much of the achievement of the seventeenth century statutes by providing that the issue of the writ was to be discretionary, not a matter of right. Rather than have the long awaited reform of the civil code delayed, Part VIII was dropped, and there was enacted as a temporary alternative the Judicature Act s 54C which is to the same effect as R 606.

In New Zealand public life expedients which start off as temporary have a way of acquiring permanence. Despite the tiresome complexity of marrying English practice to current New Zealand rules no step was taken to provide a sensible procedure appropriate to New Zealand conditions until in November 1997 the Law Commission ex proprio motu published its report *Habeas Corpus Procedure* (NZLC R44).

MEMBER'S BILLS

That was of course no more than a first step. The Minister of Justice of the day had no stomach for battling for a slot in the legislative programme for non-sexy law reform proposals (his preoccupation was with Treaty settlements). He was however prepared to encourage his back benchers to put forward Law Commission drafts as members' Bills. (It was by this route that the Arbitration Act 1996 reached the statute book.) In July 1999 there was introduced by Alec Neill MP a Habeas Corpus Bill that was an adoption of the Law Commission's draft. When as a consequence of the 1999 general election Mr Neill left Parliament for a period, the orphaned Bill was fostered by Simon Power MP.

Only two matters of principle were advanced to the Select Committee which considered the Bill. The Rules Committee did not feel inhibited by its long neglect of the matter from opposing the Law Commission's proposals. The view which it consistently advanced both when consulted by the Law Commission in the preparation of the Commission's report, and before the Select Committee (supported by the High Court Judges) was in substance that in the context of habeas corpus as in any other the inclusion in a statute of rules of procedure was inefficient because it is hard to change statutory rules. The proper course in the view of the Rules Committee was to leave procedure to be formulated from time to time by the Rules Committee.

The Law Commission's response was that the English statutes that were to be replaced were prompted, as their terms make abundantly clear, by the wrongful imprisonment of the Crown's opponents being prolonged by deliberate procedural foot-dragging. The preamble to the Act of 1679 refers to sheriffs, jailers and other officers using great delays and other shifts "to avoid their yielding obedience" to writs of habeas corpus "contrary to their duty and the known laws of the land, whereby many of the King's subjects have been and hereafter may be detained in prison ...", and after detailing these abuses states that it is "For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters" that the statute is enacted. The statute of 1816 similarly recites that preventing delays is one of its purposes.

So in the statutes the English Parliament spelled out a precise procedure including tight time limits. It seemed to the Law Commission that the lessons of history should not be ignored and that the liberty of the subject is of such importance that in the case of habeas corpus Parliament should keep the procedure firmly under its own control. This view was accepted.

The other matter of principle was advanced by intrepid Tony Ellis on behalf of the New Zealand Council for Civil Liberties. Section 9 of the Habeas Corpus Act 1679 (which until the 2001 statute formed part of New Zealand law) provides for a Judge who "shall deny any writ of habeas corpus by this Act required to be granted" to forfeit the sum of £500. The Law Commission had omitted any corresponding provision from its recommendations. It took the view that to subject Her Majesty's Judges to fines or amercements payable by them personally as a punishment for getting something wrong was to go just a little too far. Mr Ellis wished s 9 or an equivalent to be retained in the new statute, but failed to persuade the Select Committee.

The Bill emerged from the Committee unaltered in substance but with its drafting very much improved, as a result partly of various constructive submissions, but also of the skills of Parliamentary Counsel whose services were not

available to the Law Commission at the stage the Commission's report was prepared. Apart from some more fine tuning at Committee Stage the Bill made its way unscathed through the balance of the parliamentary process and became law in May 2001.

The terms of the statute emphasise the traditional role of habeas corpus as festinum remedium, a swift remedy. The function of the procedure is to secure with as little delay as possible the release of a detained person if the gaoler on whom lies the onus of justifying the detention is unable to do so.

Detention is defined in the Act as including "every form of restraint of liberty of the person". There is Canadian Supreme Court authority (untainted on this point by Charter considerations) for the proposition that the concern can be not just with the fact of restraint, but also in the case of a person lawfully in custody with the manner of restraint, solitary confinement for example, the release ordered being from the part of the prison where the person is unlawfully detained into the general prison population. (*Miller v The Queen* (1985) 24 DLR (4th) 9.)

The constitutional importance of the procedure is not in the frequency with which it is employed but in the fact that it is there to be used if needed

The procedure that the statute provides is an originating application under the High Court Rules. Inquiry into the locus standi of the applicant is excluded. ("No applicant may be disqualified for lack of capacity or standing.") No filing fee is payable. The defendant, if the detention is in a penal institution, or in police custody, or under Immigration Act or Customs and Excise Act powers, may be described simply by reference to his office (eg "The Superintendent of Mt Eden Prison") and there is provision for this list to be extended by the Rules Committee.

An application for habeas corpus is not an exclusive remedy. A plaintiff may prefer some more leisurely procedure such as an ordinary action or a claim for judicial review, if for example he needs discovery or wishes in the same proceeding to include a claim for damages.

A hearing date must be allotted by the High Court that is no later than three working days after the date on which the habeas corpus application is filed. The statute expressly preserves the possibility of ex parte and of oral applications in circumstances of extreme urgency. Such time-consuming refinements as directions, conferences, discovery and inspection of documents and security for costs are expressly excluded.

The Act restates the existing rule of practice that puts habeas corpus applications at the head of queues of cases waiting to be heard. The same rule applies to appeals.

The Judge must either grant or refuse the application. There is no middle way. If the defendant fails to discharge the onus of justifying the detention, the plaintiff is entitled to an order for release ex debito justitiae. The Act makes it clear as did s 3 of the 1816 statute that the Court may look behind the ex facie position, but also preserves the qualifications of the existing law to the effect that the habeas corpus procedure may not be used to relitigate criminal convictions or failed bail applications. To avoid the need to determine whether proceedings should be classified as civil or criminal the Act includes an express costs power.

Except where the procedure is used (as in New Zealand it historically has been) to determine what is in substance a dispute as to the custody of a child, no appeal lies against an order for release. This dovetails neatly with the well settled rule that an order for release cannot support a claim in subsequent proceedings (such as a claim for damages for false imprisonment) of estoppel per rem judicatam. There is an express appeal right where an order is declined.

Security for costs may not be ordered on an appeal by or on behalf of a detained person against the Crown. The rule that it is possible for an unsuccessful applicant to apply to Judge after Judge, if such rule ever existed, is given its quietus, the new appeal right being an adequate replacement.

The provisions prohibiting rearrest following a successful habeas corpus application on the same grounds contained in s 5 of the 1679 Act are repeated in wording that captures the effect of the cases deciding that this prohibition does not apply where the release was on the basis of a procedural defect since cured.

There are machinery provisions providing for interim orders (in effect bail), for transfer to the Family Court if the dispute is essentially one relating to child custody and spelling out that non-compliance with an order is contempt of Court. Writs of habeas corpus other than the writ of habeas corpus ad subjiciendum (if such other habeas corpus writs still exist as part of New Zealand law) are expressly declared for the avoidance of doubt to be abolished. The English statutes cease to apply in New Zealand.

COMMENT

The hope is that the new statute will function as a useful tool of trade enabling procedural requirements to be swiftly attended to without the need for practitioners to waste time scratching their heads as they work out just how to go about things. Court and counsel will be able to get down to an examination of the merits of the particular case without the need to grope their way through ancient learning and dusty precedents.

It has been cynically suggested that clearing away the procedural complications makes it too easy to launch a habeas corpus application. The High Court, so the argument goes, will now be clogged with hopeless in extremis applications by overstayers and illegal immigrants seeking to evade deportation. No doubt if this becomes a nuisance there are Judges robust enough to deal firmly with such abuse. It cannot be a serious argument for the creation or preservation of needless procedural complexity that some would be litigants or their advisers are scared off by it.

Immigration cases aside, habeas corpus applications are not common in New Zealand. The constitutional importance of the procedure is not in the frequency with which it is employed but in the facts that it is there to be used if needed, and that governments minded to deprive citizens of their liberty must disclose that intention by procuring legislation to suspend either directly or indirectly the availability of the remedy. Such examples as the Suppression of Rebellion Act 1863 s 5, the Disturbed Districts Act 1869 ss 22 and 27, the Maori Prisoners Act 1880 ss 3 and 4, and the West Coast Peace Preservation Act 1882 ss 3 and 4 demonstrate that New Zealand history is not innocent of instances of this. ❑

CHANGING SHAPE OF THE PUBLIC SECTOR

Mai Chen, Partner, Chen Palmer & Partners

addressed the IIR Public Law Conference, 4 April 2001, Wellington on the new approach of the Labour/Alliance Coalition Government. This revised version of the paper will be published in two articles

The Labour-led coalition government took office in December 1999 vowing to restore the capacity of the public service to provide high quality, practical advice, and to implement the new policy directions it had been elected to effect. *In the Annual Report of the State Services Commission for the year ended 30 June 1998*, the Commissioner defined "capability" as an organisation's fitness for its purpose.

Labour's November 1999 Manifesto *The Shape of the Central Government Sector* said:

> The past fifteen years has seen a massive restructuring of the central government sector. ... One of the consequences of the restructuring has been a fragmentation of the sector, both in terms of the variety of different types of agencies which are responsible for some aspect of output delivery, and in terms of the number of agencies now having some responsibility for functions which were previously all under one department. Departments and ministries exist in isolation, making decisions with little or no reference to each other or to overall system needs. ... A belief has developed that agencies of the core state sector are businesses – with clients and customers. Taxpayers and beneficiaries are neither. Some service-providing departments spend fortunes on branding exercises – as if they had competition. ... There has been a loss of long term operational capacity because of short term cost containment and the resulting expense of consultants. Also lost is a strategic response capacity able to react to unforeseen circumstances or to help the public service adapt to operating environment changes.

Similar sentiments were expressed by the Leader of the Alliance partner in the coalition in various Alliance Party press releases prior to the 1999 election. (*Alliance Pledges full State Sector review* 20 June 1999; *Comprehensive State Sector review required*, 15 July 1999; *Call off WINZ campaign, review State Sector*, 18 July 1999.)

Now that the Labour-led government has been in office for half a term, changes are starting to emerge in the public sector: how it is defined, how it is structured, and what behaviour this government expects of those who work in it.

WHY IS THE PUBLIC SERVICE NOT WORKING?

It is difficult to attribute to any one cause this government's dissatisfaction with the public service. The concerns do not appear to centre around the fundamental state sector reforms implemented during the fourth Labour Government by the State Sector Act 1988, the Public Finance Act 1989 and the State-Owned Enterprises Act 1986. Indeed, many reviews of the effectiveness of those reforms have been undertaken, such as that by Basil Logan in June 1991 for the National Government, and the review of the state sector entitled *The Spirit of Reform: Managing the New Zealand Public Sector in a Time of Change* (Wellington, State Services Commission, 1996), prepared by Professor Allen Schick for the SSC and the Treasury. Although these reviews have recommended changes, they generally conclude that the state sector reforms of the 1980s have lived up to expectations, and have helped to transform the state sector into a more efficient and effective organisation. Those improvements should not be lost sight of in analysing why this government is still unhappy with the public service.

Rather, the problem appears to be three-fold: partly structural, partly behavioural, and partly the difficulty of attracting and retaining quality people in the public service due to an inadequate focus by ministers on being good "owners" of the public service.

This paper discusses the basis for this analysis of the problems the current government has with the state sector, and describes the changes the government is making to the public sector to remedy these mischiefs, and likely future trends. These include operational activities carried out by departments and Crown entities being folded back into core policy-making departments, Crown entities being disestablished or made into SOEs, or vice versa, and a clearer articulation of the government's expectations of the behaviour of the public service. The reach of these changes extends not only to core departments, but also to SOEs and Crown companies, which are also defined as part of the public service, in terms of how the government expects them to behave. The failure to adequately differentiate between the SOE, or commercial, and the departmental models is also examined, along with the fragmentation caused by the undisciplined proliferation of Crown entities, and the impact of that on state sector capability. The paper concludes with observations on this government's discomfort with the commercial model extending even to Local Authority Trading Enterprises in local government, and the impact of a recently introduced Bill to redefine "a successful business" in the LATE model.

The fundamental question remains whether the changes to the state sector being implemented by the government will result in increasing, or restoring (depending on your viewpoint) the capacity of the public service to perform its role. This role, as it is perceived by this government, has been

clearly articulated by the Minister of State Services in a speech at the launch of the Price Waterhouse Cooper *Public Sector Leadership Best Practice Survey Report*, on 14 June 2000 as:

> A public service which operates efficiently and effectively while maintaining its core objective to serve. To serve the government of the day by providing quality advice and support as it seeks to implement its policy. To serve the people of New Zealand who deserve respect and value for money from their public service.

As the *Report to the Minister of State Services on a Draft Statement of Government Expectations of the State Sector* January 2001 by the State Sector Standards Board stated:

> The effectiveness, efficiency and overall quality of the state sector's performance has a strong influence on living standards and the sense of wellbeing in the New Zealand community. It also impacts on New Zealand's image and reputation overseas.

Being good owners of the public service

Given the institutional focus of this paper, I will not say much about personnel issues except that retaining and recruiting talent into the public sector depends on the government's willingness to focus on being good "owners" of the public service, and not just on its purchase interests in driving down the price of what it costs to get outputs and outcomes from the public service. As Professor Allen Schick concluded on p 43 in his review of the state sector, the purchase role has dominated to this point, and the ownership role must now be given greater emphasis:

> It is important that ownership be given greater scope, even at the risk of making the minister a somewhat less independent purchaser of outputs. Of course, ministers should drive hard bargains to ensure that the government is getting value for money and that the services provided by the departments are those they contracted for. But ministers must also be mindful of the organisational strength of their departments; they should be institution builders, and they should forbear from demanding so much by way of outputs and from pushing the purchase price down so far as to jeopardise the department's long-term capacity to perform. For example, a low purchase price or excessive work demands might deter the department from investing in the training of employees or in upgrading management control systems.

Departments should not be criticised for a lack of capability if they do not have the resources to do the job. A less tangible factor to measure than adequate resourcing is the issue of morale in the public service. Anecdotal evidence suggests that this government has not settled into a comfortable working relationship with officials, tending to keep them at arm's length, viewing them with suspicion, and not using them in a way which maximises their potential to contribute to policy decision-making and implementation. More use is being made of politically appointed staff in ministers' own offices to develop policy partly because of the capability issues perceived by ministers with their portfolio departments. The concern is where this trend might lead.

I note that in the *Annual Report of the State Services Commission* for the *year ended 30 June 2000*, Michael Wintringham talked about a new focus and direction for the SSC as a principal adviser to ministers on the health and capability of public service departments, and from time to time, of organisations and resources in the wider state sector. In summary, the SSC will advise ministers in their roles as owners, not solely reviewing past performance but also anticipating future capability requirements. This work was initiated under the former Minister of State Services, the Rt Hon Simon Upton in 1999 and has been confirmed by the current Minister of State Services. New Deputy State Services Commissioners have been appointed to facilitate this changed focus and direction for the SSC on the minister's ownership interests. However, if the government is not prepared to increase resources to allow the retention or development of the necessary capability to meet future requirements, then it is difficult to see how this worthy new focus and direction for the SSC will have any impact except at the margins.

Structural problems

Dr Graham Scott, ex-Secretary of Treasury, has spoken of five sets of principles developed to assist the thinking on the restructuring of the core public service in the 1980s and the 1990s as follows:

- ***separation of ownership and purchase responsibilities*** – "ownership" referred to the interests of the government as owner in the continuing capability and development of the ministry or department, including development of its physical, human and intellectual capital. Ownership interests also extended to financial management and risk management. Purchase interests are the interest in the goods and services provided by the ministry or department, such as policy advice, monitoring services, and so on;
- ***separation of policy making from operational activities*** – to avoid domination of policy advice by the operational needs;
- ***separation of funding, purchasing and provision of services*** – eg in health, where the Ministry of Health was the funder, the Health Funding Authority the purchaser, and the public hospitals the service providers; ...
- ***competition between service providers***; ...
- ***reallocation of functions for focus, synergy and transparency*** – large conglomerate ministries were dissected into more manageable forms.

(See Dr Graham Scott, "Remodelling the State Sector: An Economic Perspective", speech for Legal Research Foundation Seminar on *Shaping the Future State Sector* 21 September 2000, 8-9; and by the same author *Public Management in New Zealand: Lessons and Challenges.* (NZ Business Roundtable, 2001).)

The application of these principles has resulted in transforming the structure of the public service from 54 departments and quangos, with approximately 126,000 staff in mid-1984 (including the Post Office), to 35 departments and 34,000 full-time equivalent staff as at the end of 1993 (Office of the Auditor General of Canada, *Toward Better Governance – Public Service Reform in New Zealand (1984-94) and its Relevance to Canada*, (1995, Minister of Supply and Services, Canada)). In Treasury's latest Economic and Fiscal Update, (19 December 2000) Hon Dr Michael Cullen reported a total of 44 departments and ministries, 16 SOEs (excluding Terralink), and 86 core Crown entities (excluding school Boards of Trustees, which would bring the count closer to 2700).

The Prime Minister recently stated that the previous policy of splitting departments means New Zealand now has 39 departments and ministries compared to about 16 in Britain. As well, there were hundreds of Crown agencies.

In the Prime Minister's view: "It is a problem and opportunities will be taken to concentrate like activities again". (*Evening Post* 22 March 2001, p 1.)

Fragmentation causes confusion amongst ministers as to who has the responsibility for generating an outcome, let alone the power, given that separating functions into different departments has also resulted in some cases in separating the portfolio responsibilities, often to different ministers. The then Prime Minister, the Rt Hon Jenny Shipley, introduced Cabinet clusters of ministers when she reshuffled her Cabinet in August 1998, to create greater co-ordination amongst ministers with portfolios in similar areas. She introduced six teams of ministers, with a lead minister in each, to lead teams in the: economic, enterprise and innovation, social policy, justice and security, New Zealand 2000, and APEC areas (National Government Media Release 30 August 1998).

Fragmentation may be problematic as no one department or Crown agency may have the power to bring about the outcomes government wants. The Schick Report has already signalled that the New Zealand public service is increasingly characterised by a collection of silos where accountabilities run from the top to bottom of each silo and through to the minister, but there is not enough co-ordination or cooperation between the different silos.

The State Services Minister has recently stated that the government did not have any blueprint of what it wanted to do with the public service but "some people are of the view that there are some costs of having as many ministries and Crown entities in New Zealand. This is an issue that we need to address". The Hon Trevor Mallard also said he was in favour of reducing the number of public service departments. But that said, "We want to take a lot of care ... we don't want major state sector reform again" (*Evening Post*, 23 March 2001).

The State Sector Standards Board also recently stated on p 16 of its January 2001 Report that:

> State sector activity is remarkably fragmented and needs to be more strongly oriented to whole-of-government issues. This means:
>
> - explicit processes oriented to whole-of-government outcomes;
> - collegial team processes to lead and manage a whole-of-government approach to systems, procurement, and employee development and training, performance management, etc; and
> - a more proactive centre on whole-of-government issues.

A good example of the problems fragmentation has caused in the public sector, resulting in the need for statutory remedial measures, is the novel inclusion of cl 20D in the Electoral Amendment (No 2) Bill 2001 requiring "State Sector Agencies to Assist with Administration of Elections". The clause is designed to prevent a repeat of the problems during the 1999 elections, where the Department for Courts decided that none of its staff would be available to assist with the elections, despite the fact that they had traditionally done the work. The rationale was that it might affect the running of the Courts. As a result, new staff had to be recruited, and their lack of experience showed in the very slow outturn of the result several hours after the Chief Electoral Officer had promised the delivery of final results. Clause 20D states that the Chief Electoral Officer may seek assistance from any state sector agency to facilitate the effective administration of elections. It also contains the original provision that:

> (2) Any agency approached by the Chief Electoral Officer for assistance must have regard to the public interest in a *whole-of-government approach* to support the effective administration of elections in considering the assistance it can provide. (Emphasis added.)

The Ministry of Justice *Review of the General Election Process 1999* commented at p 3 that:

> ... the fact that the Department of Courts no longer sees election work as part of its responsibility means that there is no longer any de facto national infrastructure that has such a responsibility. The segmentation of responsibility and functions among three different agencies ie Ministry of Justice incorporating the Chief Electoral Office, the Electoral Commission undertaking the functions as provided in s 5 of the Electoral Act 1993, and New Zealand Post Ltd to carry out the electoral registration process, requires co-ordination and cooperation among agencies that adds to the level of risk. For completeness we also mention the functions of the Representation Commission and the Clerk of the Writs (Internal Affairs). We do not say that there is no evidence other than good cooperation between these agencies but, for a function as important as maintaining the electoral process within a democratic system, an organisation that has overall responsibility for all facets of the system seems desirable.

AMALGAMATING DEPARTMENTS AND CROWN ENTITIES

The government appears to be "putting Humpty Dumpty together again", folding some operational activities back into core departments carrying out policy-making. An early example is the re-amalgamation of the Crown entity, the HFA and its funding role for health services, back into the Ministry of Health. Another example is the re-amalgamation of the Specialist Education Service with the Ministry of Education. The SES was established in 1989 to deliver services to children and young people with special education needs. It has operated as a Crown entity, presided over by a board and established under the Education Act 1989. On 19 February of this year, the Hon Lianne Dalziel, Associate Minister of Education, and the Hon Trevor Mallard, the Minister of Education, announced that the SES was to be disestablished and its functions transferred to a new directorate within the Ministry of Education. This followed a review of the SES (Cathy Wylie *Picking up the Pieces: Review of Special Education 31 July 2000*) which found the organisation was "increasingly ineffectual, fragmented and distanced from schools and parents".

The most significant recent re-amalgamation announcement is that of the Department of Work and Income (DWI) (5000 staff) with the Ministry of Social Policy (MSP) (200 staff) to form a new Ministry of Social Development. (Media release from the Hon Trevor Mallard, 11 April 2001.) Child, Youth and Family Services will not be included in the merger. The merger will bring the policy and operational arms of social welfare back together again, with the Ministry of Social Development becoming the government's primary adviser on social policy, as well as continuing to deliver income support and social services.

There has been controversy over the motive for the re-amalgamation, and litigation has been commenced by

the outgoing chief executive of DWI who is arguing, inter alia, that the restructuring is designed to ensure that her job no longer exists to minimise her ability to challenge the State Services Commissioner's decision not to reappoint her. However, papers released on 18 April 2001 under the Official Information Act show that, although the final decision to re-amalgamate the two departments was a rushed one, with even the costings of such a move yet to be done, key ministers were considering a re-amalgamation of DWI and MSP in December 2000. A letter dated 18 December 2000 from the State Services Commissioner to the Prime Minister states that: "You have asked for my views about the future of the [MSP] and the possibility of amalgamation with [DWI]". Both the Prime Minister and the Hon Trevor Mallard argue that speed was required because of the need to re-advertise Ms Rankin's position, as she was not to be reappointed. Appointing a person to that position would have raised "fiscal issues" if the government then moved to merge the departments, thereby rendering the new chief executive of DWI redundant (*Evening Post*, 23 April 2001).

key ministers were considering a re-amalgamation of DWI and MSP in December 2000

More interesting from an instrument choice perspective are the State Services Commissioner's comments on re-amalgamating DWI and MSP. He states in his 18 December 2000 letter that:

> In the past couple of years, the relationships between MSP and DWI and CYFS [Child, Youth and Family Services] have at times been difficult. Tension between agencies, or competition of ideas, is not necessarily negative. The most negative aspect of the status quo is, from my perspective, the perception that it reinforces silos and artificially separates theory and practice. If a review of MSP resulted in policy capability transferring in toto to one of the operational departments, or [sic] split between DWI (benefit reform for example) and CYFS (social policy), then the "gap" between theory and practice may be reduced or closed.
>
> Success in integrating the "mind and matter" should improve the overall quality of advice. But there is a real risk that the operationally urgent crowds out the long term important at the expense of the hard policy work needed to improve the social outcomes (and associated economic benefits) of New Zealanders during the 21st Century. An unrelated example has been the crowding out of local government policy advice in the operationally biased Department of Internal Affairs.

Michael Wintringham further stated that:

> On a pragmatic level, reintegration of MSP into operations has benefits, for example, the reduction in the number of public service departments reduces overall transaction and compliance costs. Further, the social sector is "crowded" and fewer departments at the "consultation table" would seem desirable.

The Prime Minister has also said the government would look at folding back the Department for Courts and the Department of Corrections into the Ministry of Justice.

Other candidates for this type of treatment may include the transport sector, which currently consists of the Ministry of Transport and no less than six Crown entities which administer various aspects of the government's role in the transport sector. The ministry provides ministerial and policy advice, support for legislation, and has monitoring and audit roles. The six Crown entities are the Civil Aviation Authority, the Maritime Safety Authority, the Land Transport Safety Authority, the Transport Accident Investigation Commission, Transfund New Zealand, and Transit New Zealand, the latter managing state highways. All of these Crown entities are contracted by the minister to carry out specific tasks. They are controlled by Boards of directors or authorities appointed by, and accountable to, the Minister of Transport. These Crown entities were all established between 1989 and 1996 in a bid to re-focus the government's role in transport. Prior to these arrangements, the roles now carried out by these Crown entities were largely performed by the Ministry of Transport.

Questions also arise over the separate existence of a number of small departments such as the Ministry of Women's Affairs, the Ministry for Pacific Island Affairs, the Ministry of Youth Affairs, and the Ministry of Cultural Affairs. Would such small departments be more effective if they were disestablished and their functions incorporated into bigger departments? The answer may depend not only on capability, but also on ensuring that this government signals to the groups whose interests are represented by these small departments that their interests will be just as well catered for, and not relegated or sidelined, in bigger departments.

There may well be significant benefits in re-amalgamating and re-configuring departments, ministries and Crown entities. Such restructuring should strive to retain the benefits of greater focus, synergy and transparency, which have been achieved for some large departments when the policy and operational functions were split out.

Hunn Report on DWI

Don Hunn's Report of the Ministerial Review into the Department of Work and Income, 8 May 2000 is worthy of closer study to ascertain whether there is a sound basis for this government's proposed further restructuring. The report was the first substantial review of a department under the new Labour-led government, and made some significant findings of relevance to the state sector as a whole. Though diplomatically written, the Hunn Report reflected concern about "DWI's peculiar role as 'solely a service delivery agency'". It further stated that "the governance arrangements for DWI are more complex and demanding than they are for almost any other department".

One gets the impression from reading the report that what Hunn continually calls "the experiment" to establish DWI to become the state's principal delivery arm of social services, with ministers providing the overall policy and purchase direction through the Ministry of Social Policy, went one step too far – it resulted in a department that was delivering operations, but had no brain:

> It was the first institutional expression of coalition politics – the personal "dream" of a senior member of one of the coalition partners which was redesigned to fit with the agenda of the other partner (and in that respect was seen as part of a continuum over a decade and a half of a progressive solution to the country's welfare and unemployment problems). It was part of the last major public sector reform in the social area which had, from the outset, been much more difficult to bring off than the economic reforms – and by the time it took place the

electorate's taste for reform had dissolved. The unique quality of the experiment was intensified by the fact that it was an attempt at merger, whereas most of the change management experience had been learned in situations of down-sizing and the transfer of departments outside the public service. Organisationally, DWI was unusual in that its focus was on reducing unemployment while the bulk of its work derived from managing the benefit system; it was set up as a single purpose service delivery agency without some of the functions normally associated with a government department; it was subject to a dual monitoring regime in addition to the usual performance management and accountability structure – and differences of opinion on all three of these matters persist to the present day. (p 13)

Behavioural expectations of the state sector

The Hunn Report also spoke of the government's "wish that DWI become more departmental in its style". The Hunn Report goes on to say that there was some debate about whether DWI should be a Crown entity based on a corporate business model, or a department. Hunn says at p 9, that:

> In retrospect one has the impression that in deciding on the departmental option, somehow the corporate business model became incorporated with it. (Certainly, corporate concepts of business practice, service delivery, branding and references to "customers" all pre-dated the establishment of DWI and the appointment of the chief executive.) In a sense this was reinforced by the deliberate move to focus DWI on service delivery with limited policy functions, dependent on another ministry for its IT and data management. In addition the dual MSP/DOL [Department of Labour] monitoring, purchase advice and performance evaluation process placed DWI in a unique position to which it has had some difficulty in adjusting.

The Hunn Report goes on to analyse how DWI's fulfilment of its organisation integration goals before time and within budget, putting together the largest department in the country with extraordinarily difficult tasks to perform, has been completely overshadowed by a series of "mistakes" which have "undermined the department's public credibility":

> Perceptions have been formed from a regular diet of stories [concerning] office fitouts; the sale of personal information; the disastrous Wairakei affair; corporate activities such as mock weddings at managers' meetings; the pay-offs and resignations of staff; the problems first with student allowances and then, despite assurances to Parliament, with student loans.

The Hunn Report demonstrated the real concern from those interviewed in the public service that the whole Christine Rankin/WINZ affair reflected very badly on the public service in general, and that the management, credibility, and political and public faith in the integrity of the public service was being badly damaged. It was felt that the "corporate style" was not appropriate in public sector management, and not a necessary prerequisite to good programme delivery.

On "The Future of the Public Service", Hunn reminds those who work in the sector on p 8 that:

> The government has indicated that it wants to bring about changes in the public service as a whole. This is not the place to explore that issue in detail. The point to be made in this context is that it is the duty of the public service to serve the ministers of the day to the best of their ability and with the utmost professionalism; to implement the policies of the government in power, and to give objective, high quality advice freely and frankly. The public service must do this in accordance with the law, the prevailing constitutional conventions and parliamentary procedures and the public service ethic as set out in the Acts of Parliament, Codes of Conduct, guidance from Cabinet, and the State Services Commission and elsewhere. Within this framework a wide range of behaviours is possible and it is open to any government to determine what these are to be during its term of office.

The expectations of the government have now been made clear by the State Sector Standards Board, established by the Hon Trevor Mallard on 19 November 2000 and whose first report was released in January of this year. Not surprisingly, the draft statement of expectations released by the Board in January 2001 is vague, but that does not mean that the expectations cannot be used potently against state servants who embarrass their political masters. The very vagueness of the expectations means that such standards could be applied to any situation, if ministers wanted to. This can have a "chilling effect" on public servants who can never be sure whether their behaviour would be deemed to fall within the standards or outside of them. Some messages are clear, however; the corporate approach, and anything that smacks of waste and extravagance, is inappropriate. A sense of service to the public, modesty and frugality in expending taxpayers' money are what is required.

Making SOEs and Crown companies behave like departments

These government expectations for core departments are not that surprising. That the expectations and standards being formulated by the Standards Board are to apply not only to core departments, but also to SOEs and Crown companies is surprising. I note that one of the behavioural standards recommended by the State Sector Standards Board is to "serve the government by implementing its decisions effectively and with commitment; ... being aware of and reflecting the government's priorities". This standard is appropriate for departments, but is less so for SOEs.

The original Cabinet paper on the establishment of the Standards Board proposed a mandate that covered all departments and non-company Crown entities. It proposed that:

> [t]he Minister of State Services, in consultation with the Treasury Ministers, the Minister for SOEs, and other ministers as appropriate, investigate whether any enhancement to the present system for conveying expectations to SOE boards and Crown-owned companies through shareholding ministers was desirable, including an examination of whether the scope of the work of a Standards Board and the Government's Expectations should apply to companies. (Cabinet Policy Committee Paper "Ministerial Inquiry into the Department of Work and Income: Government Response" (July 2000) 1.)

The 11 September 2000 Cabinet Policy Committee paper from the Minister of State Services entitled "Restoring Trust in Government: Standards Board and Government's Expectations" recommended that:

> [T]he Board's mandate be extended to Crown companies and SOEs. Shareholding ministers will discuss the government's expectations with boards of directors, which

will take into account any elements of the expectations that shareholding ministers and directors agree are relevant.

These recommendations were not supported by the Minister for SOEs. The Minister of Finance indicated he was unconcerned, but Treasury and the Crown Company Monitoring Advisory Unit expressed significant concerns:

> The Minister for State-Owned Enterprises notes that extending the Board's responsibilities to SOEs and Crown companies is a problem from a statutory and functional point of view. He would prefer that the Board's mandate exclude companies, and does not support recommendation (c) below [which states "agree that the scope of the Board's advice will include departments, Crown entities (including Crown companies) and state owned enterprises, and that the government's expectations will extend to departments, Crown entities (including Crown companies) and state owned enterprises, taking into account their respective legal environments]".

Treasury and CCMAU consider there are a number of risks in extending the scope of the Board to SOEs and Crown companies. ...

> The Treasury and CCMAU also expressed concerns about including SOEs and Crown companies within the scope of the Standards Board, inter alia:
>
> - commercial performance may deteriorate because of confused objectives;
> - responsibilities and accountabilities may be blurred;
> - increased public perceptions of ministerial accountability for matters which ministers can not legally control under the present legal framework; and
> - reduced credibility of Crown companies in the government with the business community ...
>
> ***The Scope of the Standards Board advice*** – Treasury and CCMAU consider that if the Standards Board's advice extends to Crown companies and SOEs there is a risk that the business community's and investors' perception that SOEs are free from political involvement in day-to-day operational matters – a fundamental principle of the SOE Act – will be impaired ...
>
> ***Conveying government's expectations*** – they also consider that ministers may be placed in the difficult position of having to justify why an expectation would not apply to a particular or all Crown companies. They would prefer that the government's expectations not explicitly apply to Crown companies, but that shareholding ministers be able to reflect in their communications with boards any of those expectations which they consider to be relevant and appropriate to companies ...
>
> ***Board membership*** – the Treasury and CCMAU consider that a Standards Board where a minority of members has direct commercial experience is unlikely to have sufficient credibility with the business sector in generating expectations for companies.
>
> The Treasury and CCMAU also consider that this proposal represents a step away from the principle underlying the SOE Act, which is intended to focus SOEs on being successful businesses, in a different environment from public service departments.

The question for those working in, or advising, SOEs and Crown companies, is whether the application of public service standards, which require a movement away from a corporate culture, will allow SOEs to achieve the commercial objectives imposed on such Crown companies by the SOE Act? Will SOEs be able to attract and retain staff, and create an environment where employees can satisfy the requirement in s 4(1)(a) of the SOE Act that SOEs are to be "as profitable and efficient as comparable businesses that are not owned by the Crown"? Section 4(1)(c) also speaks of "exhibiting" and "endeavouring to accommodate or encourage" a sense of "social responsibility by having regard to the interests of the community in which [the SOE] operates" but only "when [the SOE is] able to do so". It appears that some key ministers and their officials have their doubts about the answers to the above questions. ❑

THE TREATY OF WAITANGI IN LEGISLATION

Professor Matthew Palmer, Dean of Law, Victoria University of Wellington

suggests that generic references to the Treaty of Waitangi in legislation must be accompanied by specific provisions spelling out what it means

The Treaty of Waitangi is the founding document of New Zealand. In 1990 the then President of the Court of Appeal, now Lord Cooke of Thorndon, said of the Treaty "It is simply the most important document in New Zealand's history": (1990) NZULR 1. In essence, the Treaty of Waitangi symbolises and expresses an agreement between Maori and the Crown in 1840 on how coercive power should be shared in New Zealand.

Legislation is the primary instrument of coercive power of the New Zealand Government; usually proposed and applied by the executive branch of government, finalised by the Legislative branch, and interpreted by the judicial branch of government. Legislation symbolises and expresses the will of government in exercising power in New Zealand.

What then is the relationship between New Zealand's founding agreement on how to share coercive power and the primary instrument of government's coercive power?

You might think that looking to the "constitution" would provide a ready answer to this. Yet even the United States constitution displays an agnosticism as to the fundamental relationship between its constructed government and its indigenous inhabitants. There, it was left to the US Supreme Court under Chief Justice Marshall in the early nineteenth century to find that nation's own halfway house for the status of American Indian tribes as possessing the status of "domestic, dependent nations": *(Cherokee Nation v State of Georgia* 30 US 1 (1831) (5 Peters 1) at 16). The US Courts have been exploring the ambiguous parameters of that status ever since. The Canadian Charter of Rights and Freedoms has contained since 1982 a more explicit, but still opaque recognition of some constitutional protection for First Nations peoples. Section 35(1) provides that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed". The meaning of this has had to be filled in by a succession of controversial decisions by the Canadian Supreme Court.

New Zealand's constitutional arrangements are much more informal than the North American examples. In my view, that is a good thing. It means our constitution is flexible and dynamic and can evolve with changing social, economic and cultural circumstances. It also means, however, that the fundamental principles of the constitution can always be questioned, and can always be seen as being "at risk" as well. The changing place of the Treaty of Waitangi in our constitution is a good illustration of both the opportunities and risks of these aspects of constitutional life in New Zealand.

TREATY CLAUSES IN LEGISLATION

From a traditional legal perspective the Treaty of Waitangi exists in a shadowland: half in and half out of the law. It is "part of the fabric of New Zealand society": *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210. But it has no legal "status" in and of itself. In order for the Treaty to be part of the law it has to be made so. The primary way in which this occurs is through incorporation in legislation.

It is worth noting, in passing, that despite the traditional perspective the Treaty of Waitangi has legal effect in other ways. There has been increased judicial, academic and political regard for the informal constitutional status of the Treaty over the last fifteen years. This has added to the ways in which the Treaty is found to have influence by the Courts. In interpreting legislation, Courts will call on a number of aids, such as those referred to in the Interpretation Act 1999. On increasing occasions, Courts will refer to the Treaty of Waitangi as an aid to interpretation – simply because of its informal constitutional importance. (See *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179.) In applying the principles of administrative law under applications for judicial review Courts can find that the Treaty is a relevant consideration to which a decision-maker must have regard. *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (See Janet McLean, "Constitutional and Administrative Law: The Contribution of Lord Cooke" in *The struggle for simplicity in the law: Essays for Lord Cooke of Thorndon*, ed Paul Rishworth (Butterworths, 1997). In addition, analysis of the content of the common law doctrine of aboriginal title and customary rights can shade into analysis of the implications of the Treaty of Waitangi: *Te Runanga o te Ika Whenua v Attorney-General* [1994] 2 NZLR 20.

The primary way in which the Treaty has legal effect in New Zealand is where legislation refers to it. The biting effect of the *Lands* case, (*NZ Maori Council v Attorney-General* [1987] 1 NZLR 641) which represents the seminal modern awakening of the legal importance of the Treaty was only possible because s 9 of the State-Owned Enterprises Act 1986 stated that:

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

It was in interpreting this section, and only because of this section, that the Court of Appeal found that the Crown was

obliged to work out a system to safeguard Maori claims under the Treaty before transferring land to SOEs.

This is comforting for the traditional lawyer. It means that the particular words that Parliament adopts in referring to the Treaty might affect the way in which it has legal effect. And, indeed, the statute book contains a rich variety of forms of reference to the Treaty of Waitangi. I set out below several interesting examples of a general reference to the Treaty are. The *actor* (who) is in *italics*, the action (what) is underlined and the **nature of the requirement in relation to the Treaty** (how) is in **bold** in the quoted sections:

- this Act shall be so interpreted and administered as **to give effect to** the principles of the Treaty of Waitangi, s 4 Conservation Act 1987;
- in relation to the transfer, pursuant to this Act, of any land, or any interest in land, to a Crown Research Institute or a subsidiary of a Crown Research Institute, the *shareholding ministers* shall **have regard to** the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), s 10 Crown Research Institutes Act 1992;
- in achieving the purpose of this Act, *all persons exercising functions and powers* under it, *in relation to managing the use, development and protection of natural and physical resources* shall **take into account** the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), s 8 Resource Management Act 1991;
- *all persons exercising the functions and powers* under this Act shall **have regard to** the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), s 4 Crown Minerals Act 1991;
- it is the duty of the *Council of an institution*, in the performance of its function and the exercise of its powers, – (b) To **acknowledge** the principles of the Treaty of Waitangi, s 181 Education Act 1989.

Other Acts refer to a particular (or general) aspect of what the Treaty means:

- whereas in the Treaty of Waitangi the Crown confirmed and guaranteed to the Maori people, among other things, all their taonga: and whereas the Maori language is one such taonga:, Preamble, Maori Language Act 1987.
- whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: and whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people, Preamble, Te Ture Whenua Maori Act 1993.

Other sections in the statute book do not explicitly invoke the Treaty of Waitangi but do refer to matters which are at the heart of the Treaty, and presumably would be interpreted in the context of the Treaty, eg:

- "In achieving the purpose of this Act, *all persons exercising functions and powers under it* shall **recognise** – (c) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga", s 4 Historic Places Act 1993.

There are some interesting points to be found in comparing the provisions quoted above. First, there do appear to be clear distinctions in the force of those provisions that require someone to "give effect to" the Treaty compared to those which require someone to "have regard to" or "take into account" or not to "act inconsistently" with the Treaty. For example, there is likely to be a difference in whether a substantive obligation to comply with the Treaty is created or a procedural obligation is created for the decision-maker to turn his or her mind to the Treaty. Also, a strict reading of the differences between these formulations might find a difference in the extent to which positive action is required to be undertaken.

Second, there are a variety of different actors who are affected by the Treaty in these clauses in relation to a variety of different sorts of activities. These range from those interpreting an Act (anyone reading it to see what it means but ultimately, and authoritatively, the Courts), to those exercising general or specific powers and functions under it. There are also distinctions between different decision-makers being affected by the Treaty in some Acts. For example, shareholding ministers of Crown Research Institutes (CRIs) are affected but CRIs themselves are not.

Finally, there are the references to the "principles" of the Treaty of Waitangi rather than to the Treaty itself. This is not the place to analyse what the principles of the Treaty are or might be. I have faced various queries from foreign and domestic commentators as to whether the reference to "principles" is a "plot" – but some of them have suspected it to be plot to enhance the Treaty's effect and some to constrain it. I suggest that this formulation indicates that it is the spirit and intent of the Treaty which is important, rather than its bare words. This is consistent with the constitutional significance of the Treaty and the broad, open-textured reading of such documents.

And it is this last point that leads me in the direction of questioning the utility of ordinary statutory interpretation as a form of Treaty analysis.

THE FUTILITY OF TEXTUAL INTERPRETATION

The Treaty of Waitangi is not sensibly susceptible to ordinary techniques of statutory interpretation as they have evolved in a common law system. There are three reasons for this:

First, the Treaty of Waitangi is a document of constitutional importance. As such, common law principles of statutory interpretation themselves set the Treaty apart by requiring that it, and references to it, be interpreted generously, as always speaking and in light of evolving social circumstances as well as its original intent. The then and current Presidents of the Court of Appeal made this crystal clear in the 1987 *Lands* case:

> A broad, unquibbling and practical interpretation is demanded. It is hard to imagine any Court or responsible lawyer in New Zealand at the present day suggesting otherwise. (Cooke P at 655.)
>
> Whatever legal route is followed the Treaty must be interpreted according to its principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise. (Richardson J at 673.)

Second, the terms of most legislative references and more importantly the Treaty itself do not yield black and white answers from straight textual analysis. The essence of the Treaty of Waitangi surely lies in the balance of articles one and two – the balancing of te tino rangatiratanga with kawanatanga. As the Waitangi Tribunal characterised it in 1983 in the Motunui-Waitara Report (1983 at pp 55, 65, 61):

> The Treaty represents the gift [by Maori] of the right to make laws in return for the promise to do so so as to acknowledge and protect the interest of the indigenous inhabitants ... That then represents the exchange of gifts that the Treaty represented. The gift of the right to make laws, and the promise to do so so as to accord the Maori interest an appropriate priority.

This balancing act is not aided by looking more closely at the words or the original intent. I acknowledge that this takes us directly into the great jurisprudential debates of North American constitutionalism. I argue that context is more important than text. And the context is social, economic, political, with a special nod to culture. Balancing these factors is primarily the job of elected representatives – also known as politicians. Lawyers and Judges should certainly be only a secondary resort. Lawyers are not trained to think laterally about ill-framed and changing issues, or to identify and analyse the policy effect of a wide variety of options for dealing with an issue, or to make tradeoffs between loudly competing political interests. Politicians, on the basis of sound professional advice, are better placed for these challenges.

If your purpose in referring to the Treaty in legislation is to enhance its symbolic value, then strictly speaking you have no need to give it a particular legal effect

Third, and underlying the first two points, the reason that its words do not materially aid our application of the Treaty of Waitangi lies in its essential nature: the Treaty of Waitangi does not express a contract; it expresses an ongoing relationship, or set of relationships. In arguing this I draw on the work of others, in particular Dr Paul McHugh and Professor Ken Coates (See *Living Relationships: Kokiri Ngatahi – the Treaty of Waitangi in the New Millennium* (Wellington, Victoria University Press, 1998). The relationships between the Crown, Maori and other New Zealanders are complex, enduring and evolving. We do not expect them to cease. A perspective of the Treaty that emphasises relationships moves beyond formalistic legal constructs to look at what is actually going on between people.

As Casey J said in the *Lands* case (at 702):

> I think the deliberate choice of the expression "inconsistent with the principles of the Treaty" in preference to one such as "inconsistent with its terms or provisions" points to an adoption in the legislation of the Treaty's actual terms understood in the light of the fundamental concepts underlying them. It calls for an assessment of the relationship the parties hoped to create by and reflect in that document, and an inquiry into the benefits and obligations involved in applying its language in today's changed conditions and expectations in the light of that relationship.

If the Treaty of Waitangi expresses the parameters of a relationship rather than the terms of a contract, then we must expect a particular issue that arises within that relationship to be resolved through discussion, consultation, and dialogue within the context of the time rather than being determined by the original and general expression of the relationship.

WHY REFER TO THE TREATY?

If the Treaty of Waitangi expresses a set of relationships what point is served by referring to those relationships in legislation? Addressing the "why" question in relation to the Treaty in legislation gets us quite a long way.

I suggest that there are two primary reasons to refer to the Treaty in legislation: for symbolic value and for instrumental value.

Symbolic value

The words "symbolic value" are often prefaced by the word "only". This disturbs me. Symbolism is a corner-stone of constitutional arrangements. The normative value of symbolism is a core element of the force of constitutional conventions. Furthermore, symbolism is intimately tied up with identity – whether it is the identity of a nation, an iwi or hapu or even a government agency.

I suggest that the most important reason to refer to the Treaty of Waitangi in legislation is if the state wishes to reinforce the symbolic value of the Treaty. Legislation is the primary, and most authoritative expression of authority in a liberal democratic state. Legislative recognition of the set of relationships expressed in the Treaty confers legitimacy on those relationships. Furthermore, given the founding character of the Treaty, it also confers legitimacy on the state itself. No doubt different groups in New Zealand would see different aspects of such symbolism and would disagree on whether it is justified. But in the long term, symbolism is the most important, and most undervalued, function of legislation. It signifies fundamental values.

If the Treaty is referred to in legislation for its symbolic value, what sort of reference is required? A general reference. A legislative mihi. A bow in the direction of the Treaty that acknowledges its presence. This could be contained in a general statute. Suggestions at the constitutional conference held in 2000 on this topic included one by Denese Henare that the Treaty of Waitangi could be included as a preamble to the Constitution Act 1986 (See Denese L Henare, "Millennial thoughts on Maori Development", Appendix A to *the Annual Report of the Law Commission*, 2000). In particular pieces of legislation, a reference to the Treaty might look pretty much like many of the clauses quoted earlier in this paper. And, contrary to the instincts of statutory interpreters, the exact words of the acknowledgment don't matter too much – it's the symbolism that counts.

But let's be clear. If your purpose in referring to the Treaty in legislation is to enhance its symbolic value, then strictly speaking you have no need to give it a particular legal effect. It does not need to have a legal status that would see Judges interpreting and applying it directly. That is the realm of instrumental value.

Instrumental value

The second reason to refer to the Treaty in legislation is if Parliament intends to create some legal effect that is relevant to the Treaty. This is the instrumental value of legislation: its practical effect. Let us pause here.

The purpose of most legislation is to enable something to be done that otherwise could not be, or to prevent something from being done that otherwise could. Detailed provisions in legislation therefore create functions, powers and duties and even organisations. They define behaviours that should not occur, and the consequences of them occurring.

I have argued above that the Treaty expresses an ongoing set of relationships between the Crown, Maori and other New Zealanders. It is a general expression of those relationships. Yet it is not useful to refer to a general expression of relationships in a set of detailed statutory provisions when you are concerned with the instrumental value of those provisions. When the legislative drafter is formulating specific statutory provisions to achieve a set of policy objectives referring to the Treaty alone does not help very much. The Treaty of Waitangi is expressed too generally to have a clear implication for most detailed legislative clauses. Simple reference to it leaves the legal and policy implications unclear on the face of the statute and leaves the discretion to fill in their meaning to lawyers' arguments and Judges' decisions. As the Courts themselves have consistently stressed, resolving the policy questions raised by the Treaty of Waitangi requires political engagement first and foremost. Lawyers and Judges may be able to offer assessments of those resolutions but are poorly placed to forge them.

The real task within government lies in the detail of policy analysis and its translation into legislation. Successive governments have maintained that the Treaty of Waitangi is relevant to policy-making. The *Cabinet Manual 2001* (para 5.35) requires Ministers, in every Cabinet paper proposing legislation, to draw attention to any aspects that have implications for or may be affected by the Treaty of Waitangi. If this is to be satisfied, the Treaty implications must be considered in relation to the detail of policy, including policy that requires implementation by legislation. Setting out how to do that is a matter for another paper. However, a comprehensive revision and expansion of the Legislation Advisory Committee Guidelines is about to be issued and should be consulted by all those having input into the policy and legislative process. These Guidelines retain and reinforce an emphasis on the need to precisely ascertain Maori rights and interests affected by legislation and how the Crown's power to govern relates to them. This was summarily described in the 1991 version of the Guidelines as follows (Legislation Advisory Committee, *Legislative Change: Guidelines on the Process and Content*, Report No 6 (rev ed, 1991), para 42):

> It is very important that attention is focused on the specific aspects of the Treaty which are relevant. What are the guaranteed rights or interests which are put in question? What is the role of the Crown's right to govern?

Undertaking this analysis requires willingness on the part of policy-makers to do a lot of work. Answering detailed policy questions of how Maori interests are or should be affected by the creation of a new function, power or duty can be difficult. It requires a detailed set of questions to be worked through. Two papers by Bill Mansfield commissioned for the Ministry of Justice in 1999 ("Legislative References to the Treaty of Waitangi" and "The Identification of Maori Treaty Interests that may be Affected by Legislative Proposals and the Consideration of Mechanisms for the Safeguarding of those Interests: A Guide to Process") suggested a step by step guide to the process of identifying and addressing Maori Treaty interests that may be affected by a legislative proposal:

- ***relationships and consultation:*** identify whether there is a relevant relationship in existence, whether it is at the appropriate level, and whether additional or different relationships are needed;
- ***deconstruction of proposal into decision-making elements:*** identify the decisions that will be taken under the legislative proposal and the decisions that will need to be taken to give effect to it, group them into useful categories of decisions (such as decisions relating to the exercise of public powers; matters of fact; matters of law; issues of policy operational matters; the allocation of public resources; access to, or the use of public resources) and identify when each decision needs to be made and the time period to which it relates;
- ***identification of affected Maori interests:*** consider which decisions have the potential to impinge on Maori interests.
- ***mechanisms for safeguarding Maori interests:*** consider whether the decision can be circumscribed, or appropriate safeguards included or whether the possible decision would be a clear breach of the Treaty and must be precluded by legislation. The paper suggests a list of helpful questions in this regard, including considering who the decision-maker should be, who should be consulted and how, whether the process and timing of decision-making should be specified, and whether general policy, plans or staff guidance should be required to be developed.

These sorts of questions are difficult and require a lot of work to answer. In particular, the task of determining what are Maori interests requires detailed consideration and, probably, consultation of some sort. For what it's worth, I suggest that it may often be useful to view Maori interests as rooted in the distinctiveness of Maori culture and the need for cultural survival – the right of Maori to live as Maori. The task of working through the details of these questions is part of the point of filling in the specifics of the policy implications.

The same sort of detailed consideration of policy implications has to be worked through in formulating policies that impinge on other interests. There are a variety of general values, such as enhancing democracy, preserving the rule of law, and protecting individuals' liberty that must be attended to in working through the detailed legislative provisions required to achieve public policy purposes. Attending to the health of the relationships between the Crown, Maori and other New Zealanders must surely be one such value. If it is, then the detailed policy and legislative work simply has to be done.

And when the answers to these questions are worked out, they are unlikely to require legislative reference to the Treaty of Waitangi per se. Rather, any legislative reference is likely to be to the interests protected by the Treaty and the factors which make up the appropriate balance between kawanatanga and tino rangatiratanga. These legislative provisions will elaborate and fill out the meaning of the Treaty. And they will be formulated by the political process, with all its negotiation, consultation and iterative decision-making. The several controversial versions of the "Treaty clause" in the Health and Disability Bill as it passed through Parliament in 2000 provides a fascinating example of this process.

The Treaty clause in the NZ Public Health and Disability Act

The New Zealand Public Health and Disability Bill as introduced and passed in 2000 has contained a series of permutations of cls 3 (the purpose clause) and 4 (Treaty of Waitangi) concerning the Treaty of Waitangi:

New Zealand Public Health and Disability Bill:

As introduced:	*As reported back from the Select Committee on majority vote, and passed*
	(changes marked)
"3 Purpose The purpose of this Act is to provide for the public funding and provision of personal health services, public health services, and disability support services, and to establish new public health organisations in order to –	**"3 Purpose** (1) The purpose of this Act is to provide for the public funding and provision of personal health services, public health services, and disability support services, and to establish new publicly-owned health and disability organisations in order to pursue the following objectives – (b) to reduce health disparities by improving the health outcomes of Maori and other population groups:
(d) consistently with the purposes specified in paras (a) to (c), recognise and respect the principles of the Treaty of Waitangi."	~~...(d) consistently with the purposes specified in paras (a) to (c), recognise and respect the principles of the Treaty of Waitangi."~~ (2) The objectives stated in subs (1) are to be pursued to the extent that they are reasonably achievable within the funding provided. (3) To avoid any doubt, nothing in this Act (a) entitles a person to preferential access to services on the basis of race; or (a) limits s 73 of the Human Rights Act 1993 (which relates to measures to ensure equality).
"4 Treaty of Waitangi This Act is to be interpreted in a manner that is consistent with the principles of the Treaty of Waitangi."	**"4 Treaty of Waitangi** "In order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Maori, Part 3 provides for mechanisms to enable Maori to contribute to decision-making on, and to participate in the delivery of, health and disability services."
(in substitution for previous cl 4)	

I suggest that the key change made in the provisions above lies in the shift from the general to the specific. Instead of purporting to affect the interpretation of the whole Act in a general but unspecified way, the new cl 4 clarifies Parliament's intention behind the specific provisions in part 3 of the Act. This means that a Court (or anyone else for that matter, can focus on interpreting *how Parliament* intended to "recognise and respect" the principles of the Treaty by turning to the specifics in part 3 rather than starting from scratch.

Part 3 of the Act relates to District Health Boards (DHBs) and includes a variety of provisions relating to specific ways in which Maori interests are taken into account. These provisions include:

- specific references to Maori interests in establishing the objectives and functions of DHBs (ss 22 and 23);
- specific imposition of a duty on a Minister to ensure Maori membership on DHBs proportional to the number of Maori in the resident population (s 29) and Maori representation on community and public health advisory committees, disability support advisory committees, and Hospital advisory committees (ss 34-36);
- specific requirements on a DHB to train Board members relating to, and keep an up to date record of the familiarity of Board members with, Maori health issues, Treaty of Waitangi issues, and Maori groups or organisations in the district (Sch 3); and
- more general provisions that can extend to DHBs' relationships with Maori among others, such as the power to enter into cooperative agreements and service agreements (ss 24 and 25).

(It may be queried why it is only Part 3 that is identified as relevant. While Part 3 contains more provisions directly and obviously relevant to Maori interests, the development of a Health and Disability Strategy under part 2 and the relevance of Maori tikanga to inquiry procedure under part 5 also seem relevant to Maori interests under the Treaty.)

Whatever your position on the substance of these provisions, it is in them that we see the specific operationalisation of the relationships between the Crown, Maori and other New Zealanders that is expressed in general terms in the Treaty of Waitangi. It is provisions such as these that give substance and certainty to how those relationships should work. It is here that endless debate over abstract ideologies must give way to working out pragmatic solutions to problems in the real world.

Specificity and certainty are not new legal concepts. They have an honourable jurisprudential pedigree resonating in the rule of law. In relation to the Treaty of Waitangi there are a variety of examples of specific legislative provisions that are intended to achieve Treaty-related policy objectives. The State-Owned Enterprises Act 1987 and Resource Management Act 1991 are just two examples of Acts that contain detailed legal provisions constituting a specific regime of protection of Maori interests. But they also both contained

generic references to the Treaty with general effect, as noted above.

The issue then becomes what sort of a generic reference to the Treaty should be left in legislation, should it have legal effect, and if so what sort?

With the State-Owned Enterprises Act, s 9 was found by the Courts to have a significant effect as a "safety net" (or undertow) in requiring the Crown to go further than the specific provisions that were judged in those circumstances not to meet the standard of the generic provision. This effectively meant the Courts formulating their own view of what the relationships expressed by the Treaty should mean in specifics even when Parliament has already turned its "mind" to that question. There is a legitimate argument that a generic reference to the Treaty is a desirable residual safety-net underneath the high-wire of parliamentary deal-making on Treaty interests. It can be argued that:

- Parliament, as an institution rooted in the principle of majority rule, is not well-placed to safeguard the interests of a minority, especially where there are majoritarian political incentives not to do so;
- where the Courts are faced with a specific statutory regime outlining Parliament's intent in how to protect Maori interests the Courts can and should generally be expected to be reluctant to substitute their own judgment of what is appropriate for Parliament's judgment;
- there may be extreme cases where judicial scrutiny of a specific legislative regime reveals manifest injustices when considered against general principles of healthy relationships as expressed in the Treaty of Waitangi. It is a worthwhile safeguard for the minority to enable the Courts to express this as a view. In these cases, anyway, the Courts are likely simply to point out the deficiency and to leave the formulation of a new specific regime to the policy-making and political machinery – as occurred in the *Lands* case.

On balance I consider that these arguments, while validly made, are ultimately unconvincing. I suggest that:

- as I have argued above, the New Zealand Courts are not trained in, or well-suited to, what is essentially a policy-making job of balancing the interests under the Treaty of Waitangi;
- the advent of MMP has increased the diversity of representation in Parliament, and particularly improved the political power of Maori. This political power, rooted in democratic representation, is a much better way of influencing political decisions than relying on the Courts;
- if the approach outlined here is followed Parliament will have considered and decided on the specifics of how to protect Maori Treaty interests. Courts should be constrained to their usual function of interpreting Parliament's expressed intention rather than effectively legislating themselves with little to rely on, regarding controversial policy issues;
- if a generic reference to the Treaty in a particular statute is still necessary to protect the minority Maori interest, then it must be necessary in all statutes and should therefore be a generic provision residing in the Constitution Act 1986 or Interpretation Act 1999. This requires a more general, informed, constitutional debate than we have had to date on these issues.

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CONCLUSION

Whether and how the Treaty of Waitangi should be referred to in legislation are current questions that arise every time a new piece of legislation is developed. These questions provoke visceral political reactions from all sides of the political spectrum. The answers matter.

I argue that it is important to consider the purpose of referring to the Treaty in legislation.

The symbolic value of referring to the Treaty of Waitangi in legislation should not be underestimated as a purpose. This purpose may be satisfied by a general reference to the Treaty as contained in a variety of current statutes. But achieving this symbolic value should not involve attaching legal effect to a generic clause. To do so leaves the details of that legal effect to be filled in by lawyers and the Courts. In New Zealand's constitutional system, our Courts should not be deciding such broad policy issues. They are not trained for it or suited to it. Their reputation with the public will suffer in the long term if they continue with that function and their general function itself will be perceived to have changed.

The instrumental value of referring to the Treaty in legislation is the value that lies in its legal effect. This value will not be well-achieved by a general reference to the Treaty itself. Rather, the legal effect of the Treaty that is desired in a particular area of law is a policy question that requires detailed consideration. The answer, if it requires legislation at all, will require a detailed legislative elaboration of the intended application of the Treaty of Waitangi. This sort of analysis poses a challenge to current systems of policy-making. It requires hard work on hard issues. But if Cabinet and Parliament do not consider these issues of detail then general references to the Treaty will ensure that the Courts will have to. If government and Parliament wants to live up to the rhetoric of taking seriously the relationship between the Crown, Maori and other New Zealanders, this detailed policy work simply must be done, as it is for other general public policy values. Parliament can no longer afford to avoid the hard issues of detail by passing generic provisions that leave the details to the Courts to fill in.

Finally, I note that the symbolic and instrumental values of referring to the Treaty in legislation may combine to reinforce each other. As in the NZ Public Health and Disability Act 2000 a generic reference to the intention of specific provisions to recognise and respect the Treaty, *as long as it is accompanied by* the specific legislative provisions that achieve particular Treaty-inspired purposes, achieve both symbolic and instrumental purposes. While the political negotiations in 2000 which led to this formulation may have been difficult, their product may also point us in a useful direction for the formulation of future references to the Treaty of Waitangi:

- a generic symbolic legislative mihi to the Treaty of Waitangi, without general legal effect;

as long as it is combined with:

- specific legislative provisions that achieve Parliament's specific policy purposes in attending to the health of the relationships between the Crown, Maori and other New Zealanders as expressed in the Treaty of Waitangi.

In following this current we may be closer to discerning the dimensions of the creature that is the Treaty of Waitangi – fished up on a legislative hook, cast by the executive and reeled in by the judiciary from the depths of our legal system. ❑