

# WAIKATO LAW REVIEW

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## EDITOR'S INTRODUCTION

I am pleased to present the second and general issue of the fourth edition of the *Waikato Law Review*. We continue to receive positive reviews of and feedback on the *Review* and it is even more well cited than before. This has been particularly evident in relation to the last issue, our Special Issue on Domestic Violence. I am pleased to report that the Special Issue was so well received that not only did it receive glowing reports from New Zealand and overseas publications in the field and become a student text at two law schools, but it has also sold out already (!). I am proud to say that it appears that we will need to reprint it and I congratulate the Special Issue Editor, Ruth Busch.

This issue continues the *Review's* publication of the Harkness Henry and Stace Hammond Grace Lectures. I am pleased to present Sian Elias' lecture on judicial review and Paul Heath's on preferential payments in bankruptcy. The *Review* continues to be grateful to the two Hamilton firms that sponsor these Lectures and their publication to a wider audience. I am also pleased to continue to publish the winning argument in the student advocacy competition, sponsored by the Hamilton firm, McCaw Lewis Chapman.

In addition to these regular features, the *Review* continues to publish papers on a wide range of topics, all of which can be described as being on the cutting edge of New Zealand jurisprudence. Indeed, some of the papers in this issue make controversial suggestions for the development of New Zealand's law and will help develop New Zealand's jurisprudence if only through the debate that they will likely provoke. I am pleased to note the important contribution from authors with a strong connection to University of Waikato School of Law, particularly as staff member or student.

I am thankful to the editorial committee for their work on this issue. I am also thankful to everyone's perseverance through the various production difficulties that have resulted in this issue being published late. (I note that these should not occur again and that future issues should continue to be published on time.) I am just pleased that we have been able to maintain the quality of the review.

We hope that you are as pleased with this and the last issue as we are. I note, particularly after the success of the last Special Issue, that we still intend to publish a supplementary special issue on the topic of globalisation.

This will be published in 1998 and, like the Special Issue on Domestic Violence, will be sent to subscribers free of charge. The review continues to depend on subscriber support and we hope to be able to continue to serve your needs in the future.

Catherine Iorns Magallanes,  
Senior Lecturer in Law,  
Editor, *Waikato Law Review*

## THE HARKNESS HENRY LECTURE

### “HARD LOOK” AND THE JUDICIAL FUNCTION

BY SIAN ELIAS\*

#### I. INTRODUCTION

My theme is the rule of law and the function of the courts in upholding it. It traverses topics covered by Sir Ivor Richardson in his address to you last year and I am conscious of some presumption in attempting it in his wake. With only eight months experience in the job, I cannot pretend to deal with the subject from a judicial perspective. Rather, my thoughts are shaped by years of attempting, with little success, to persuade judges to accept greater responsibility for controlling executive action.

The “hard look” of my title, which I draw from North American legal thinking, has not been my experience of exercise of the judicial function in what Sir Ivor Richardson preferred to call “public interest litigation”. That has been, I suggest, an approach which should be reconsidered. Three circumstances in particular prompt re-assessment of the role of judicial review in New Zealand.

In the first place, the New Zealand Bill of Rights Act 1990 provides a measure against which executive action can be tested readily. The rights-based approach it requires of the courts has profound implications for judicial decision-making. It affects not only the subject matter of adjudication, but also its processes and remedies. Behind the Act stand the international covenants it implements, with a body of international law available to be drawn on and against which the performance of New Zealand domestic courts can be measured. New Zealand’s ratification of the Optional Protocol to the International Covenant on Civil and Political Rights provides a mechanism for direct international vindication of the rights should the domestic courts prove inadequate. It would be naive to believe that our Judges will not care about the figures they cut on the world stage. The international legal community draws on traditions and experiences different from those we have largely inherited and about which we have perhaps been too smug.

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In the second place, complacency about the competence of the public service has been jolted by a decade of dislocation and change, and associated deregulation. Increasingly, achievement of public good is left to private enforcement, through legislation such as the Commerce Act 1986, the Fair Trading Act 1986, and the Employment Contracts Act 1991. Such private enforcement frequently entails recourse to the courts in cases which are politically charged, and which have significant consequences for the distribution of benefits and costs through the community.

Finally, New Zealand is in a period of constitutional change. In addition to the sweeping reform of the electoral system, other constitutional fundamentals are being reviewed. They include the position of the sovereign, the place of the Treaty of Waitangi in the constitutional structure, and the restructuring of the courts to remove the oddity of recourse to the Privy Council as our final court of appeal. How these changes and reassessments will work out in practice is not easy to predict. If a consequence of the changes to the electoral system is that legislation becomes more difficult to pass through Parliament, we may see executive encroachment upon the law-making function. If coalition government inhibits executive action, administrative decision-making by officials may fill the gap. If effective law-making through legislation becomes more difficult and executive action is inhibited or is channelled to achieve minority goals by power sharing, then, in an increasingly rights-conscious society, those seeking to achieve social and economic objectives could well turn to the courts. Whether this will be the effect if the role of the state contracts is not clear. The growth of judicial review from the 1950s occurred at a time of state expansion. It may be, as some commentators have suggested, that diminution of the role of the state will lead to a corresponding withdrawal by the courts. I refer to these possibilities not to express any view of how matters will work out, but to indicate that the changes already under way prompt close attention to the function of the courts in the scheme of things.

In addressing this topic, I am conscious that the perspective of a lawyer is a limited one. That is in part a measure of the poverty of the discourse between disciplines in our community. It is usually embarrassing to read the writings of judges on the role of the judiciary. Too often, they seem a grab for power. And the insistence of judges that their role is constitutional is easily dismissed as anti-democratic self-aggrandisement. Recent indications of public interest and disquiet about the role of the judiciary suggest that its function is imperfectly understood within the community. I suggest that such lack of understanding is mirrored to an extent in the judiciary and amongst practising lawyers. So although I acknowledge deficiencies dealing with the topic from a legal perspective, I offer my comments as a contribution to a wider debate which is timely and important.

## II. THE RULE OF LAW

Constitutional legitimacy in our system of government is based upon the rule of law. That will always be the case where power is organised and not arbitrary. In such states, ultimate or sovereign power must rest upon the rule of law, if only because, as R T E Latham pointed out more than 50 years ago:

...where the purported sovereign is anyone but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him.<sup>1</sup>

Because of our constitutional history, some of the most significant norms of constitutional law are judge-made rules of the common law. They are augmented by great statutes such as Magna Carta, Habeas Corpus, the 1689 Bill of Rights and modern statutes such as the Constitution Act 1986, as well as the legislation which provides for electoral rights and regulates executive action and responsibility, among which the Official Information Act 1982, State Sector Act 1988, Public Finance Act 1989, Fiscal Responsibility Act 1994, and the New Zealand Bill of Rights Act 1990 are critical. But fundamentally the constitution rests on the decisions of the judges.<sup>2</sup>

Through evolution, and largely as a result of the 17th century struggles between the King and Parliament, the constitution today recognises two sources of constitutional powers: the Queen in Parliament and the Queen’s Courts. The Queen in Parliament makes law. The judges enforce legality and, in addition, are themselves a source of law through development of the common law which they create. Under the New Zealand constitution there is not a tripartite division of power between the legislative, executive and judicial branches of government. Instead, the executive carries the law into effect at the direction of Parliament and under the supervision of the courts.<sup>3</sup> The prerogative power exercised by the executive is no longer properly to be seen as a source of authority beyond the law but, as Sedley describes it, as “... the power, within the law, to fill constitutional

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<sup>1</sup> Latham, RTE *The Law and the Commonwealth* (1949, reprint 1970), 523 (citations omitted).

<sup>2</sup> A position to be contrasted with countries having written constitutions where judge-made law supplements the written instrument.

<sup>3</sup> Refer *M v Home Office* [1994] 1 AC 377, 395 per Lord Templeman.

spaces and exercise governmental choice.”<sup>4</sup> Even within its shrunken sphere, it is increasingly the subject of statutory encroachment (as through the application of the New Zealand Bill of Rights Act 1990), and the subject of close judicial supervision.<sup>5</sup>

In matters not affecting the legitimacy of Parliamentary law making, Parliament and the courts adhere to their respective functions: “Parliamentary supremacy over the judiciary is only exercisable by statute. The judiciary enforce the law against individuals, against institutions and against the executive.”<sup>6</sup>

The role of the courts is to enforce the law. The courts themselves are subject to the rule of law and for that reason cannot usurp powers lawfully exercised by other agencies. The courts will therefore respect all acts of the executive within its lawful province. Ensuring that such actions are lawful, however, is the province of the courts exercising the powers of judicial review which flow from the rule of law and the courts’ obligation to enforce it. Lord Diplock in the *CCSU* case<sup>7</sup> classified the grounds upon which judicial review controls executive action under the triumvirate of “illegality, irrationality and procedural impropriety,” with the acknowledgment that a further ground of “proportionality” might be around the corner. Although the classification is useful, all are really aspects of insistence upon legality. That is the constitutional duty of the courts. The courts operate at the boundaries, not usurping the judgment of the body which exercises the power, but making sure it is exercised for legitimate purpose, fairly and reasonably. Without those conditions, the exercise of power is unlawful. Although judicial review is thought of as a public law concept for the control of public agencies, the function being exercised by the court in its supervisory jurisdiction is essentially the same as is applied in other areas. Wherever power is conferred and its exercise turns upon the exercise of judgment the role of the court is supervisory. So, for example, an appellate court will not substitute its discretion for the exercise of a discretion conferred upon a lower court and will not attempt to second-guess the judgments of directors of companies or trustees acting within their powers and reasonably.

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4 Sedley, “The Sound of Silence: Constitutional Law without a Constitution” (1994) 110 LQR 270, 290. See *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864; *M v Home Office* (supra note 3); *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 All ER 244.

5 *R v Secretary of State for the Home Department, ex parte Fire Brigades Union & Ors* [1995] 2 All ER 244. *Burt v Governor General* [1992] 3 NZLR 672, 678 per Cooke P.

6 *M v Home Office*, supra note 3, at 395, per Lord Templeman.

7 *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374.



### III. JUDICIAL SELF DOUBT

In public interest litigation, judicial self restraint is palpable. It is evident in reference to concepts of "justiciability," "administrative expertise" and "judicial activism." Labels such as these, while no doubt convenient shorthands for significant debate, are particularly unhelpful. In part, they perpetuate mythology about the judicial function and confusion about the political process. The suggestion that modern judicial review is a recent development by activist judges insufficiently deferential to democratic process, is convincingly countered by Stephen Sedley.<sup>8</sup> It is historically inaccurate. Worse, as Sedley points out, the suggestion that it is only the *use* of judicial power which is activism dangerously obscures the truism that:

Abstention from judicial review is just as much a deliberate judicial activity, based just as much on jurisprudential and policy considerations and with just as many constitutional and political repercussions as judicial interventionism.<sup>9</sup>

Sedley characterises the history of judicial review since the 1920s in the United Kingdom until recent times as having been a long sleep, punctuated only by the "snore" of *Wednesbury*.

### IV. "JUSTICIABILITY"

The concept of "justiciability" is often question-begging. It usually indicates an attitude that some questions are not appropriately resolved through the courts because they raise policy choices more appropriately considered by the executive or legislative branches of government. The concern about court determination of issues affecting wide policy turns in part upon a democratic concern about judicial decision-making and partly upon the capacity of the judicial process to address the policy choices thrown up.<sup>10</sup>

The democratic concern often entails reference to the doctrine of separation of powers. Thus, for example, in *Takaro Properties v Rowling* Richardson J,

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<sup>8</sup> Sedley, "The Sound of Silence," supra note 4, at 278.

<sup>9</sup> *Idem*.

<sup>10</sup> See *CREEDNZ* [1981] 1 NZLR 172, 197-198, per Richardson J; *Hawkins v Minister of Justice* [1991] 2 NZLR 530, 536 per Richardson J.

in rejecting the imposition of liability in negligence in the case of an invalid exercise of statutory power by a Minister, referred explicitly to the doctrine.

In terms of the concept of separation of powers, the responsibility for basic policy decisions is vested in other branches of Government and is not ordinarily monitored by the judicial branch through the granting of private law remedies to citizens adversely affected by such policy decisions.<sup>11</sup>

Reference to the separation of powers is common in judgments supporting the argument for judicial restraint.<sup>12</sup>

In application, the concern not to intrude into areas of high policy has resulted in the creation of no-go areas for the courts. Thus, in *Council of Civil Service Unions v Minister for the Civil Service*<sup>13</sup> the House of Lords held that it was “for the government and not for the courts” to decide whether requirements of national security outweighed the duty of fairness:

[T]he Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security.<sup>14</sup>

Lord Roskill was of the view that a number of prerogative powers could not properly be made the subject of judicial review:

Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers, as well as others, are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.<sup>15</sup>

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<sup>11</sup> *Takaro Properties v Rowling* [1978] 2 NZLR 314, 333; See also *X & Ors (minors) v Bedfordshire County Council* [1994] 4 All ER 602

<sup>12</sup> See eg *R v Home Secretary ex parte Fire Brigades Union*, supra note 4, at 267-268 per Lord Mustill (dissenting); *Dupont Steels Ltd v Sirs* [1980] 1 WLR 142 at 157 and 169 per Lord Diplock and Lord Scarman respectively.

<sup>13</sup> Supra note 7.

<sup>14</sup> *Ibid*, at 402 per Lord Fraser.

<sup>15</sup> *Ibid*, at 418. However, his Lordship’s views were expressed to be “as at present advised”.

That approach can be contrasted with the approach of the Canadian Supreme Court in *Operation Dismantle v the Queen*<sup>16</sup>. The case concerned a challenge to a decision by the Canadian Government to permit the United States to test cruise missiles in Canada. The basis of the challenge was that the testing of the missiles would lead to an increased threat of nuclear war and was accordingly a violation of s 7 of the Charter of Rights and Freedoms, guaranteeing life and security of the person. All judges agreed with the conclusion of Madam Justice Wilson as to justiciability. Disputes of a political or foreign policy nature could be assessed by the court. Although the court would not "second guess" the executive on matters of defence, it was under a constitutional obligation to consider a claim that a decision taken in the interests of national defence violated rights under the Charter, and to decide the matter. National defence was not, therefore, a talisman such as had been invoked in the *CCSU* case and its precursor *Chandler v Director of Public Prosecutions*,<sup>17</sup> to ward off judicial supervision.

The judgment of Wilson J also considered the question of justiciability in relation to the objection to the court's fitness to decide questions of broad policy. The judge pointed out that judicial review of administrative tribunals often raises significant policy content. The real issue was suggested to be "not the *ability* of judicial tribunals to make a decision on the questions presented, but the *appropriateness* of the use of judicial techniques for such purposes":

I cannot accept the proposition that difficulties of evidence or proof absolve the court from making a certain kind of decision if it can be established on other grounds that it has a duty to do so. I think we should focus our attention on whether the courts *should or must* rather than on whether they *can* deal with such matters. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us.<sup>18</sup>

After reviewing the American literature and case law based on the "political questions doctrine" and referring to the judgment of Lord Devlin in *Chandler*,<sup>19</sup> Wilson J agreed with the view that "the courts should not be too eager to relinquish their judicial review functions, simply because they are called upon to exercise it in relation to weighty matters of state."<sup>20</sup>

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<sup>16</sup> (1985) 18 DLR(4th) 481.

<sup>17</sup> [1964] AC 763.

<sup>18</sup> *Operation Dismantle v the Queen*, supra note 16, at 500.

<sup>19</sup> *Ibid*, at 519.

<sup>20</sup> *Ibid*, at 503.

The difficult questions for judicial review arise not in cases where illegality is manifest because the power purportedly exercised falls outside the four corners of the statute. Rather, they arise where the unlawfulness alleged is a matter of balance between competing interests or is one of degree (as in the case of challenges based on standards as imprecise as fairness, reasonableness or proportionality). In all such cases the approach of the Canadian Supreme Court requires the competing interests to be directly confronted. As Wilson J recognised, a reviewing court must be scrupulous not to substitute its own judgment for that of the person entrusted with the power to decide. Were it to do so, it would infringe basic legal principle and usurp the function, which is not its to exercise.<sup>21</sup> As Sir John Laws has commented, these well known limits upon the jurisdiction of judicial review:

[H]ave nothing whatever to do with problems about the judges embarking upon political disputes. They are simply a function of the rule of law: the judges are no more than anyone else entitled to exercise power which legally belongs to another.<sup>22</sup>

But because the trigger for intervention by a court exercising supervisory jurisdiction is in part a matter of degree, and to that extent is a policy decision taken in individual cases by judges, the underlying concerns which prompt the shorthand references to “justiciability” or “political question” analysis, need to be directly confronted and understood. If they are not, the legitimacy of judicial intervention will be misunderstood and confidence in the judiciary will be eroded. The two substantial objections wrapped up in the label “justiciability” are that judicial review is anti-democratic, and that, because of the subject matter of questions involving high policy, the judicial process is inappropriate.

## V. JUDICIAL REVIEW AND DEMOCRATIC PRINCIPLE

In *X v Morgan Grampian*<sup>23</sup> Lord Bridge asserted that:

The maintenance of the rule of law is in every way as important in a free society as the democratic franchise.<sup>24</sup>

At first sight startling, this statement merits serious attention. Although the doctrine of separation of powers is generally invoked by the courts in

<sup>21</sup> *Idem*.

<sup>22</sup> Sir John Laws, “Law and Democracy” [1995] PL 72, 78.

<sup>23</sup> [1991] 1 AC 1.

<sup>24</sup> *Ibid*, at 48.

support of deference to policy making by the legislature or executive, that is not its principal function in the Anglo-American tradition.<sup>25</sup> The purpose of the doctrine of separation of powers, as Justice Brandeis, dissenting in *Myers v US*,<sup>26</sup> explained, is not to promote the efficiency of government but to prevent the exercise of arbitrary power. The rationale for the separation of powers expressed by James Madison in *The Federalist*<sup>27</sup> is that, while in a democratic system government is primarily controlled by the people, "experience has taught mankind the necessity of auxiliary precautions." Judicial review is an auxiliary check upon legislative and executive abuse of power. The control which a modern government exercises over the legislature and the executive, when combined with the complexity of executive government, makes vindication or approval of much policy by the ballot box uncertain.

Against such background, abdication by the judiciary of its responsibility to scrutinise executive actions with care may clothe those actions with a legitimacy in the eyes of the electorate which is not justified. As Gerald Gunter has pointed out, "safeguarding the structure of the political process is a major judicial obligation".<sup>28</sup> Professor Neil MacCormick has perceptively argued that any adequate overall view of law must recognise that it is "a form of institutionalised discourse or practice or mode of argumentation".<sup>29</sup> Executive decision-making is a process which is often not readily accessible to those affected by it. Although great strides have been made in recent years to improve the transparency of decision-making, it remains the case that powerful interest groups find it easier to be admitted to executive deliberations than others who may nevertheless be directly affected.<sup>30</sup> On the other hand, although I do not minimise the costs of litigation, the courts are accessible to all and court business is conducted in public. The judicial process has the capacity to be highly participatory. Although judges are appointed, they deal with real life problems in actual cases which anchor their decisions to the actual community. As Alexander

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<sup>25</sup> The French theory for the separation of powers emphasises the exclusive functions of the three branches: see Barendt, "Separation of Powers and Constitutional Government" [1995] PL 599.

<sup>26</sup> 272 US 52 (1926).

<sup>27</sup> Hamilton, Madison & Jay *The Federalist*, No.51 (Bigsby ed, 1992) p 266.

<sup>28</sup> See also Ely, *J H Democracy and Distrust: A Theory of Judicial Review* (1980), especially chapter 4, "Policing the Process of Representation: The Courts as Referee" 73f; and *A Bill of Rights for New Zealand - a White Paper* (Department of Justice, 1985).

<sup>29</sup> MacCormick, "Beyond the Sovereign State" (1993) 56 MLR 1, 10.

<sup>30</sup> Capelletti, M *The Judicial Process in Comparative Perspective* (1989), p46. In the New Zealand context, this point is also made in Mulgan, R *Democracy and Power in New Zealand: a Study of New Zealand Politics* (1989).

Bickel has pointed out, the legislator (whether executive rule maker or member of parliament) deals typically with abstract or dimly foreseen problems.<sup>31</sup>

These democratic apologies for judicial function cannot be taken too far. But it is important not to overlook that the courts not only check abuse of power, but also can assist in the democratic process. The court processes, as well as the electoral processes, permit the individual affected to participate in government. Moreover, the obligation of the courts to give reasons assists in explaining government to the people and to the executive and legislature. Again, I do not want to exaggerate this feature, although I think it has the potential to be extremely important. I acknowledge that the decisions of the courts are often not readily accessible and suggest that the judges need to pay more attention to improving communication of decision-making.<sup>32</sup> But the discourse permitted by the judicial process does have the capacity to improve decision-making by both the executive and the legislature. This is a theme developed in American jurisprudence in considering the role of the courts in improving administrative decisions which are rule-making.

To the extent that judicial review requires consideration of all relevant matters and deliberation in reasoning rather than the exercise of “naked preferences”<sup>33</sup> judicial review can be seen not as anti-democratic but as a protector of “deliberative democratic values.” To those concerned that judges lack technical expertise to supervise policy determinations, it can be said that technical expertise is not a prerequisite for judicial review. As Justice Wilson indicated in *Operation Dismantle*,<sup>34</sup> if the courts are obliged to exercise a function, they are obliged to become informed about an issue arising in the performance of that function.

In any event, concern about judicial competence in technical matters is substantially exaggerated. Technical issues arise before the courts every day. Moreover, the workings of the Official Information Act have revealed what has been intuitively believed by a number of observers, that the courts are wrong to defer unduly to administrative expertise:

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<sup>31</sup> Bickel, AM *The Least Dangerous Branch* (1962) p.20.

<sup>32</sup> Perhaps through press summaries and admission of television filming.

<sup>33</sup> Rossi, J “Redeeming judicial review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry” [1994] *Wisconsin Law Review* 763 820.

<sup>34</sup> *Supra*, note 16.

A comprehensive technical evaluation may have expertly skimmed the surface of the problem and never touched its depths. Tendering a full accounting of the technical aspects of a problem may fall far short of taking full account of its legal aspects. A court should not then turn inferior and abdicate its responsibility for review merely because the problem it confronts calls for massive homework.<sup>35</sup>

A democratic perspective reminds us that technical decision-making should not be implemented "in isolation of the democratic process." Most regulation turns upon value judgments as to where costs, risks and benefits should fall. Technical analysis is often inconclusive and deference to perceived technical expertise may blunt democratic controls:

Major changes in policy should be articulable in common language, easily comprehended by reviewing courts and the regulated industry, and the beneficiaries of a regulatory scheme. Otherwise, we run the risk of divorcing the exercise of bureaucratic expertise from the democratic process. If agencies anticipate that the reasoned basis for their rules and policies will be subject to the scrutiny of reviewing courts, agencies will be more likely to formulate reasons in *understandable* language, relating to the policies advanced. Only if the bases for policy changes are articulated in understandable terms will courts be able to review them for rationality, or Congress be able to review them for responsiveness to the will of the people. Thus, by invoking the hard look doctrine to review the sufficiency of an agency's reasoned analysis, courts play a role in ensuring that the dialogue of bureaucratic expertise is compatible with the democratic process.<sup>36</sup>

## VI. THE LIMITS OF ADJUDICATION

Allied to concerns about the courts' expertise in assessing legislative and executive decision-making, is the more fundamental objection that supervision of executive action, particularly of the rule-making type, is inherently unsuitable for judicial determination. The limitations of the adjudicative process, it is said, make it impossible for the court to be fully informed as to the effect of a decision upon those not present before the court. Such cases are said to be examples of the "polycentric disputes" described by Lon Fuller in his influential essay "The Forms and Limits of Adjudication".<sup>37</sup> Fuller defines a polycentric problem as one which affects

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<sup>35</sup> Traynor, "Essay on States Revolving in Common Law Orbits" (1968) *Cath. ULR* 401, Reprinted in the *Traynor Reader*, 38, *Nousvwrns*, 155, at 191-192.

<sup>36</sup> Rossi, *supra* note 33, at 820-821.

<sup>37</sup> Fuller, L. "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353.

many parties and has “interacting points of influence” which can be figuratively described as the shift in the pattern of tensions created if one strand in a spider web is pulled.

Such disputes, Fuller suggests, are difficult to handle by adjudication, which depends upon the presentation of argument only by parties to the particular dispute. He considered that such problems could be solved, “at least after a measure”, by “Parliamentary methods which include an element of contract in the form of the political ‘deal’”.<sup>38</sup> This thinking has recently been invoked by Neil LJ in the English Court of Appeal,<sup>39</sup> discussed in a recent article by John Allison.<sup>40</sup>

Fuller’s views were tentative. The article was unfinished and he expressed some considerable reservations about its direction during his lifetime.<sup>41</sup> Fuller himself acknowledged that it was important to realise that the distinction involved in characterising a dispute as polycentric or not is often a matter of degree:

There are polycentric elements in almost all problems submitted to adjudication. A decision may act as a precedent, often an awkward one, in some situation not foreseen by the arbiter... In lesser measure, concealed polycentric elements are probably present in almost all problems resolved by adjudication. It is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.<sup>42</sup>

The polycentric implications of a decision are greatly amplified in legal systems which adhere to precedent.

Professor Davis in his *Administrative Law Treatise* considers that Fuller’s analysis is useful “whenever a satisfactory alternative way of disposing of a controversy can be found” but points out that:

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<sup>38</sup> *Ibid*, at 400.

<sup>39</sup> *RT and TG v Secretary of State for the Home Department and Criminal Injuries Compensation Board* unreported judgment of the Court of Appeal, May 4 1994.

<sup>40</sup> Allison, “The Procedural Reason for Judicial Restraint” [1994] *Public Law* 452.

<sup>41</sup> Davis, *KC Administrative Law Treatise* (2nd ed, 1979) Vol.2, p 312.

<sup>42</sup> *Supra* note 37, at 397-398.



The plain fact is that the Supreme Court *does* adjudicate many polycentric problems every year, and it does so successfully in the sense that the society accepts the results. Perhaps Supreme Court adjudication of polycentric problems should even be regarded as an outstanding feature of the American governmental system.<sup>43</sup>

He suggests that:

What the system needs is not abstract rumination that polycentric questions cannot be resolved in the way they are being resolved, but more attention to procedural devices for better development of legislative facts ...<sup>44</sup>

This suggestion is one echoed by the Woolf Committee in its consideration of increased use of amicus briefs and the introduction of a Director of Civil Proceedings.<sup>45</sup> It is also a theme which has been raised on a number of occasions by Sir Ivor Richardson, who, in his 1995 Harkness Henry lecture, referred to the need to adopt the technique of the Brandeis brief.<sup>46</sup> In recent years New Zealand courts have received a range of statistical, historical and sociological material to assist them in dealing with polycentric disputes. But the courts have so far been most reluctant to make decisions in cases where the result will affect the allocation of scarce resources. Such caution is appropriate, but it can be carried too far. All decisions shift cost and risk to some extent. It is hard to think of any administrative law decision which would have done so to the extent of the common law's perfection of limited liability through *Saloman v Saloman*<sup>47</sup> or the imposition of liability in negligence upon the "neighbour" principle expounded in *Donoghue v Stevenson*.<sup>48</sup>

Although caution is to be expected, it would be quite wrong for the 'abstract rumination' of polycentricity to be used to deter judicial review in public interest litigation. Adjudication may not be ideal, but it is the best system we have yet devised for resolving disputes in the last resort and, until a better system emerges, judicial intervention is essential in public interest litigation to provide a check against executive and legislative over-reaching and to maintain the rule of law. That does not preclude reforms designed

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<sup>43</sup> Davis, *supra* note 41 at 316.

<sup>44</sup> *Idem*.

<sup>45</sup> Allison, *supra* note 40, at 471.

<sup>46</sup> Richardson, I "Public Interest Litigation" (1995) 3 *Waikato Law Review* 1.

<sup>47</sup> [1897] AC 22.

<sup>48</sup> [1932] AC 562.

to improve the information available to judges, although ultimately I suspect that many polycentric questions will continue to be decided, as Davis puts it, “on the basis of nothing better than the justice’s general education and experience, including, inevitably a substantial element of guesswork.”<sup>49</sup> The reality is that a judiciary paralysed by self-doubt about the limits of adjudication will not be able to respond in the cases of greatest human rights and social needs. As Leventhal has observed: “How should the courts proceed in political thickets? Carefully; pragmatically.”<sup>50</sup>

## VII. HARD LOOK REVIEW

Judicial review based upon what I would call four-corners illegality and procedural irregularity attracts close judicial scrutiny. Fairness and legitimate expectation as to process, once controversial bases for review, are now established. They are easily defended by recourse to parliamentary intent; could parliament have intended that decision makers should act unfairly?

On the other hand, review of outcomes of the decision-making process is still timid and usually dressed up in procedural language, often with a strained appearance. In limited circumstances a condition precedent to lawful decision-making will raise a ground of illegality which the courts will look at closely.<sup>51</sup> But in all other cases, when it comes to assessing the outcome of executive decision-making, the courts are largely adrift. *Wednesbury* is the only established principle, and it is lacking. Concepts such as mistake of fact,<sup>52</sup> the so-called “innominate” ground of unfairness<sup>53</sup> and proportionality<sup>54</sup> remain controversial. Review upon the basis that excessive weight has been given to unimportant considerations and inadequate weight to those which are patently of great significance, is generally regarded as heretical. These grounds for review, all of which as counsel I have urged upon courts with little success, seek to maintain a line between what is legitimate judicial supervision and what is illegitimate judicial usurpation.

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<sup>49</sup> Supra note 41, at 316.

<sup>50</sup> Leventhal, H “The Courts and Political Thickets” (1977) 77 Columbia Law Review 345.

<sup>51</sup> *CCSU* supra note 7 at 410, per Lord Diplock; *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 at 751 per Lord Templeman.

<sup>52</sup> *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 145-149 per Cooke J.

<sup>53</sup> *R v Panel on Takeovers and Mergers, ex parte Guinness PLC* [1990] 1 QB 146, 160 per Lord Donaldson MR; *Thames Valley EPB v NZFP Pulp and Paper Limited* [1994] 2 NZLR 641 at 652-3 per Cooke P.

<sup>54</sup> *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696.

The courts should not be reluctant to interfere where decisions have clearly gone wrong. That will be the case when a decision-maker has proceeded on a mistaken view which is material to the decision, where a truly important consideration has been paid no more than lip service, or where the result is patently unfair or disproportionate in its effect. Of course these standards depend on judgements of degree. But there is nothing new in that. Such standards have been applied by judges confident of the principle upon which they act.<sup>55</sup> But too often judges shrink from looking closely at the outcome of administrative decision-making in the mistaken view that applying such tests amounts to trespassing upon the merits of the decision.

A substantial impediment to proper perspective is the fixation with what has come to be known as "*Wednesbury* unreasonableness." The principle takes its name from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.<sup>56</sup> Lord Greene MR was not purporting to lay down any new foundation for review and as other commentators have pointed out,<sup>57</sup> the principles described in his judgment are ancient ones. His Lordship did not confine his statement to cases where the courts are reviewing the decision of a public body. Instead he was clear that they are principles which the court applies when considering any question of discretion, as opposed to considering an appeal.<sup>58</sup>

*Wednesbury* was decided in 1947. It concerned a local authority's grant of a licence to operate a picture theatre, upon the condition that no children under 15 years of age should be admitted to performances on Sundays unless accompanied by an adult. In 1947, that was a matter upon which the court accepted that honest and sincere people could hold different views. But it is what Lord Greene said about the concept of "reasonableness" which continues to mesmerise:

It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and in this case, the facts do not come anywhere near anything of that kind. The court is entitled to investigate the action of the local authority with a view

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<sup>55</sup> See eg Cooke P in *Daganayasi*, supra note 51; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 30 per Mason CJ (applying the principle of proportionality to a statute restricting free speech).

<sup>56</sup> [1948] 1 KB 223.

<sup>57</sup> Sedley, "The Sound of Silence", supra note 4 at 278.

<sup>58</sup> Supra note 56, at 228.

to seeing whether they have taken into account matters which they ought not to, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.

Subsequent cases have sought to explain “so unreasonable that no reasonable authority could ever have come to it” by terms such as “irrational” or “perverse”. In practice, the threshold for judicial review on the ground of *Wednesbury* unreasonableness is extremely high.

The “hard look” approach to judicial review pioneered in the United States by Judges such as Judge Harold Leventhal<sup>59</sup> and Chief Justice Bazelon is not the *Wednesbury* approach. Those judges advocated strict judicial scrutiny of administrative action as a protection against administrative arbitrariness. The approach is characterised by close attention to the reasons given by a decision maker and a refusal to assume that unexplained conclusions are based upon adequate facts and reasons. Chief Judge Bazelon considered that such an approach was particularly important in cases touching on:

Fundamental personal interests and life, health and liberty. Those interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a rate making or licensing proceeding.<sup>60</sup>

I have some doubts about the emphasis of the “hard look” school upon the provision of reasons as a remedy for arbitrariness: to insist on reasons in administrative decision-making may be wishful thinking (as some commentators have suggested) and bad decisions can readily be dressed up with a show of reasons. But a hard look approach does seem to me to be the responsibility of the courts, particularly in cases where human rights or fundamental values are affected. In such cases, it is wrong for the courts to hold back unless satisfied that a decision is one that no reasonable administrator could have taken, or is “perverse” or “irrational”. As Lord Greene noted in *Wednesbury*, such unreasonableness is pitched at a level

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<sup>59</sup> See eg *Greater Boston Television Corp v Federal Communications Commission* (1970) 444 F 2d 841,850-853 and *Environmental Defense Fund Inc v Ruckelshaus* (1971) 439 F 2d 584.

<sup>60</sup> *Environmental Defence Fund Inc v Ruckelshaus*, *ibid*, at 598.

which shades into bad faith. The protection of fundamental rights should not defer to a decision maker who is manifestly wrong even if in good faith.

The supervisory jurisdiction does depend on assessment of degree. In cases where human rights or fundamentals of the constitution (such as electoral rights) are encroached upon, the European test of proportionality is a more appropriate guide than *Wednesbury*. Proportionality does not substitute appellate scrutiny for supervisory scrutiny. It permits the decision maker a "margin of appreciation." But the margin of appreciation in cases of fundamental rights must be, as Chief Judge Bazelon suggests, narrower than in other cases. In some cases, where there are no balancing commensurate considerations and the human right is significant (as would be the case if identified in the New Zealand Bill of Rights Act 1990), there may be no room for a 'margin of appreciation.' Fundamental rights require "hard look review." The test to be applied is whether the erosion of rights is disproportionate to the benefit obtained. The adoption of the New Zealand Bill of Rights Act 1990 provides an accessible reference against which such questions can be systematically assessed.

There are a number of straws in the wind suggesting that the test of proportionality and the approach of hard look in the case of fundamental rights are the direction in which judicial review is heading. The High Court of Australia has applied a test of proportionality in cases in which statutes encroached disproportionately upon the right to freedom of expression, not articulated in the Australian constitution but necessarily inferred by the court as essential to the democratic process.<sup>61</sup> In the *CCSU* case, Lord Diplock indicated that proportionality as a measure for judicial review was a possible adoption. In *R v Home Secretary, ex parte Brind*,<sup>62</sup> a case also concerned with freedom of expression, Lord Templeman explicitly invoked the test of proportionality and doubted the sufficiency of a *Wednesbury* approach in cases of interference to human rights.

The discretionary power of the Home Secretary to give directions to the broadcasting authorities imposing restrictions on freedom of expression is subject to judicial review, a remedy invented by the judges to restrain the excess or abuse of power. On an application for judicial review, the courts must not substitute their own views for the informed views of the Home Secretary. In terms of the Convention, as construed by

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<sup>61</sup> *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

<sup>62</sup> [1991] 1 AC 696.

the European Court, a margin of appreciation must be afforded to the Home Secretary to decide whether and in what terms a restriction on freedom of expression is justified.

The English courts must, in conformity with the *Wednesbury* (supra) principles discussed by Lord Ackner, consider whether the Home Secretary has taken into account all relevant matters and has ignored irrelevant matters. These conditions are satisfied by the evidence in this case, including evidence by the Home Secretary that he took the Convention into account. If these conditions are satisfied, then it is said that on *Wednesbury* principles the court can only interfere by way of judicial review if the decision of the Home Secretary is “irrational” or “perverse.”

The subject matter and date of the *Wednesbury* principles cannot in my opinion make it either necessary or appropriate for the courts to judge the validity of an interference with human rights by asking themselves whether the Home Secretary has acted irrationally or perversely. It seems to me that the courts cannot escape from asking themselves whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable. In terms of the Convention, as construed by the European Court, the interference with freedom of expression must be necessary and proportionate to the damage which the restriction is designed to prevent.

My Lords, applying these principles I do not consider that the court can conclude that the Home Secretary has abused or exceeded his powers. The broadcasting authorities and journalists are naturally resentful of any limitation on their right to present a programme in such manner as they think fit. But the interference with freedom of expression is minimal and the reasons given by the Home Secretary are compelling.<sup>63</sup>

There is much food for thought here. The courts will defer to the “informed” views of the Home Secretary. Interference with fundamental freedoms must be “necessary and proportionate.” The reasons given by the Home Secretary were weighed and found “compelling,” and the assessment was made that the interference with freedom of expression was “minimal.”

Where democratic processes are in issue, as illustrated by *Nationwide News Pty Ltd v Wills*,<sup>64</sup> close judicial scrutiny of the outcome is critical because it is antecedent to substantive legislative decision-making. For this reason, Justice Stone, in his famous footnote in the *Carolene Products*

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<sup>63</sup> Ibid, at 751 (emphasis added, citations omitted).

<sup>64</sup> Supra note 56.

case<sup>65</sup> raised the question whether legislation affecting political processes should be "subjected to more exacting judicial scrutiny" than those dealing, for example, with regulation of commerce. This is a theme developed by John Hart Ely<sup>66</sup> and Frederick Schauer.<sup>67</sup> In Canada, the courts, acting on the basis of the right to vote contained in the Charter, have scrutinised with particular care legislation and administrative action affecting the electoral processes.<sup>68</sup>

I suggest the proper approach to the scope of judicial review is that there is a continuum, depending upon the importance and nature of the interests entrenched upon and the extent of that entrenchment. At one end of the spectrum there is no room for any margin of appreciation at all; the courts must, in performance of their constitutional duty, decide whether action is legal or not and not defer to any discretion in the decision maker. I do not consider that it matters whether the decision being impugned is that of the legislature or the executive. In the case of the legislature, we can expect such cases never to arise. They are referred to by Lord Cooke in his essay on "Fundamentals"<sup>69</sup> and touched upon by him in a few judgments.<sup>70</sup> Such cases might arise if parliament were to purport to put someone to death without trial, or withhold the franchise on racial grounds.

At the other end of the spectrum are cases where the decision maker is entrusted with power on a consensual basis, where those affected by the decision are of equivalent bargaining strength. Commercial arbitrations are one ready example. In such cases, the margin of appreciation permitted could ordinarily be expected to be extremely wide.

Along the continuum between the two are cases where those affected by the exercise of power are in a position of weakness, or the power being exercised has implications for significant aspects of their lives, such as the ability to work. In such cases, the margin of appreciation will be adjusted. It does not seem to me to matter much in assessing such factors

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<sup>65</sup> *United States of America v Carolene Products Company* (1937) 304 US 144, 153.

<sup>66</sup> Ely, JH *Democracy and Distrust: A Theory of Judicial Review* (1980).

<sup>67</sup> Schauer, "Judicial Review of the Devices of Democracy" (1994) 94 *Columbia Law Review* 1326.

<sup>68</sup> See *Re Dixon v Attorney General of British Columbia* (1989) 59 DLR (4th) 247; *Re Scott and Attorney General of British Columbia* (1986) 29 DLR (4th) 544; *Reform Party of Canada v Canada (Attorney-General)* [1993] 3 WWR 139.

<sup>69</sup> [1988] NZLJ 158.

<sup>70</sup> *Taylor v NZ Poultry Board* [1984] 1 NZLR 394, 398; *Fraser v State Services Commission* [1984] 1 NZLR 116, 121; *NZ Drivers' Assn v NZ Road Carriers* [1982] 1 NZLR 374, 390.

whether the power is exercised by a public body under a statute or by a private body such as the stock exchange.<sup>71</sup> The function of review is the same.

At the top end will be the cases involving fundamental freedoms, particularly those recognised in the New Zealand Bill of Rights Act 1990. Such rights and freedoms are not absolute and may require adjustment if there are competing rights of equivalent status. The margin of appreciation where human rights are affected is narrower and requires close judicial scrutiny. Where there are no competing rights, there may be no margin of appreciation. Depending on the extent of the interference with rights, the reasons of the decision maker will have to be compelling and the result in terms of the benefits achieved will have to be proportionate to the infringement of the rights.

That we are some distance from this model can be illustrated by reference to two recent decisions. They are the *Maori Electoral Option* case<sup>72</sup> and the decision of the English Court of Appeal in *R v Ministry of Defence, ex parte Smith*.<sup>73</sup> Both ultimately turned on the application of the *Wednesbury* test of irrationality in cases touching human rights.

The *Maori Electoral Option* case concerned the conduct of the 1994 Maori Electoral option. The option (to choose between the Maori or the General Rolls) was necessary to fix the number of Maori seats under the Electoral Act 1993, thus determining the number of seats in the new MMP parliament and permitting their boundaries to be established. I was counsel in that case and would not ordinarily have referred to it, but it illustrates my

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<sup>71</sup> See eg *NZ Forest Products Ltd v NZ Stock Exchange* [1984] 2 NZCLC 99,051 (injunction upheld against NZFP to protect thousands of its shareholders who would have been prevented by a proposed takeover from selling their shares on an open market); *Finnigan v NZ Rugby Football Union Inc (No.2)* [1985] 2 NZLR 181 (a decision of the NZRFU to send a representative team to tour South Africa was, in a series of decisions, held to be reviewable, culminating in the granting of an interim injunction stopping the tour); *R v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] QB 815 (Panel on Take-overs and Mergers held subject to judicial review since it operated as an integral part of a governmental framework regulating financial activity in the City of London); cf *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan*, [1993] 2 All ER 853 (a decision of the Club's Disciplinary Committee held not susceptible to judicial review, despite the Club's effective regulation of a significant national activity).

<sup>72</sup> *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA).

<sup>73</sup> [1996] 1 All ER 257.



concerns about *Wednesbury* well. I shall try not to let too much indignation peep through.

The option as implemented by the executive proceeded on the assumption that there was no duty to inform all Maori eligible to exercise the option about it, but only those who had identified themselves previously on the electoral rolls as being Maori. The discrepancy was, on the Crown's evidence, between 55,466 and 59,000 people. (The Court of Appeal judgment is in error in referring to a range between 12,000 and 59,000.) The executive did not appreciate that the discrepancy was nearly as large and mistakenly believed the electoral rolls were satisfactory. In the High Court, Justice McGechan was of the opinion that executive conduct was to be judged according to whether it was "irrational." The Court of Appeal applied a test of whether the conduct of the executive throughout was "tenable" or "reasonable." The argument advanced that a more strict test was required in a case involving the rights to political representation of a disadvantaged indigenous minority people, with special claims to protection under the Treaty of Waitangi, was not addressed by the Court of Appeal in its brief judgment. Leave to appeal, on grounds which raised the sufficiency of the *Wednesbury* approach, was refused by the Court of Appeal. An application for special leave was denied by the Privy Council.

Justice McGechan had held that the decision was not reviewable because the Minister and his officials acted on views of the facts which were "tenable" on information available at the time (although proven to have been to some extent wrong) and did not act "irrationally." That conclusion was on the basis that:

In the end, this case calls for decision under the cold legalism of administrative law, which looks at process rather than result.<sup>74</sup>

Although he accepted that the Minister and Cabinet acted on a misconception which was an important element in their decisions and that "Maori have been disadvantaged, to an extent not precisely measurable, but of some significance," review was not available. Similarly, the Court of Appeal concluded that "what was done was far from perfect but it passes the test of reasonableness".<sup>75</sup> Hard look review, which should in my view have been prompted by the fundamental electoral rights at

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<sup>74</sup> *Taiaroa v Minister of Justice*, High Court, Wellington, CP 99/94, 4.10.94, McGechan J, p3.

<sup>75</sup> *Supra* note 72 at 418.

stake, would not have countenanced a result in which “a significant number” of Maori were disadvantaged.

My second illustration is a recent decision of the English Court of Appeal.<sup>76</sup> Judicial review had been sought on a policy of the Ministry of Defence (taken under the prerogative) that prohibited homosexual people from serving in the Armed Forces. The case for the appellants did not seek to depart from an irrationality formulation although they argued that “in judging whether the decision maker has exceeded [the] margin of appreciation, the human rights context is important.” The Court of Appeal accepted that approach but concluded that the policy could not be “stigmatised” as irrational. The judgments perpetuate the notion that “the threshold of irrationality is a high one”.<sup>77</sup> In the course of his judgment, Sir Thomas Bingham MR, dealing with the question of irrationality, said:

The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue, even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations.<sup>78</sup>

In the *Ministry of Defence* case, the court clearly felt hampered by the lack of adequate information which a Brandeis brief could have provided, and was conscious of the fact that a review of policy by the Armed Forces was under way. The Court of Appeal also clearly felt uncomfortable with applying the provisions of the European Human Rights Convention as a standard in English domestic law. That problem at least is overcome for New Zealand by the adoption of the New Zealand Bill of Rights Act 1990, but whether our courts will depart from the “high threshold” of irrationality may be doubted, particularly in cases where there is high policy content.

## VIII. CONCLUSION

My view is that we need to move on from *Wednesbury* if judicial supervision is to be appropriate to human rights needs. The position here, I fear, is still that described by Anthony Lester in a recent article commenting on the *Ministry of Defence* case:

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<sup>76</sup> *R v Ministry of Defence, ex parte Smith* [1996] 1 All ER 257.

<sup>77</sup> *Ibid*, at 266, per Sir Thomas Bingham MR; Henry LJ and Thorpe LJ agreed.

<sup>78</sup> *Ibid*, at 264.

To put it crudely, our courts will review the merits of an administrative decision only if the decision-maker acts "*Wednesbury* unreasonably" by "taking leave of his senses".<sup>79</sup>

As Lester goes on to point out:

European standards of judicial review are stricter. They forbid not only decisions which are senseless, or procedurally unfair, or made for an improper purpose, but also decisions that represent an unnecessary and disproportionate interference with basic rights and freedoms.<sup>80</sup>

It is ironic that judges of the common law tradition should lag. Over the long haul, I do not believe they will. I leave the last word to Lord Cooke of Thorndon whose contribution to this area of the law I cannot hope to see equalled in my lifetime.

The world is moving, as it seems to me, towards an international law of human rights. The process will be lengthy, not least because of religious and ethnic and economic differences. In the long run, figuratively marathonian, it will be achieved.<sup>81</sup>

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<sup>79</sup> Lester, A "Judges and Ministers" London Review of Books, 18 April 1996, p.10.

<sup>80</sup> *Idem*.

<sup>81</sup> *R v Barlow* (1995) 14 CRNZ 9, 24.

## THE STACE HAMMOND GRACE LECTURE

### PREFERENTIAL PAYMENTS ON BANKRUPTCY AND LIQUIDATION IN NEW ZEALAND: ARE THEY JUSTIFIABLE EXCEPTIONS TO THE PARI PASSU RULE?

BY PAUL HEATH\*

#### I. INTRODUCTION

It is important at the outset to state unequivocally what this article is not. It is not, and does not purport to be, a treatise on the current state of the law regarding preferential debts on insolvency. Rather the purpose of this article is to consider, from a New Zealand perspective, whether preferential payments presently in force for bankruptcies of individuals<sup>1</sup> and company liquidations<sup>2</sup> can be justified in light of the *pari passu* rule and the fundamental importance which has been attached to that rule both in New Zealand and overseas. The article also considers the policy issues underpinning preferential payments. Of necessity, in a paper dealing with such issues, the discussion will tend to be in broad terms. My intention is to highlight issues which must be addressed rather than to suggest definitive answers. On many of the issues there will be no right answer.

In his text, *Principles of Corporate Insolvency Law*,<sup>3</sup> Professor R M Goode said:

The most fundamental principle of insolvency law is that of *pari passu* distribution, all creditors participating in the common pool in proportion to the size of their admitted claims.

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<sup>1</sup> Insolvency Act 1967 s.104; see also *Laws of NZ Insolvency* paras 390-409.

<sup>2</sup> Companies Act 1955, ss.209 P(c), 229 (5) and 286 and Schedule 8C; Companies Act 1993 ss 234, 255(5) and 312 and Seventh Schedule. This paper will deal only with personal bankruptcies and company liquidations; however, for the position on receivership see also Receiverships Act 1993, s.30.

<sup>3</sup> Goode, R M *Principles of Corporate Insolvency Law* (1990).

It is this principle of rateable distribution which marks off the rights of creditors in a winding up from their pre-liquidation entitlements. Prior to winding up each creditor is free to pursue whatever enforcement measures are open to him....The rule here, in the absence of an insolvency proceeding, is that the race goes to the swiftest....Liquidation puts an end to the race. The principle first come first served gives way to that of orderly realisation of assets by the liquidator for the benefit of all secured creditors and distribution of the net proceeds *pari passu*. The *pari passu* principle is all pervasive. Its broad effect is to strike down all agreements which have as their object or result the unfair preference of a particular creditor by removal from the estate on winding up of an asset that would otherwise have been available for the general body of creditors. The principle is buttressed by related rules on preference by which pre liquidation payments and transfers made in the run up to winding up may be avoided.<sup>4</sup>

Professor Goode goes on to explain that while the theory of insolvency law holds that the *pari passu* principle of distribution is fundamental and all pervasive, a rateable distribution among creditors is rarely achieved. Professor Goode points to two main reasons why this is so: first, the fact that security holders, suppliers of goods under contracts which reserve title until payment and third parties for whom the company holds assets on trust or who have proprietary tracing rights in equity to assets in the possession or under the control of the company will have prior claims; second, what the Professor describes as “huge chunks of what remains” must be applied to meet claims ranking in priority to those of ordinary unsecured creditors.<sup>5</sup>

While Professor Goode’s comments were made in the context of corporate insolvency they are just as applicable to bankruptcies of individuals.

The learned Professor’s observation that the principle of *pari passu* distribution is “*the most fundamental principle of insolvency law*” was approved, in apparently unqualified terms, by a majority of the Court of Appeal in *Attorney General v. McMillan & Lockwood Ltd.*<sup>6</sup> Williamson J, who was in the minority in the Court of Appeal, took the view that the *pari passu* rule had a qualified, rather than universal, application to an insolvent company. His Honour reasoned that the express provision in the statute for preferential debts qualified the general principle of equal sharing which is encapsulated in the *pari passu* rule.<sup>7</sup>

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<sup>4</sup> Ibid, 59-60.

<sup>5</sup> Ibid, 60.

<sup>6</sup> [1991] 1 NZLR 53 (CA) at 58. The majority judgment of Richardson and Bisson JJ was delivered by Richardson J.

<sup>7</sup> Ibid, 63.

The *pari passu* rule is reinforced in a number of ways. For example, an agreement for the post liquidation combination of accounts (otherwise known as contractual set off or netting) which goes beyond the rules of insolvency set off (e.g. because sums due from the company in liquidation to third parties are included) will be declared void by the Court as being contrary to public policy.<sup>8</sup> Likewise, the provisions made in both the Insolvency Act 1967 and the Companies Acts 1955 and 1993 for an insolvency administrator to set aside voidable preferences, voidable securities and voidable gifts support the basic proposition that creditors should share rateably in the distribution of the property of an insolvent debtor.<sup>9</sup> Although parties will not be permitted, by reason of public policy, to agree to exclude statutory provisions governing the distribution of property on insolvency, the Courts will recognise as valid the right of a party to subordinate its claim to those of others.<sup>10</sup>

The right of a creditor to waive equal participation in the proceeds of realisation of assets of an insolvent entity was recognised by the Court of Appeal in *Stotter v. Ararimu Holdings Ltd*. In giving the judgment of the Court of Appeal in that case Gault J said:<sup>11</sup>

The rationale underlying the *pari passu* rule is that no creditors should receive preference over the general body of creditors in the division of assets. We see no inconsistency with that if a creditor simply assents to foregoing the entitlement to participate. We see that as no serious inroad to the Court sanctioned compromise

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<sup>8</sup> *British Eagle International Airlines Ltd v. Compagnie Nationale Air France* [1975] 2 ALL ER 390 (HL); Goode, *supra* note 1, at 61. For the set off rules on bankruptcy see s.93 Insolvency Act 1967 and Laws of NZ, Insolvency paras 373-376; for set off rules on liquidation see s.284 Companies Act 1955 and s.310 Companies Act 1993. As authority for the proposition that a creditor or a debtor cannot contract out of or waive the right to effect set off on bankruptcy in the manner provided by statutes see *Rolls Razor Ltd v. Cox* [1967] 1 QB 552; [1967] 1 ALL ER 397 (CA) and *National Westminster Bank Ltd v. Halesowen Press Work and Assemblies Ltd* [1972] AC 785; [1972] 1 ALL ER 641 (HL). See also, generally, *Stein v. Blake* [1995] 2 ALL ER 961 (HL). From a conceptual standpoint insolvency set off can be categorised either as an exception to the *pari passu* rule or as a recognition of the practical consequences when mutual debts are owed.

<sup>9</sup> For individuals, see ss.54,55, 56 and 57 Insolvency Act 1967 and s.47 Matrimonial Property Act 1976; for companies see ss.266-270 Companies Act 1955 and ss.292-296 Companies Act 1993; for additional provisions of relevance in a company liquidation see ss.271-275 Companies Act 1955 and 297-301 Companies Act 1993 respectively; generally, see s.60 Property Law Act 1952. See also *Laws of NZ, Insolvency* para 311.

<sup>10</sup> *Stotter v. Ararimu Holdings Ltd* [1994] 2 NZLR 655 (CA).

<sup>11</sup> *Ibid.*, 662. See also, in this context, s.313(3) Companies Act 1993 to which Gault J refers at 661-662.

procedure nor to the orderly administration of insolvent estates. To allow debt subordination is to recognise a commercial arrangement common internationally and to ensure that the legitimate expectations of the parties and those induced to deal in reliance on the arrangement are met.

The judgment of the Court of Appeal in *Stotter v. Ararimu Holdings Ltd* ended a long debate in New Zealand over the question whether subordination of debt in advance of liquidation or bankruptcy was contrary to public policy.<sup>12</sup>

## II. THE PARI PASSU RULE AND PREFERENTIAL PAYMENTS

Other jurisdictions have addressed, in recent times, the inter-relationship between preferential payments and the *pari passu* rule. By way of introduction to the substantive matters to be addressed in this article, I refer to some of the more important commentaries on this topic.

In the United Kingdom, in the Report of the Committee on Insolvency Law and Practice<sup>13</sup> [the Cork Report] it was stated:

It is a fundamental objective of the law of insolvency to achieve a ratable, that is to say *pari passu*, distribution of the uncharged assets of the insolvent among the unsecured creditors.<sup>14</sup>

The Cork Report went on to state (in relation to the topic of preferential debts):

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<sup>12</sup> Generally, in relation to cases dealing with the *pari passu* rule and the public policy aspects of it, see also the earlier New Zealand decisions in *re Walker Construction Co Ltd (in Liquidation)* [1960] NZLR 523, *Rendell v. Doors & Doors Ltd (In Liquidation)* [1975] 2 NZLR 191, *re Orion Sound Ltd* [1979] 2 NZLR 574, *Re Faberge NZ Ltd (In Liquidation)* (1992) 6 NZCLC 68,369 and *Attorney General v. McMillan & Lockwood Ltd* [1991] 1 NZLR 53 (CA). For relevant judgments from other jurisdictions see generally *First National Bank of Hollywood v. America Foam Rubber Corp* 530 F 2nd 450 (1976), *Ex parte De Villiers: Re Carbon Developments (Pty) Ltd (in Liquidation)* 1993 (1) SA 493, *Canada Deposit Insurance Corp v. Australia and New Zealand Banking Group Ltd* (1993) 11 ACLC 707, *Re NIAA Corporation Ltd (In Liquidation)* (1993) 12 ACLC 64, *British Eagle International Airlines Ltd v. Compagnie Nationale Air France* [1975] 2 ALL ER 390 (HL), *National Westminster Bank Ltd v. Halesowen Presswork & Assemblies* [1972] AC 785 and *Re Maxwell Communications Corp PLC (No.2)* [1994] 1 ALL ER 737.

<sup>13</sup> Cmnd 8558 1982 (Chairman: Sir Kenneth Cork).

<sup>14</sup> *Ibid* at para 1396.

We have received a considerable volume of evidence on this subject, most of it critical of the present law, and much of it deeply hostile to the retention of any system of preferential debts. We are left in no doubt that the elaborate system of priorities accorded by the present law is the cause of much public dissatisfaction, and that there is a widespread demand for a significant reduction, and even a complete elimination, of the categories of debts which are accorded priority in an insolvency.<sup>15</sup>

In Australia, the Australian Law Reform Commission's report, *General Insolvency Inquiry* [the Harmer Report], stated that the principle of equal sharing between creditors should be retained and in some areas reinforced as a fundamental principle to guide insolvency law reform.<sup>16</sup> The Commission stated:

Equal sharing has long been regarded as a fundamental principle of insolvency law. The Commission's review of the priority provisions of the legislation was guided by this principle and was the basis of the Commission's recommendation that the priority of the Commissioner of Taxation which (in some areas of taxation) provides a substantial advantage to the Commissioner over other creditors, should be abolished. The principle of equal sharing is also evident in the Commission's recommendations for the distribution of trust property.<sup>17</sup>

Further, after referring to the extract from the Cork Report quoted above,<sup>18</sup> the Harmer Report continues:

Despite this principle, the objective of equal distribution is rarely, if ever, achieved because of the extensive range of creditors upon whom statutory priority is conferred. It is the view of the Commission that, to the maximum extent possible, the principle of equality should be maintained by insolvency law subject to these qualifications:

- ◆ It should not intrude unnecessarily upon the law as it otherwise affects property rights and securities and
- ◆ It should encourage the effective administration of insolvent estates.

Any departure from this approach should only be countenanced by reference to clearly defined principles or policies which enjoy general community support.<sup>19</sup>

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<sup>15</sup> Ibid para 1397.

<sup>16</sup> *General Insolvency Inquiry*; Report No.45 of the Australian Law Reform Commission, 1988 (Chairman, Mr Ronald Harmer). See in particular para 33 at p 16 and para 713 at pp 290-291.

<sup>17</sup> Ibid at para 33, p 16.

<sup>18</sup> *Supra* note 14.

<sup>19</sup> Ibid at para 713, pp 290-291.



In the Canadian report entitled *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*<sup>20</sup> [the Colter Report] a Canadian committee also dealt with the interaction between preferential claims and the *pari passu* rule. The Colter Report put the problem in the following way:

The proliferation of statutory deemed trusts and liens has created significant uncertainty and confusion in the distribution of a bankrupt's property. The priority attributed to Crown claims, either by way of statutory deemed trusts and liens or under s.107 of the Bankruptcy Act, has reduced the ability of a debtor to make a proposal to its creditors. Frequently the requirement that claims of the Crown be paid in full before there is any distribution to the unsecured creditors prevents an effective reorganisation.

Unsecured creditors often do not take an active interest in the administration of a bankruptcy because all the proceedings of any recovery will go to the Crown as a preferred creditor. The Crown, either federal or provincial seldom involves itself in the administration of a bankrupt estate. In many instances, a representative of the Crown will not attend the first meeting of creditors or will not act as an inspector. It is also most unusual for the Crown to advance any money to recover assets for a bankrupt estate. Crown corporations also have the advantage of the same priority, and this creates unfair competition against private sector companies in the market place.<sup>21</sup>

The Colter Report went on to consider other preferred claims and said:

When the original [Bankruptcy Act] was passed, the legislators determined that certain groups of creditors required additional protection. The question at issue today is whether these groups still need such assistance.<sup>22</sup>

Finally, I refer briefly to the position in Scotland. The common law of Scotland recognised three categories of preferred debts (deathbed and funeral expenses, wages of farm and domestic servants for the term current at the date of sequestration, and a year's rent of the house where the bankrupt died).<sup>23</sup> Subsequently, in 1707, Crown priority was introduced

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<sup>20</sup> January 1986; Chairman, Mr G F Colter. I am indebted to Mr David Baird QC of Tory, Tory, DesLauriers & Binnington, Barristers and Solicitors, Toronto (who was a member of the Colter Committee) for supplying me with a copy of this report.

<sup>21</sup> *Ibid* at 77-78.

<sup>22</sup> *Ibid* at 79.

<sup>23</sup> Laws of Scotland, Bankruptcy para 1426 Erskine, Institute III, 9.43; third category doubted in Goudy, *H A Treatise on the Law of Bankruptcy in Scotland* (4th ed, 1914) p 516.

by statute.<sup>24</sup> In subsequent years many additional classes of preferred debts were created by statute and

...the effect of these was severely to restrict the availability of funds to meet the claims of ordinary creditors. No topic provoked more discussion when the reform of bankruptcy legislation was being contemplated. The Scottish Law Commission recommended the virtual abolition of all Crown preferences and a restriction of other preferences to employee's wages and related matters.<sup>25</sup>

The recommendations of the Scottish Law Commission were not adopted in full but some modifications were made to the number of preferred debts.<sup>26</sup>

Overall, from this survey, it can be seen that (for a variety of reasons) general dissatisfaction with the system of preferential payments has been expressed in a number of jurisdictions which operate similar insolvency regimes to those in New Zealand.

### III. THE ISSUES

On other occasions I have expressed the view that the over-riding requirement of insolvency law is to determine which of two or more innocent parties will, ultimately, bear a loss. As I have stated previously, it is inherent in any insolvency administration that loss will be suffered. The only question is: who will bear it? While this is, to some extent, implicit in the principle of equal sharing, it is worth stating explicitly (if only to emphasise) that all creditors are not treated equally: only creditors of equal priority are treated equally.<sup>27</sup>

It is easy to understand why those who have made submissions on insolvency law reform should have focused specifically on the question of preferential debts. The increasing number of preferential debts means

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<sup>24</sup> Exchequer Court (Scotland) Act 1707, s.7; see also *Admiralty v. Blair's Trustee* 1916 SC247, 1916 1 SLT 19.

<sup>25</sup> Laws of Scotland, Bankruptcy, para 1426; see also Bankruptcy and Related Aspects of Insolvency and Liquidation (Scottish Law Commission no 68, 1982) ch 15.

<sup>26</sup> Laws of Scotland, Bankruptcy para 1426.

<sup>27</sup> Heath, "How Can Creditors Ever Achieve Certainty? A Commentary" (1993) *NZ Law Conference, Conference Papers*, Vol.2 p. 187 at 189 para 5.2 and Heath, "Voluntary Administration - Proposals for NZ" in *Essays on Corporation Restructuring and Insolvency* Charles Rickett, ed (1996), 91, in particular p. 97.

that unsecured creditors receive less on bankruptcy or liquidation. Ultimately questions of policy and principle arise when one asks the question: who must bear the loss? In each case it is necessary to ask whether there is any justification for Creditor A (the preferred creditor) to receive payment before Creditor B (the unsecured creditor) and (if so) to articulate that reason. Unless preferential treatment can be justified by some social, economic or political reason the payment to Creditor A ought not, I suggest, be given preferential status.<sup>28</sup> Furthermore, in my view good reason needs to exist to depart from the *pari passu* rule. Despite the recommendations of the Harmer Report, Australian law still recognises a number of preferential payments for both corporate and non corporate insolvencies.<sup>29</sup> What stance should New Zealand take?

This article endeavours:

- (a) to ascertain the underlying basis in principle or in policy for the preferential payments presently in force in New Zealand;
- (b) to consider whether these preferential payments can be justified; and
- (c) to consider whether it is possible to apply a litmus test to any further type of preferential payment which may be introduced to determine whether it is appropriate or inappropriate that such a priority payment be enacted.

The time is opportune to consider these issues for three reasons. First, there is a general insolvency law review in the wind at present. Second, there have been recent attempts to safeguard further the interests of employees on the insolvency of an employer: see the Status of Redundancy Payments Bill introduced into Parliament in 1996. Third, there have been recent proposals by the Reserve Bank in relation to netting indebtedness and (so called) "payments finality" which could, if adopted, undermine the *pari passu* rule further.<sup>30</sup>

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<sup>28</sup> This general proposition appears to accord with the observations made in the Harmer Report *supra* note 16, at (para 713) and the Colter Report *supra* note 20 (at 77-79) about the underlying rationale for preferential payments.

<sup>29</sup> See Corporations Law, s.556 and Bankruptcy Act 1966 (Cth), s.109 as both amended by the Insolvency (Tax Priorities) Legislation Amendment Act 1993 (Cth).

<sup>30</sup> See the two papers entitled *Netting: A Discussion Paper* and *Payments Finality: Proposed Changes to Insolvency Law* (Reserve Bank of New Zealand, August 1996). The value of the proposals contained in the Payments Finality paper is dependent upon acceptance of the Netting proposals.

Before embarking upon a discussion of the issues I have raised, I propose to set out expressly the philosophical basis upon which I propose to address the issues. There are a number of philosophical bases upon which insolvency law reform can proceed:<sup>31</sup> it is therefore necessary to identify the basis upon which my discussion of the issues proceeds.

#### IV. PHILOSOPHICAL PERSPECTIVE

In an essay entitled “Voluntary Administration - Proposals for New Zealand”<sup>32</sup> I discussed the philosophical basis upon which insolvency law reform should proceed in New Zealand in the context of considering whether a voluntary administration regime should be enacted. So far as the underlying philosophical basis for insolvency law reform is concerned there is no difference between the points made in that essay (which considered voluntary administration) and the issues which arise in the context of this article (preferential payments).

In that essay, I offered some tentative conclusions on this topic. I noted that the underlying philosophy of insolvency law in New Zealand was something which had received little attention either from law reform agencies or from those making submissions to such agencies. I then said (by reference to definitions of the competing philosophies in a paper by Professor Axel Flessner):

My own view is that our current law presently combines elements of the capitalist philosophy and pragmatism. I do not see the capitalist philosophy and pragmatism (as defined by Professor Flessner) as being mutually exclusive. Because insolvency law attempts to cover diverse business operations there will clearly be occasions on which liquidation is necessary; equally there will be many occasions where the business of the trading entity can be saved or preserved for sale as a going concern for the benefit of all creditors. Pragmatism simply recognises the need for flexibility in dealing with the diverse array of circumstances with which an insolvency practitioner will be faced from time to time.<sup>33</sup>

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<sup>31</sup> See Flessner, A “Philosophies of Business Bankruptcy Law: An International Overview” in Ziegel (ed) *Current Developments in International and Comparative Corporate Insolvency Law* (1994).

<sup>32</sup> *Essays on Corporate Restructuring and Insolvency*, supra note 27 at 94-100. See also the comments by Prof. Farrar in *Essays on Corporate Restructuring and Insolvency* at 69-70 and see also Flessner, supra note 31.

<sup>33</sup> *Essays on Corporate Restructuring and Insolvency*, ibid at 114. See, generally, ibid at 113-115.

Four philosophies were identified by Professor Flessner in relation to insolvency law regimes,<sup>34</sup> labelled “pragmatism”, “Government activism”, “capitalist” and “enterprise”. Pragmatism is said to take bankruptcy law as it is with a view to applying it on a case by case basis according to business necessities. Government activism is said to flourish in countries where the state is strongly involved in economic activity: examples are Italy and France. The capitalist philosophy focuses on the debts of the estate with the objective of maximising returns to creditors. The enterprise philosophy was described by Professor Flessner as “centre left;” it focuses on the nature of the business enterprise and the preservation of it as a going concern rather than on maximising recoveries for creditors from the sale of assets. It is in that context that I concluded that our current law presently combines elements of the capitalist philosophy and pragmatism.

I have also expressed the view that insolvency law, in a country such as New Zealand which had adopted wholeheartedly free market philosophies, should, first and foremost, have clear rules as to priorities which apply in the event of the business entity becoming insolvent and being required to realise assets to meet its debts in accordance with statutory priorities. Furthermore, I said that these rules should be made on a principled basis. Once creditors know that priorities are fixed in advance they can assess the risk of giving credit with more confidence.<sup>35</sup>

## V. PREFERENTIAL PAYMENTS: HISTORY IN NEW ZEALAND

Under present New Zealand law for both individuals and corporations a number of different tiers of debts are established.<sup>36</sup> First, secured debts are taken into account on the basis that they fall outside (except for any

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<sup>34</sup> Flessner, *supra* note 31. The summary which follows in the text is taken from Farrar, J “Voluntary Administration in Australia and the United Kingdom - A Comparative Study” in *Essays on Corporate Restructuring and Insolvency*, *supra* note 27 at 69-70.

<sup>35</sup> *Essays on Corporate Restructuring and Insolvency* *supra* note 27 at 98. For a general discussion of issues of principle which impact on preferential payments see Cantlie, S “Preferred Priority in Bankruptcy” in Ziegel, *supra* note 31 at 413.

<sup>36</sup> Insolvency Act 1967, s.104, Companies Act 1955, ss.209P(c), 229(s) and 286 and Schedule 8C; Companies Act 1993, ss.234, 255(s) and 312 and Schedule 7.

shortfall on realisation of securities) the insolvency regime.<sup>37</sup> Second, come the preferential debts with which I deal in this article.<sup>38</sup> Third, there are the ordinary unsecured claims.<sup>39</sup> Finally, there are some deferred debts.<sup>40</sup> As this paper addresses only the underlying reasons for preferential debts being exceptions to the *pari passu* rule, I confine my discussion of historical developments to preferential debts only.

The first insolvency statute in New Zealand was the Imprisonment for Debt Ordinance 1844. The Ordinance had been enacted because it was considered:

...desirable that provision be made for the relief of persons imprisoned for debt, who have become indebted without any fraud or gross or culpable negligence, by releasing the persons of such debtors from imprisonment, so as nevertheless their estates may still remain liable for satisfaction of their debts:....<sup>41</sup>

In essence, the purpose of the Act was to enable a person imprisoned for the debt to be discharged from custody provided a full and true statement in writing was given by the prisoner of all debts then due or accruing due to him or to any person in trust for him and to require the prisoner to execute a power of attorney in favour of any creditor who had sought to detain him (or to one of the detaining creditors on behalf of the body of creditors) enabling the creditor to sue for the debts. All monies which were then received under the power of attorney were to be paid into Court

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<sup>37</sup> Insolvency Act 1967, ss.3(3) and 90; See also Laws New Zealand, Insolvency paras 377-389. Companies Act 1955, s.286; Companies Act 1993, s.312. The expanding categories of secured indebtedness need to be taken into account in this regard. In particular issues are raised as to the appropriate scope of liens by the judgments of Thomas J in *Re Papesch* [1992] 1 NZLR 751 and *Re H & W Wallace Ltd* [1994] 1 NZLR 235 respectively. Proprietary claims are sometimes difficult to separate from secured claims in this context. Further consideration of the types of interest which ought to fall outside the scope of insolvency legislation is timely but beyond the scope of this paper.

<sup>38</sup> Insolvency Act 1967, 2.104(1)(a)-(e); Companies Act 1955, Schedule 8C; Companies Act 1993, Schedule 7.

<sup>39</sup> Insolvency Act 1967, s.104(1)(f); Companies Act 1955, s.287(1)-(2); Companies Act 1993, s.313(1) - (2).

<sup>40</sup> Insolvency Act 1967, s.104(1)(g)-(i); Companies Act 1955, s.287(3)-(4); Companies Act 1993, s.313(3)-(4); Partnership Act 1908, s.6.

<sup>41</sup> Imprisonment for Debt Ordinance 1844, preamble.

and, after deducting the expense of the power of attorney, be divided among the creditors at whose suit the prisoner had been detained.<sup>42</sup> But, Crown debts were not covered by the Ordinance of 1844.<sup>43</sup>

The next insolvency statute to be passed in New Zealand was the Debtors and Creditors Act 1862 which repealed the Imprisonment for Debt Ordinance 1844. The Act of 1862 was more sophisticated in its nature and allowed for the first time a creditor to petition the Court for sequestration of the debtor's estate.<sup>44</sup> By s.43 of the Act Crown debts were not covered by this process. Section 43 of the Act provided, in similar terms to s.14 of the Imprisonment for Debt Ordinance 1844:

This Act shall not extend to discharge any debtor with respect to any debt due to Her Majesty or Her successors or to any debt or penalty with which he shall stand charged at the suit of the Crown or of any person for any offence committed against any Act or Ordinance enforced within this Colony relative to any branch of the Public Revenue or at the suit of any sheriff or other Public Officer upon any Bail Bond entered into for the appearance of any person prosecuted for any such offence unless his Excellency the Governor shall certify under his hand his consent that such person may apply to take the benefit of this Act.

No other special provisions were contained in the Debtors and Creditors Act 1862 for the payment of debts preferentially.

The Bankruptcy Act 1867 received the Royal Assent on 10 October 1867 and repealed the Debtors and Creditors Act 1862.<sup>45</sup> This statute has been described as the "first real bankruptcy legislation in New Zealand".<sup>46</sup> By Part XIV of the Bankruptcy 1867 issues of (inter alia) preferential payments were addressed. For the first time preferential claims were set out in the legislation. In particular, where a bankrupt was indebted "to any servant

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<sup>42</sup> Ibid ss.5-8. Note, however, that a debtor could still be imprisoned for contracting debts fraudulently (s.10 of the Ordinance) or for having fraudulently concealed or misrepresented his state of affairs (s.11 of the Ordinance).

<sup>43</sup> Ibid, s.14. The Governor of New Zealand retained a discretion to certify that any person mentioned in the section seeking to recover Crown debts could apply to take the benefit of the Ordinance; otherwise a prisoner was not liable to be discharged from imprisonment so long as any debt remained due to the Crown.

<sup>44</sup> Debtors and Creditors Act 1862 s.6.

<sup>45</sup> Bankruptcy Act 1867 s.3.

<sup>46</sup> Spratt & McKenzie, *Law of Insolvency*, Butterworths 1972 para [0/1]; see also *Official Assignee v. NZI Life Superannuation Life Nominees Ltd* [1995] 1 NZLR 684 at 692 per Blanchard J.

or clerk for wages or salary” the trustee in bankruptcy was required to pay so much as was due which did not exceed three month’s wages or salary or £50, with the servant or clerk proving for any sum exceeding that amount.<sup>47</sup> Likewise, where a bankrupt was indebted to any artisan, labourer or workman, whether skilled or unskilled, in respect of wages or labour, the trustee in bankruptcy was entitled to pay so much as was due not exceeding one month’s wages at current rates to the artisan, labourer or workman; the artisan, labourer or workman was entitled to prove for any sum exceeding that amount.<sup>48</sup> An order of adjudication was also to be a complete discharge of any deed or articles of apprenticeship and if any money had been paid by or on behalf of an apprentice to the bankrupt as an apprentice fee, the Court, on proof of that, had a discretion to award such sum as it thought reasonable to be paid out of the estate as a preferential debt.<sup>49</sup>

Trustees in bankruptcy were also given a discretion to make an allowance to the bankrupt if they thought that necessary for the support of the bankrupt and his family with the caveat that such an allowance could not be made for any period after the adjournment of the bankrupt’s last examination sine die.<sup>50</sup>

The position in respect of Crown debts was set out in s.127 of the Bankruptcy Act 1867 in the following terms:

The order of discharge [from bankruptcy] shall not discharge the bankrupt from any debt due to the Crown or any debt or penalty with which he stands charged at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue or at the suit of the sheriff or other Public Officer on a Bail Bond entered into for the appearance of any person prosecuted for any such offence unless the Colonial Treasurer for the time being certify in writing his consent to the bankrupt being so discharged.

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<sup>47</sup> Bankruptcy Act 1867 s.216.

<sup>48</sup> *Ibid* s.217.

<sup>49</sup> *Ibid* s.218.

<sup>50</sup> *Ibid*, s.219.



Notwithstanding the express terms of Part XIV and s.127 of the 1867 Act, the Supreme Court held, in 1885, that in the administration of a bankruptcy in New Zealand, the Crown was entitled to priority over all other creditors.<sup>51</sup>

The next bankruptcy statute was the Bankruptcy Act 1892. This statute was more sophisticated still and provided in much greater detail for the administration of a bankrupt estate. This was the first New Zealand bankruptcy statute to state expressly that it bound the Crown.<sup>52</sup> It is interesting to note that no Crown debts were, in fact, granted priority in the preferential debts set out in the Act of 1892.<sup>53</sup>

Under s.120 of the Bankruptcy Act 1892 the monies received by the Official Assignee on behalf of creditors of the bankrupt were to be applied in the following manner: firstly, and rateably *inter se*, the costs and expenses of the Official Assignee, the costs of the petitioning creditor and the costs of the petitioning debtor; secondly, the Official Assignee's commission and supervisors' remuneration; thirdly, rent due for any period not exceeding six months actually due and payable by the bankrupt at the date of adjudication in respect of which there were goods on the premises on which, but for the bankruptcy, the landlord may have distrained; fourthly, and rateably *inter se*, wages or salary of any clerk or servant, artisan, labourer or workman or apprentice up to specified levels. One can immediately see that the list of preferential creditors had expanded between 1867 and 1892 to include administration costs and rent due in certain

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<sup>51</sup> *Re Donne* (1885) 4 NZLR SC 321. For some discussion of the Crown prerogative in this context see also (inter alia) *Federal Commissioner of Taxation v. Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 (HCA), *re Mutual Traders (Aust and NZ) Ltd* [1943] NZLR 254 and *Re Arnold Trading Co Ltd* [1983] NZLR 445 (CA) at 460. Note that, in *re Donne*, Johnston J, for some reason which is unclear from the report of the judgment, refers to provisions of the English Bankruptcy Act 1883 and to the Bankruptcy Act Amendment Act 1884 (NZ) which adopted some of the new provisions contained in the 1883 English Statute: the judgment does not refer at all to s.127 of the Bankruptcy Act 1867 although that section is consistent with the result in *Re Donne* in the sense that it puts Crown debts generally outside the scheme of the Act.

<sup>52</sup> Bankruptcy Act 1892 s.148.

<sup>53</sup> Compare s.120 Bankruptcy Act 1892 with s.148 of the Act. It was not until 1943 that this view of the law was adopted with regard to the administration of an insolvent company: see *Re Mutual Traders (Aust. and NZ) Limited (In Liquidation)* [1943] NZLR 254 at 260-261 per Kennedy J; see also *Tasman Fruit Packing Association Limited v. The King* [1927] NZLR 518 at 520 per Alpers J.

circumstances. It is also notable that both of those expenses were given priority over monies payable to persons who may be broadly called “employees” who previously enjoyed priority over those debts by the Act of 1867. This highlights the fact that preferential payments are set having regard to the social, economic and political considerations of the day.

Finally, by way of historical development, one comes to the Bankruptcy Act 1908. This was the last bankruptcy statute before the passing of the Insolvency Act 1967. The Crown’s position remained the same as under the Bankruptcy Act 1892.<sup>54</sup> The provisions dealing with preferential creditors remained the same as those contained in the Act of 1892 except that the priority payments for employees were elevated to a third priority with rental arrears being demoted to fourth priority.<sup>55</sup>

So far as company liquidations were concerned, they were governed, at all material times, by the provisions of the Companies Acts then in force. It would lengthen unduly this particular paper to go through at length the provisions contained in various Companies Acts to review priority. To a large extent, the priorities allowed under company legislation tended to reflect priorities established under the insolvency legislation for bankrupts. It should be noted, however, that until the passing of the Companies Act 1933, the right of priority by Crown prerogative seems to have remained in force in respect of company liquidations. As Sir Clifford Richmond observed, in delivering the judgment of the Court of Appeal in *Re Arnold Trading Co Ltd*:<sup>56</sup>

...the position in New Zealand, after the enactment of the Companies Act 1933, was that the Crown prerogative had been for most practical purposes removed in the case of a winding up. See *Re Mutual Traders (Aust and NZ) Ltd* [1943] NZLR 254..

Having set out the history of priority payments in New Zealand under the bankruptcy statutes, it is now appropriate to review the current position starting with the Acts still in force; the Insolvency Act 1967 (for individuals) and the Companies Acts 1955 and 1993 (for companies).

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<sup>54</sup> Cf Bankruptcy Act 1892 s.148 and Bankruptcy Act 1908 s.148.

<sup>55</sup> Bankruptcy Act 1908 s.120.

<sup>56</sup> [1983] NZLR 445 (CA) at 460.

## VI. PREFERENTIAL PAYMENTS: THE CURRENT NEW ZEALAND POSITION

### *1. Introduction*

Insolvency law in New Zealand can be divided into two general categories. First, individual insolvencies (including partnerships) which are governed by the Insolvency Act 1967. Second, there are corporate insolvencies which are governed by the Companies Act 1955, the Companies Act 1993 or the Receiverships Act 1993.<sup>57</sup> Although there are other types of insolvency regimes in operation in New Zealand, it is unnecessary to consider those in any detail in this paper as the principles applicable to them, so far as they refer to preferential debts, will be no different from the principles discussed in respect of either the Insolvency Act or the Companies Acts.<sup>58</sup>

It is, of course, possible for both individuals (particularly partnerships) and companies to be involved in business activities. Thus, although the Insolvency Act 1967 will apply to consumer debtors as well as to those involved in business, I propose to review the types of preferential payments in existence from the perspective of debtors (whether corporate or non corporate) who are involved in business activities.

In essence, both individual and corporate preferential debts can be divided into four distinct categories; ie, first, administration costs; second, employee related claims; third, Crown related claims; and fourth, miscellaneous debts which have, for one reason or another, been afforded priority. Some of the priority payments in the miscellaneous category seem to reflect (on the face of it) an ability for a certain interest groups to lobby Government rather than any particular reason in principle or policy for the debt to have preferential status.<sup>59</sup>

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<sup>57</sup> From this point on I will refer (in the context of companies) to the Companies Act 1993 as, for most practical purposes, it will be the sole governing statute for those companies which go into liquidation after 1 July 1997.

<sup>58</sup> For a summary of the types of insolvency administration which operate in New Zealand see *Laws of NZ, Insolvency* para 3.

<sup>59</sup> In this category I refer, in particular, to the Companies Act 1993 Schedule 7 clause 2(h) which provide priority for all sums that the Motor Vehicle Dealers Institute Inc. is entitled to recover from a defaulting licensee company under s.42 of the Motor Vehicle Dealers Act 1975 in the event of the company being put into liquidation.

I propose to review each of the four categories of debt to which I have referred in turn and to discuss, in respect of each category, the questions set out earlier in this article: i.e. under each heading I will endeavour to discuss and determine the underlying basis in principle or policy for the particular type of preferential payments and consider whether the preferential payments can be justified. After discussing payments under each of the categories mentioned, I will discuss (when setting out my conclusions) whether it is possible to apply a litmus test to further types of preferential payments which may be introduced to determine whether it is appropriate or inappropriate that preferential status be granted in respect of such debts.

## 2. Administration Costs

Administration costs are not, strictly speaking, preferential debts because they are not debts which would otherwise have been payable by the insolvent entity *pari passu* with other creditors. It is self evident that administration costs would not have been incurred had there been no bankruptcy or liquidation. Thus, in my view, it is not really appropriate to regard administration costs as a preferential debt when considering whether particular preferential debts are justifiable exceptions to the *pari passu* rule.

There are good reasons why administration costs should be a first charge against the bankruptcy or the liquidation. First, there is a public interest in ensuring that liquidations and bankruptcies are administered professionally and competently: if persons qualified to administer such insolvencies were asked to administer without guarantee of costs being recovered as a first charge on the estate, it would be difficult to encourage qualified people to take on the position of an insolvency administrator. Second, as the Harmer Report put it:

The creditors have a community of interest in having a common agent to maximise a fund for distribution among them.<sup>60</sup>

In New Zealand administration costs rank first in priority in both liquidations<sup>61</sup> and bankruptcies.<sup>62</sup>

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<sup>60</sup> Harmer Report, *supra* note 16, para 717; see also *Re Universal Distributing Co Ltd (in Liquidation)* (1933) 48 CLR 171.

<sup>61</sup> Companies Act 1993 Schedule 7 clause 1.

<sup>62</sup> Insolvency Act 1967 s.104(1)(a) as amended by s.3(1) Insolvency Amendment Act 1994. See also, generally, Laws NZ, Insolvency para 391.

### 3. *Employees*

There is a variety of payments which are intended to protect the interests of employees which are made preferential on insolvency. Under the Insolvency Act 1967 and the Companies Act 1993, the references are to “any servant or worker” (under the Insolvency Act)<sup>63</sup> and to “any employee” (under the Companies Act 1993)<sup>64</sup>. While different terms are used in each statute, the difference in terminology seems to reflect the era in which the statute was drafted rather than any discernible difference in meaning. In each situation the question is whether preferential status is justifiable to the extent allowed. For convenience I will use the more modern expression (“employee”) from now on.

It is the nature of the employee’s relationship with the insolvent employer that is said to provide justification for preferential treatment. As Mr Bruce Gleig wrote:

When an employer becomes insolvent, a free market economy treats the employee in the same manner as it treats other unsecured creditors. The employee is assumed to have recognised that unpaid wages form an unsecured loan to the employer and to have anticipated the possibility of bankruptcy. Before agreeing to the loan, the employee is expected to have determined the risk involved by analysing the financial health of the employer and to have minimised this risk by negotiating some form of security, such as a lien or mortgage, for the loan. Finally, the employee is expected to have negotiated sufficient compensation to offset the cost of the remaining risk of non payment. An employee who fails to fulfil these expectations, is then assumed to self insure by maintaining an income reserved for use when the employer fails to pay.<sup>65</sup>

Mr Gleig argues that those assumptions are unrealistic. He says:

The employee is unlikely to have considered the possibility of the employer failing to pay earned wages. The topic of bankruptcy probably never arose during the negotiation of the employment contract between the employer and the job applicant; the employer simply agreed to pay the wages on a periodic basis as they were earned. Furthermore, even an employee who had contemplated the possibility is unlikely to have had the requisite bargaining power to extract the financial information and wage protection from the employer. This is especially so if the employee is not part of a collective

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<sup>63</sup> Insolvency Act 1967, s.104(1)(d)(i).

<sup>64</sup> Companies Act 1993, Schedule 7, clause 2 (a) and (b).

<sup>65</sup> Gleig, B “Unpaid Wages In Bankruptcy” (1987) 21 UBC Law Review 61.

bargaining unit. Finally, the assumption that an employee self insures ignores the employee's inadequate bargaining power to command compensation for an anticipated loss; the assumption merely states the result: in a bankruptcy, an employee is expected to absorb the loss of unpaid wages.<sup>66</sup>

The New Zealand solution to these problems has been (in general terms) to accord preferential status to employees in certain circumstances; i.e. at present, to meet all arrears of wages or salary (including holiday pay entitlements and other specified benefits) of any employee due from the date of adjudication in respect of services rendered during the four months immediately preceding adjudication up to a limit of \$6,000.00 per employee.<sup>67</sup> Or, in the case of an apprentice, up to three months wages will be considered preferential if ordered by the Employment Tribunal.<sup>68</sup>

The question is: Does the nature of the employee's contractual relationship with the employer justify preferential status for all or any part of a debt owing to the employee on the bankruptcy or liquidation of the employer? Put another way, is the employee's position so different from any other supplier of goods or services which may be owed money on insolvency as to justify special treatment of the employee?

The difficulty, of course, is that creditors of an insolvent entity have many manifestations. Some may be large financial institutions which may be able to obtain financial information about the debtor, assess the risk of insolvency and seek security or alter interest rates to protect their positions. There may be other, smaller, traders who cannot in reality protect themselves from the insolvency of their paymaster: generally tradesmen and subcontractors fall into this category.<sup>69</sup> Furthermore, many smaller

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<sup>66</sup> Ibid at 62.

<sup>67</sup> Insolvency Act 1967 s.104(1)(d)(i) and Companies Act 1993 Schedule 7 clauses 2(a),(b),(d) and (e) and 6.

<sup>68</sup> Insolvency Act 1967 s.104(1)(d)(ii) read in conjunction with Apprenticeship Act 1983 s.23 (as saved by s.16 of the Industry Training Act 1992; Companies Act 1993 Schedule 7 clause 2(g).

<sup>69</sup> Note, however, how socio-economic bases can change quite quickly. Before 1 July 1988 a subcontractor would have received a form of preferential treatment if steps had been taken under the Wages Protection and Contractors Liens Act 1939: see the observations of Williamson J on this issue in his dissenting judgment in *Attorney-General v. MacMillan & Lockwood Ltd* [1991] 1 NZLR 53 (C A) at 67-68. Note also that the Crown had priority under the 1939 Act. See also *Andrew v. Rockell* [1934] NZLR 1056; Wilson, *Contractors' Liens and Charges* (2nd ed, 1976) at p2; Wages Protection and Contractors Liens Act 1939, s.50 and Acts Interpretation Act 1924, s.5(k). As to the philosophy of the 1939 Act see *Re Williams, ex parte, Official Assignee* (1899) 17 NZLR 712 at 719 (CA) and *Farrier-Waimak Ltd v. Bank of New Zealand* [1965] NZLR 426 at 443 (PC).

tradesmen may be just as reliant on one customer as the employee is reliant on his or her employer. The Harmer Report recognised this type of problem when it discussed the extent of the definition of the term "employee".<sup>70</sup> At para 729 of the Harmer Report, it was noted that creditors who may be particularly vulnerable on bankruptcy or liquidation include persons who are not employees but are in employee-like relationships with the insolvent entity. The report referred specifically to sub-contractors and the limited protection given to such persons in some Australia states.<sup>71</sup> In the New Zealand context an owner-driver "working" for a transport company is another example which springs to mind.<sup>72</sup> When assessing whether priority should be given to employees one must also bear in mind the consequences of excluding the wider class of claimant of this type and also the danger of according priority to a class of creditor which naturally includes working shareholders who function in a management role (for the employer) and who also have contracts of employment.

These issues have become more important given the move this year to improve the position of employees on bankruptcy, liquidation or receivership.<sup>73</sup> If enacted, the Status of Redundancy Payments Bill will add to the list of employee priorities all amounts due to any employee in respect of any redundancy agreement or clauses which were negotiated or documented as part of any relevant employment contract or as separate agreements.<sup>74</sup> Furthermore, so far as the Seventh Schedule to the

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<sup>70</sup> Harmer Report, *supra* note 16, paras 728-732 at pp 297-299.

<sup>71</sup> *Ibid*, para 729. See also Subcontractors' Charges Act 1974 (Qld) and Workmen's Liens Act 1893 (SA).

<sup>72</sup> It seems clear that generally an "owner-driver" will not be regarded as an "employee" for preferential purposes. This issue arose in the context of the Employment Contracts Act 1991 when an owner-driver sought to invoke the personal grievance remedies available to an "employee" (but not to an "independent contractor") when his contract was terminated by the company by which he was engaged. In *TNT Worldwide Express (NZ) Ltd v. Cunningham* [1993] 3 NZLR 681 the Court of Appeal held the owner-driver could not claim under the Employment Contracts Act 1991 as he was a genuine independent contractor. See, in particular, the judgments of Cooke P at 687-689, Casey J at 694 and Robertson J at 701. Compare with observations of Mr DE Hurley, sitting as an Adjudicator in the *Cunningham* case at first instance: [1992] 1 ERNZ 956 (Employment Tribunal).

<sup>73</sup> Status of Redundancy Payments Bill introduced into Parliament in 1996 as a Private Member's Bill.

<sup>74</sup> Note that New Zealand has not yet ratified the Protection of Workers' Claims (Employer's Insolvency) Convention 1992 which has been adopted by the International Labour Organisation. The Convention requires preferential status to be given to certain employee related claims or protection by a guaranteed fund. The reason why the Convention has not been adopted in New Zealand appears to be that it includes redundancy payments. Redundancy payments have been adopted as a priority payment in Australia where the Convention has been ratified.

Companies Act 1993 is concerned, the Bill would repeal clause 6 which is the clause which limits priority given under the headings in clause 2 of the schedule to \$6,000.00 in the case of any one employee.<sup>75</sup> The Long Title to the Bill states the purpose of the Bill as being:

...to protect the status of redundancy of all workers by amending the schedules of preferential claims in both the Companies Act 1993 and the Companies Act 1955 to include redundancy payments as negotiated in or documented within or in addition to the relevant employment contracts when companies go into liquidation or receivership.

The *Explanatory Note* to the Bill makes it clear that the Bill arose as a result of the collapse of the Weddel meatworks: the fact that workers at the meat works found that they stood in line with other unsecured creditors for redundancy payments being the catalyst for the Bill. The *Explanatory Note* continues:

Those workers believed, quite rightly, that should their employment with the company cease, they would be in some measure compensated for the loss of their employment through redundancy agreements negotiated as part of their collective employment contract.

This Bill is an attempt to ensure that no other workers will find themselves in such a situation again, particularly as the Minister of Agriculture is predicting that other meat works will go into receivership in the future.

The *Explanatory Note* also goes on to state the intention of the Bill to amend the schedules for preferential claims in both the Companies Act 1955 and the Companies Act 1993 and also to remove the \$6,000.00 limit on all amounts due to employees. In fact, the Bill as presently drafted only removes that limit in relation to the schedule to the 1993 Act. The *Explanatory Note* also suggests that the Insolvency Act 1967 will be amended to give priority to redundancy payments owed to employees of individuals; it was also suggested that the limit on the amount that the employee can recover for wages or salaries owed and holiday pay would be removed from the Insolvency Act. Again, as a matter of fact, the Bill as drafted does not achieve that objective.

The Joint Insolvency Committee which has been set up by the New Zealand Society of Accountants and the New Zealand Law Society to consider

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<sup>75</sup> Ibid clause 5(2).



issues of insolvency law reform<sup>76</sup> has made submissions to the Labour Select Committee on the Status of Redundancy Payments Bill.<sup>77</sup>

The Joint Insolvency Committee pointed out that one of the consequences of giving redundancy payments preferential status could well be to transfer the hardship of insolvencies from one group of workers to another. The Committee said:

The experience of members of this committee, some of whom are insolvency practitioners, is that in many liquidations there is no secured lender or other secured creditor. If redundancy payments are granted preferential status (particularly unlimited amounts as the Bill proposes) this will inevitably mean that there are substantially fewer funds available to meet the claims of general trading and other unsecured creditors - the consequence could be that the additional losses suffered by those creditors will jeopardise the viability of the creditors and thus the continuing employment prospects of their employees. In the committee's experience, most companies which fail employ less than 10 staff. The redundancy claims of those staff could be disproportionately large when considered against the claims of trading and unsecured creditors, thus leaving nothing for those creditors.<sup>78</sup>

The Committee also pointed out that the preferential status presently given to unpaid wages and salary relates to work or services actually rendered whereas redundancy pay is contractually agreed compensation from the employer, usually made on some scale based on length of service, to remove some of the employees' immediate financial worry associated with losing their job. It was noted that in some cases employees received a windfall as they were able to obtain other employment after being made redundant. The Committee said:

The committee has difficulty in identifying any policy grounds social or economic, for according redundancy compensation priority over the claims of trading and other unsecured creditors.<sup>79</sup>

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<sup>76</sup> The Joint Insolvency Committee was established in February 1994. Its membership at the relevant time comprised Michael Webb and Michael Whale (Joint Conveners), Peter Hassell, Paul Heath, Robert McInnes, Peter Chatfield, Don Francis and John Vague.

<sup>77</sup> *Submissions of Joint Insolvency Committee to Labour Select Committee on the Status of Redundancy Payment Bill*. The submissions note that the reference in the *Explanatory Note* to amendments being made to the Insolvency Act 1967 has not been effected; it was also pointed out that the limit under the Insolvency Act 1967 for preferential claims by employees of the type contemplated was in fact \$6,000 rather than \$1,500 as set out in the *Explanatory Note*.

<sup>78</sup> *Ibid*, p 2 para 2.

<sup>79</sup> *Idem*.

Just as an employee [Creditor A] at the Weddel meatworks expected his or her redundancy payments to be met in full so too did the trade creditor [Creditor B] expect to be paid in full for goods or services rendered. Why then should the claims of Creditor B be deferred to those of Creditor A?

The Joint Insolvency Committee also pointed out that there could be unintended consequences if working shareholders and directors wrote favourable redundancy clauses into their own employment contracts thereby elevating their own claims from last (qua shareholder) to preferred status (*pari passu* with other employees).<sup>80</sup> Finally the Joint Committee also pointed out implications for providers of business credit and potentially for the cost of credit. One possible consequence of the enactment of the Bill would be insistence by credit providers on businesses ensuring that employment contracts include provisions making it clear that employees would not be entitled to redundancy compensation.<sup>81</sup>

It is clear that a tension exists between the need to protect employees (who are not able to negotiate on equal terms with an employer) on the insolvency of the employer<sup>82</sup> and the need to ensure that the protection or level of protection given to employees does not cause undue detriment to other creditors or cause harm to the overall economy. All of these issues must be carefully weighed before any decision is made in relation to the Status of Redundancy Payments Bill. Indeed the Status of Redundancy Payments Bill is but a microcosm of the wider issues involving preferential payments.

It is difficult to see the New Zealand Parliament withdrawing preferential status for employees. Historically, employees have been in a preferred

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<sup>80</sup> Ibid, p 3 para 5. In this respect, I note that both Canadian and Norwegian legislation may provide an answer to this problem. By s.140 Bankruptcy and Insolvency Act 1992 (RSC 1992, c 27) (Canada) no person can receive preferential wages or salary if that person was an officer or director of the company. Similarly, under para 9-3 of the Satisfaction of Claims Act 1994 (Norway) preferential wages will be denied if considerable influence could have been or was exerted over the management of the company by the claimant. I also note the comments of Susan Cantlie on this issue in her article "Preferred Priority in Bankruptcy" (supra note 35, 414 at 415) where Ms Cantlie suggests a potential deficiency in the Canadian formulation in respect of high ranking executives who are not, as a matter of law, "directors or officers" for the purposes of s.140 Bankruptcy and Insolvency Act 1992. The wider Norwegian formulation may be a better answer overall - though the width of the provision necessarily raises questions about the certainty of the law. See also Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada* (1993, 3rd ed) para G75 at 5-110.

<sup>81</sup> Ibid, 3 para 7.

<sup>82</sup> See Gleig, supra note 65 at 61-62.

position on bankruptcy since 1867; protections afforded to apprentices have been in existence since the same time.<sup>83</sup> In my view, the two most difficult issues affecting preferential treatment for employees are: (a) how one can validly distinguish an employee from an independent contractor who is reliant upon a particular customer for work; and (b) the extent to which any protection afforded should be given.

There is, however, an additional option to protect employees. In the Harmer Report the Australian Law Reform Commission said:

In the Commission's view the interests of employees would be best protected by the creation of a wage earner protection fund. Such a fund would ensure that employers are paid in every insolvency. But the Commission accepts that there is strong support for the retention of the existing priority accorded to employees. However as to the range of benefits that should be available (such as leave, retrenchment payments, superannuation) and whether there should be a ceiling on benefits the Commission makes no recommendation. This is a matter of policy that is more appropriate for the Government to determine as part of, or in the light of, its overall social welfare and income support policies. Since, however, the existence of priority runs contrary to the fundamental principle of equal sharing, the Commission would urge that the interests of other unsecured creditors should not be overlooked when determining that policy.<sup>84</sup>

Similarly, in Canada, a recommendation was made in the Colter Report that a wage earner protection fund be established:<sup>85</sup>

It is recommended that a wage earner protection fund be established because no other solution ensures prompt and certain payment to employees. The fund should be financed by contributions from employers and employees. Such financing spreads the burden of paying the claims of employees among all employers and employees and avoids any impact on a particular lender. A lender to a labour-intensive industry would not deem it necessary to restrict the amount of credit it would otherwise extend. Thus, there would be no impact on current lending practices.<sup>86</sup>

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<sup>83</sup> Bankruptcy Act 1867 s.217

<sup>84</sup> Harmer Report, *supra* note 16, para 727 at pp 296-297 (emphasis added).

<sup>85</sup> Colter Report, *supra* note 20, at 31-34.

<sup>86</sup> *Ibid* p 32. At 33-34 the Committee recommended that contributions to the wage earner protection fund be collected monthly from employers and employees with the ultimate object of having a self financing fund. See also the comparative table of wage earner protection funds operated by Belgium, Denmark, United Kingdom, France, Germany, the Netherlands and Italy which is summarised in the *Colter Report*, *supra* note 20 at 26-27.

The recommendations made in both Australia and Canada for the creation of a wage earner protection fund were rejected by the respective Governments. Given the other countries which operate such schemes, however, it is not an option which should be dismissed out of hand in New Zealand. In essence, the object of the exercise is for the fund to pay out the employees immediately and then be subrogated to the rights of the employees on insolvency. Thus, while the creation of a wage protection fund would alleviate the immediate needs of the employees (which, otherwise, would have to be met from state income support payments) a question would still remain as to whether present preferential rights should remain for subrogation purposes.

When addressing the extent to which any preferential treatment should be given to an employee one must examine the types of rights which may be protected so that a proper assessment may be made in each case as to whether justification for the protection exists. At present there are a number of headings under which preferential treatment falls: first, “wages or salary of any employee” is given preferential status whether or not earned wholly or in part by way of commission and whether payable for time or for piecework in respect of services rendered during the four months preceding the commencement of the bankruptcy or the liquidation.<sup>87</sup> Second, holiday pay is given preferential status.<sup>88</sup> Third, amounts deducted by the employer from the wages or salary of an employee in order to satisfy obligations of the employee are given preferential status.<sup>89</sup> Fourth, preferential status is given to amounts payable to the Commissioner of Inland Revenue as deductions from wages for child support purposes.<sup>90</sup> In addition where an employee would have been able to make a claim for preferential wages or salary but for the fact that monies were specifically advanced to meet such salary by a third party, that third party will have a subrogated right of priority in respect of the money advanced to the same extent as if the employee had not been paid the money.<sup>91</sup>

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<sup>87</sup> Insolvency Act 1967 s.104(1)(d)(i); Companies Act 1993 Schedule 7 clause 2(a).

<sup>88</sup> Insolvency Act 1967 s.104(1)(d)(i); Companies Act 1993 Schedule 7 clause 2(a).

<sup>89</sup> Companies Act 1993 Schedule 7 clause 2(d). This priority would include contributions made, out of the salary of the employee, to a superannuation fund on behalf of the employee - but would not include contributions payable by the employer to any such superannuation scheme.

<sup>90</sup> Insolvency Act 1967 s.104(1)(d)(iv) read in conjunction with s.163 Child Support Act 1991; Companies Act 1993 Schedule 7 clause 2 (e).

<sup>91</sup> Insolvency Act 1967 s.104(2); Companies Act 1993 Schedule 7 clause 7.

Questions arise as to what is meant by the term “wages or salary”. Wide definitions have been given of these terms in other contexts: for example, it is possible to argue that an employer contribution to a superannuation plan might fall within the term “wages or salary” on the basis that the payment by the employer is an incident of the employee’s overall remuneration.<sup>92</sup>

Finally, it should be noted that there are a wide variety of methods by which the policy issues arising in relation to employees can be addressed. Different countries have adopted different approaches and, in the end, it will be a matter of determining which approach is best from the New Zealand perspective. The following are some examples of the way in which the problem has been approached elsewhere.<sup>93</sup> In Canada, directors of a company can be liable personally for employee related debts on the insolvency of the company.<sup>94</sup> Claims of employees arising from their employment in the three years preceding the commencement of the insolvency proceeding are claimable in the Czech Republic.<sup>95</sup> In Finland there are only priorities for child support payments and claims of that nature.<sup>96</sup> In the United States of America preferential treatment is given for wages, salaries or commissions, certain contributions to employee benefit plans, claims of producers of grain and certain debts payable to fishermen.<sup>97</sup>

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<sup>92</sup> By way of analogy, see *Parry v. Cleaver* [1970] AC 1 (HL), *The Halcyon Skies* [1977] QB 14 and *Barber v. Guardian Royal Exchange Assurance Group* [1990] 2 ALL ER 660 (CJEC). In this respect see also observations made by members of the Court of Appeal in *Re UEB Industries Ltd Pension Plan* [1992] 1 NZLR 294 at 297-298 (per Cooke P) and *Cullen v. Pension Holdings Ltd* (1993) 1 NZSC 40, 259 (CA); in particular the judgments of Cooke P and Richardson J. See also *Davies v. Dulux NZ Ltd* [1986] 2 NZLR 418 at 424 - 425 (in the context of the Wages Protection Act 1964) and *Coburn v. Human Rights Commission* [1994] 3 NZLR 323 at 336 - 337 (in the context of the Human Rights Act 1993).

<sup>93</sup> The following examples are drawn from a survey conducted by The Bankruptcy Legislation Sub Committee of Committee J of the International Bar Association through its Task Force on Priority Claims in Insolvency Administration which was presented to the Committee J meeting in New Orleans USA on 11 October 1993 by the Task Force Co-Chairs, Dr Ole Borch and Mr Timothy L'Estrange of Copenhagen and Sydney respectively. I am indebted to Dr Ole Borch for supplying me with a complete set of the answers provided by the Country Chairs of the 17 nations which responded to the survey. The countries which responded were: Australia, Bermuda, Bulgaria, Canada, Czech Republic, Denmark, England and Wales, Finland, Ireland, Italy, New Zealand, Norway, Poland, Romania, Spain, Sweden and USA.

<sup>94</sup> Canada Business Corporations Act s.119.

<sup>95</sup> Bankruptcy Composition Act (No.328/1991) s.32 (Czech Republic).

<sup>96</sup> Lag om den ordning i vilken borgenär skall få betalning (Finland).

<sup>97</sup> Bankruptcy Code, s.507(USA) .

#### 4. *Crown Debts*

A variety of Crown debts are given statutory priority on bankruptcy and liquidation. There are two broad categories into which Crown debts will fall for preferential purposes: the first category consists of taxation debts; the second category consists of payments to reimburse the Government for benefits conferred by the Government.

Although a laudable attempt was made when the Companies Act 1993 was passed to set out those debts which are preferential on liquidation, it is a labyrinthine task for anyone to establish the true priority structure at any given time. This is because both the Insolvency Act 1967 and the Companies Act 1993 are affected by some debts being granted preferential status by other Acts of Parliament.<sup>98</sup> This involves the busy practitioner in much searching to ascertain the mysterious preferential payments which are not expressly stated. This position is clearly undesirable. It is imperative that steps are taken under both Acts to list in definitive terms those debts which are accorded priority on bankruptcy or liquidation.

The Crown debts which remain preferential can be summarised as follows: (a) Goods and Services Tax;<sup>99</sup> (b) tax deductions made by the employer under the PAYE rules of the Income Tax Act 1994;<sup>100</sup> (c) non resident withholding tax deducted by an employer under the NRWT rules of the Income Tax Act 1994;<sup>101</sup> (d) resident withholding tax deducted under the RWT rules of the Income Tax Act 1994;<sup>102</sup> (e) all duties payable under the Customs Acts;<sup>103</sup> (f) fisheries' management levies payable under the Fisheries Act 1983;<sup>104</sup> (g) accident compensation levies;<sup>105</sup> (h) certain preferential claims under the Radiocommunications Act 1989;<sup>106</sup> (i)

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<sup>98</sup> For example, Goods and Services Tax Act 1985, s.42(2)(a), Volunteers Employment Protection Act 1973, s.15(1)(a), Fisheries Act 1983, s.107K, Radiocommunications Act 1989, s.183 and Layby Sales Act 1971, s.11(2)(c). As to goods and services tax see also *District Commissioner of Inland Revenue v. Bain* (1990) 14 TRNZ 534.

<sup>99</sup> Goods and Services Tax Act 1985 s.42; Companies Act 1993 Schedule 7 clause 5(a).

<sup>100</sup> Companies Act 1993 Schedule 7 clause 5(b) as amended by Income Tax Act 1994 s.YB1. See also Tax Administration Act 1994, s.167(2).

<sup>101</sup> *Ibid* clause 5(b) as amended by Income Tax Act 1994 s.YB1.

<sup>102</sup> *Ibid* clause 5(d) as amended by Income Tax Act 1994 s.YB1.

<sup>103</sup> *Ibid* clause 5(e) as amended by the Customs Amendment Act 1995 s.2.

<sup>104</sup> Fisheries Act 1983 s.107K(3).

<sup>105</sup> Insolvency Act 1967 s.104(1)(e) as substituted by s.169 of the Accident Rehabilitation and Compensation Insurance Act 1992; see also ss.115(3) and (17) of the Accident Rehabilitation and Compensation Insurance Act 1992.

<sup>106</sup> Radiocommunications Act 1989 s.183.

monies payable under the student loan scheme regime<sup>107</sup> and (j) monies payable to the Commissioner under the Child Support Act 1991.<sup>108</sup>

The Harmer Report successfully recommended that Crown priorities in Australia be removed completely:<sup>109</sup>

In recent years there has been a significant reduction of the priority accorded to Crown debts in Australia. The Senate Standing Committee on Constitutional and Legal Affairs recommended the total abolition of all Crown priority (which included the Commissioner of Taxation) in its 1978 Report *Priority of Crown Debts*. This report was partially accepted....However the priorities which relate to employers and other persons being required to collect tax money and remit it to the Commissioner have largely been left untouched.<sup>110</sup>

The Harmer Report also noted that it had considered the option of limiting priority by reference to time or quantum of debt but that:

...in view of the overwhelming support for total abolition it has concluded that limiting the priority in this way is not appropriate.<sup>111</sup>

The overseas evidence is equivocal: in a number of countries (notably Australia, Denmark, Norway, Sweden and Finland) priority for taxation debts has been completely abolished whereas in other countries it remains - indeed, in some countries, on wider terms than those which apply in New Zealand at present.<sup>112</sup>

It is possible to make out a case for a system which would allow a priority payment for PAYE and GST (and possibly accident compensation levies) on the basis that, in essence, those are funds which should have been held

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<sup>107</sup> Insolvency Act 1967 s.104(1)(e)(i),(ii) and (iii) as substituted by s.90(1) of the Student Loan Scheme Act 1992.

<sup>108</sup> Insolvency Act 1967, s.104(1)(d)(iv) and Companies Act 1993, Schedule 7, cl.2(e). This debt may be better categorised as a wage related debt: see *supra* note 91.

<sup>109</sup> Crown priorities on both bankruptcy and liquidation were removed as from 1 July 1993 by the Insolvency (Tax Priorities) Legislation Amendment Act 1993 ss.20-28.

<sup>110</sup> Harmer Report, *supra* note 16, para 736 p 301.

<sup>111</sup> *Ibid*, para 741 at p 303.

<sup>112</sup> In particular I refer to Poland, where, under the Bankruptcy Law taxes and other public dues for a period of two years preceding the declaration of bankruptcy are payable as a priority debt; I also refer to the Republic of Ireland where up to one year's unpaid tax for capital gain tax, corporation tax, income tax and value added tax is payable as a priority together with up to 12 month's local property rates.

on trust for the Government by those who deduct the funds from source. But any such case would meet opposition in the form of the Tax Administration Act 1994 and the Income Tax Act 1994. First, under the PAYE rules, the Commissioner has the right to claim unpaid PAYE from the employee as well as the employer.<sup>113</sup> Second, unpaid tax deductions are made a charge on all real and personal property of the employer - though the insolvency consequences of this are uncertain.<sup>114</sup> Third, the Commissioner has an ability (in circumstances prescribed by the statute) to pursue unpaid tax liabilities under the Income Tax Act 1994 (which includes PAYE,<sup>115</sup> resident withholding tax<sup>116</sup> and non resident withholding tax<sup>117</sup>) against directors and shareholders of a company which has been unable to meet its tax obligations.<sup>118</sup> Given these additional protections for the Commissioner it is difficult to justify continued preferential status of such debts. Further, it is difficult to make a case for unlimited protection (in terms of time or quantum) for (particularly) GST and PAYE deductions when returns are made regularly to the Commissioner of Inland Revenue in respect of both of those items and the Commissioner is, therefore, probably in the best position of any creditor to determine when the debtor is getting into financial difficulties. GST and PAYE are usually the first payments to fall into arrears in such circumstances. A truly incentive based economy would require the Commissioner to act on the information which he or she was getting and therefore any priority accorded to such payments should be limited in time: a period of three months immediately preceding the commencement of the bankruptcy or liquidation process would be sufficient.

So far as other Crown priorities are concerned, it is difficult to make out a case for their retention as they mostly relate to ordinary debts and it is difficult to see why the Crown should be placed in any better position than ordinary citizens. There is no basis, in my view, for protecting the overall tax base in these ways to the detriment of trading creditors.

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<sup>113</sup> Tax Administration Act 1994, s.168(2). This rule extends to payments under s.115 of the Accident Rehabilitation and Compensation Insurance Act 1992 (where applicable): s.168(1).

<sup>114</sup> *Ibid.*, s.169(2). This rule extends to payments under s.115 of the Accident Rehabilitation and Compensation Insurance Act 1992 (where applicable): s.169(1).

<sup>115</sup> Income Tax Act 1994, ss NC1-21.

<sup>116</sup> *Ibid.*, ss NF 1-13.

<sup>117</sup> *Ibid.*, ss NG 1-17.

<sup>118</sup> *Ibid.*, s HK11(3) and (4).



All of the arguments for and against preferential status for Crown debts seem to have been considered in the Harmer Report. Some of the arguments which were rejected in the Harmer Report were that (a) taxation debts were owed to the community rather than to an individual; (b) the need to protect the revenue of the Crown and (c) the fact that the Commissioner has a statutory relationship with the taxpayer rather than a contract. The primary reason which persuaded the authors of the Harmer Report to recommend abolition of Crown preferential debts was that the Commissioner's priority assured the Revenue of payment and consequently operated as a disincentive for the Commissioner to recover debts in a commercial manner. If the Commissioner was allowing debts to aggregate the position of other unsecured creditors could be seriously disadvantaged.<sup>119</sup>

### 5. *Miscellaneous Priorities*

Finally, I come to the miscellaneous priorities. These appear to be a hotch-potch of items which from time to time appear to have gathered sufficient momentum to receive priority on bankruptcy or liquidation. In many cases, however, it is difficult to justify these priority payments. In some cases, the level of priority is so low that it has little effect in any event.

Examples of the miscellaneous priorities are: (a) claims made by persons who would otherwise be entitled to liens over books and papers of the insolvent entity;<sup>120</sup> (b) all sums that the Motor Vehicle Institute Incorporated is entitled to recover from a defaulting licensee under s.42 of the Motor Vehicle Dealers Act 1975 in the event of the company being put into liquidation;<sup>121</sup> (c) up to a limit of \$200 per claimant, any sum ordered or adjudged to be paid under the Volunteers Employment Protection Act;<sup>122</sup> (d) monies paid in relation to lay-by sales;<sup>123</sup> and (e) amounts payable to a landlord in lieu of distraint.<sup>124</sup>

I do not propose to go through each of these miscellaneous priorities one by one. In each case it is necessary to test the justification for the payments before continuing to afford priority. In my view it would be difficult to make out any case whatsoever for continued preferential status for those classes of debts with the possible exception of lay-by sales.

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<sup>119</sup> Harmer Report *supra* note 16, paras 734 and 735 at 299-301.

<sup>120</sup> Insolvency Act 1967 s.104(1)(d)(iii); Companies Act 1993 Schedule 7 clause 2(f).

<sup>121</sup> Companies Act 1993 Schedule 7 clause 2(h).

<sup>122</sup> Volunteers Employment Protection Act 1973 s.15(1)(a); Companies Act 1993 Schedule 7 clause 2(i).

<sup>123</sup> Layby Sales Act 1971 s.11(1) and (2)(c) and Companies Act 1993 Schedule 7 clause 3.

<sup>124</sup> Companies Act 1993 Schedule 7 clause 11.

## VII. CONCLUSIONS

As a result of the matters discussed in this paper I offer the following conclusions:

1. There is a need for all preferential debts to be scheduled in a clear, definitive and unambiguous manner.
2. For New Zealand purposes there is insufficient empirical research material to determine whether there remains a justifiable need for preferential payments other than administration costs. Such research is required before final views can be expressed on the justifiability of preferential debts as exceptions to the *pari passu* rule.
3. It is difficult to formulate a single litmus test against which preferential status can be judged. The Harmer Report suggested that preferential debts should not intrude unnecessarily on the law as it affects property and security rights and could encourage efficient insolvency administration.<sup>125</sup> The Colter Report pointed to the need to remove confusion and uncertainty in the distribution of an insolvent's realisable assets.<sup>126</sup> Both of those objectives are responsible and desirable.
4. I suggest that in determining whether a debt should be given preferential status the following questions should be asked:
  - a) What are the reasons which justify the type of debt in issue being paid in preference to debts owed to other unsecured creditors?
  - b) What factors militate against the grant of preferential status?
  - c) Is the proposed preferential debt likely to impact adversely on property and security rights? If so, in what way?
  - d) Is the granting of preferential status to the debt consistent with efficient insolvency administration?

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<sup>125</sup> Harmer Report, *supra* note 16, para 713 at pp 290-291.

<sup>126</sup> Colter Report, *supra* note 20, at 77-78.

The answers must then be weighed and a judgment made as to whether preferential status is justified.

5. The need for employee protection and the extent of it (including the possible extension of protection to persons in employee-like positions) needs careful consideration. As stated earlier the adoption of a Wage Earner's Protection Fund should not be dismissed out of hand. Protections given to the Crown also need careful thought. I tend at present to favour abolition of the Crown's preferential status but favour retention of employee preferential status in some form: However, relation to the latter, empirical research will need to be done before firm views can be expressed - particularly in light of the comments made by the Joint Insolvency Committee on the Status of Redundancy Payments Bill.
6. Overseas experience shows that there may be some merit in including as a preferential debt the costs incurred trying to put together a compromise for creditors when, ultimately, the compromise is unsuccessful.<sup>127</sup> Further consideration needs to be given to this issue.

As I have indicated, this article may do no more than skim the surface of an important and far reaching issue. I hope that it will act as a starting point for deeper consideration of the issues by law reform agencies.

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<sup>127</sup> In a discussion paper circulated to members of Committee J of the International Bar Association following the survey to which reference is made in fn 94 *supra*, this type of preference was recommended based on the results of the survey. This class of debt was to extend to debts contracted in "a reconstruction phase" if incurred with the authority of an official "supervisor".

# THE MCCAW LEWIS CHAPMAN ADVOCACY COMPETITION

## ADR: APPROPRIATE DISPUTE RESOLUTION?

BY SANDRA NORTH\*

“The primary human reality is persons in conversation.”<sup>1</sup>

“ADR” is commonly used to refer to alternative dispute resolution. In this paper I argue, from both ideological and practical perspectives, that ADR is also appropriate dispute resolution. I firstly show by use of example how ADR, as opposed to the adversarial system, is a highly appropriate form of dispute resolution. Secondly, I discuss the special case of domestic violence, where ADR may not in fact be appropriate. Finally, the paper concludes that, despite this exception, ADR should also stand for appropriate dispute resolution.

### I. THE APPROPRIATENESS OF ADR

Take a specific scenario.<sup>2</sup> Imagine two men quarrelling in a library. One wants the window open and the other wants it closed. They argue about how much to leave it open: a fraction, halfway, three-quarters of the way. No solution satisfies them both. Enter the librarian. She asks one why he wants the window open: “To get some fresh air.” She asks the other why he wants it closed: “To avoid the draft.” After thinking a minute, she opens wide a window in the next room, bringing in fresh air without a draft.

The successful outcome of this scenario underlines the importance of one of the fundamental advantages of ADR over the adversarial system: the focus on the underlying interests of the parties as opposed to their increasingly polarized positions. It is obvious that the positional approach was getting nowhere.

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<sup>1</sup> Harre (1983) cited in Shotter, *J Conversational Realities: Constructing Life Through Language* (1993) 1.

<sup>2</sup> Adapted slightly from Fisher, R & Ury, *W Getting to Yes* (2ed, 1991) 41.

The scenario also illustrates the second fundamental aspect of ADR: a chance to say what you want, how you want. We may usefully analyze this in a comparison with the adversarial system. In a courtroom setting where the effects of the adversarial system are most prominent, participants cannot say “what they want, how they want.” For example, the recurring phrase “Just answer the question, Mr Brown” is very familiar to those who have observed courtroom actions. Here, counsel are clearly preventing the witness from saying what he or she wants to, how he or she wants. Likewise, the hearsay rule prevents a whole story being told.

In contrast, an ADR system empowers participants by enabling them to say what they want, how they want. As part of my research for the course *Dispute Resolution in 1995*, I observed mediations in Hamilton.<sup>3</sup> One of the participants said that he had chosen mediation over a more adversarial setting in the first instance as “it was not so scary” and so that he could have the chance to say what he wanted.

It is significant that ADR participants can use language as they want, and not how a courtroom setting prescribes. This is especially the case in narrative mediations, where it is fundamental that people be able to tell their own stories. Further, a mediator may be able to assist participants by summarising and reflecting what has been said, so as to ensure that a full understanding has been gained. In contrast, in a courtroom setting, a witness may be declared unfavourable if he or she does not answer questions directly, hesitates, or generally conducts him or herself in a way which is inconsistent with courtroom rules.

Another significant aspect of communication which can be recognised in ADR, as opposed to the adversarial system, is that of non-verbal communication.

Students of communication estimate that in a face to face encounter, as much as 60% to 80% of the communication occurs non-verbally. Relevant factors include voice tone, facial expression, relative placement (eg sitting or standing), distance and “body language.”<sup>4</sup>

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<sup>3</sup> For reasons of confidentiality and an agreement regarding disclosure, I am unable to specify more.

<sup>4</sup> Bell, D “Negotiation in the Workplace: The View from a Political Linguist”, in Firth, A (ed) *The Discourse of Negotiation* (1985) 46.

Mary Parker Follett's observation in the 1920s that effective communication requires "keen perception"<sup>5</sup> is again far more apt to an ADR setting than to a courtroom setting, where counsel are perceptive primarily by being aware of mistakes and weaknesses in the "other side's" presentation, so as to undermine its argument. A perceptive mediator or negotiator, however, who is aware of non-verbal communication, including silences,<sup>6</sup> can ensure that the process is carried out to the maximum benefit of participants.

ADR is therefore highly appropriate as it allows people to be able to say what they want and how they want without strict courtroom rules. It has the added advantage of being able to accommodate various forms of communication, rather than just the spoken word, as in courtroom settings. It therefore offers greater flexibility, and allows the conversations to emerge from the narrative dialogue, thus being driven by the parties themselves rather than by others speaking for them.<sup>7</sup>

A third fundamental aspect of ADR is its ability to allow either party, the mediator or negotiator, and any other invited participant to generate any number of creative options. The ADR system therefore permits originality and flexibility. Legal training in moots where one "side" takes one stance and the other "side" takes the other is highly indicative of the polarisation of two positions, allowing little if not no room for creativity. The doctrine of precedent (*stare decisis*) further shows how constrained and bound the adversarial system may be, as opposed to the originality, creativity and flexibility of results offered by an ADR system.

## II. WHERE ADR MAY BE INAPPROPRIATE

I turn to a situation where ADR is generally thought to be inappropriate. Mayer has warned against using mediation if mediation will increase the power differential.<sup>8</sup> It is widely acknowledged that domestic violence

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<sup>5</sup> Davis, A "In Theory: Interview With Mary Parker Follett" (1992) 3:1 Australian Dispute Resolution Journal 7, 10 (with specific reference to the integrative approach to conflict resolution).

<sup>6</sup> Hoffman, L "A Reflexive Stance for Family Therapy" in McNamee, S & Gergen, K *Therapy as Social Construction* (1992) 7, 18 (with specific reference to the interviewing techniques of the Norwegian postmodern therapists Anderson, Flam and Hald).

<sup>7</sup> Firth, *supra* note 4 at 26 (with specific reference to the manner in which negotiation activity emerges in the work context through the 'talk' itself).

<sup>8</sup> Described in Astor, M & Chinkin, C *Dispute Resolution in Australia* (1992) 109.

occurs in relationships where the male attempts by power and control to dominate the woman.<sup>9</sup> The bringing together of such couples for mediation would serve to further perpetuate the power imbalance which exists in the relationship, rather than to redress it.<sup>10</sup> In Australia, the Chief Justice of the Family Court has stated that mediation will normally be regarded as inappropriate in cases of domestic violence.<sup>11</sup>

There have, however, been recent developments in ADR research in the area of Victim Offender Mediation. In Adelaide, at the Dulwich Centre, White conducts a course of narrative therapy sessions for men who have been violent in relationships.<sup>12</sup> At the end of that course, it *may* then be considered appropriate, if consent of the woman is gained, for mediation to take place. One must stress that this is an area where extreme caution is advised. However, mediation may be appropriate after a successful preparatory course has been completed and strict guidelines are followed.

### III. CONCLUSION

I have shown that, apart from situations involving domestic violence, an ADR system is appropriate in terms of discovering the parties' true interests, allowing them to say what they want to say in their own way, and its inherent ability to generate positive options. Further, ADR is a growing form of dispute resolution. The Privacy Act 1993 incorporates mediation into its scheme. Increasingly law firms advertise alternative dispute resolution services. Waikato University has established a compulsory course in the discipline. These are all indications that ADR is certainly and increasingly appropriate.

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<sup>9</sup> Busch, R & Robertson, N "What's Love Got to Do With It? An Analysis of an Intervention Approach to Domestic Violence" (1993) 1 *Waikato Law Review* 109, 116.

<sup>10</sup> Gagnon, A "Ending Mandatory Divorce Mediation For Battered Women" (1992) 15 *Harvard Women's Law Journal* 272, 273.

<sup>11</sup> Nicholson, A "Introduction to the Family Violence Administrative Direction of the Family Court of Australia (1994) 2 *Australian Feminist Law Journal* 197, 199.

<sup>12</sup> McLean, C "A Conversation About Accountability with Michael White" (1994) Issue 2 & 3 *Dulwich Centre Newsletter* 68. Two key features of White's course are the focus on accountability and the dynamics of power and control.

# SPEAK AND BE NOT SILENT<sup>1</sup>

## RECENT DEVELOPMENTS OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

BY JUDGE DAVID HARVEY<sup>2</sup>

### I. INTRODUCTION

#### 1.1 *The Purpose of the Article*

The purpose of this article is to examine recent developments in the law relating to the privilege against self-incrimination in the context of civil proceedings. The availability of the privilege in this context highlights a conflict within the law: between the interests of an individual not to provide evidence which could be used by the State to assist in his prosecution, and the interests of a private litigant seeking redress in the civil courts. In some jurisdictions the privilege has been upheld upon invocation. In others a solution has been sought to maintain the underlying protection of the privilege by providing immunities against the use of self-incriminatory testimony, and thereby allow the testimony to be given in the civil proceedings. Another tension is thereby created. Should the private litigant obtain redress by using evidence which is denied to the State in its efforts to seek conviction and punishment for criminal behaviour?

This article examines the origins of the privilege and the current approaches toward it taken in Britain, Australia and New Zealand. The article attempts to determine whether there has been a change in how the Courts approach this privilege and seeks to address a number of issues. It addresses whether any benefit can be obtained from seeking a rationale for the privilege in its origins and whether the rationale for the privilege should be sought

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<sup>1</sup> Denethor to Peregrine Took in Tolkien, J.R.R. *The Return of the King*; Volume III of *The Lord of the Rings* Book V Chapter 1.

<sup>2</sup> LLB (Auckland); MJur (Waikato) District Court Judge.

I must extend my gratitude to Professor Margaret Wilson and Dr Bede Harris of the Faculty of Law at Waikato University who supervised and assisted in the development of these issues at thesis stage. Thanks are extended to the Dean and Faculty of Law at Auckland University who made all facilities and valuable time available to me during my sabbatical when this article was written. Special thanks are due to Paul Rishworth for taking the time to read the manuscript and who made many helpful comments which assisted me greatly.



within the context of the present common law system. It discusses whether there should be a change in approach to the privilege and what the starting point for any change should be. Finally, it assesses the relevance of the privilege in the context of our accusatorial and adversarial criminal justice system.

This article concludes, firstly, that seeking a rationale in history for today's relevance of the privilege is interesting but of limited utility, for it attempts to pare away the privilege from the development of other legal processes of which it has been an integral part. Secondly, the privilege against self-incrimination is an integral and vital part of the accusatorial and adversarial system and must be upheld.

### 1.2 *The Privilege Defined*

There are in fact three distinct "rights" or immunities involving silence and elements of the privilege which have developed over a substantial period of time.

1. The "right" to refrain from speaking at all and to speak only voluntarily and not as a result of coercion or torture. This is the basis of the pre-trial right to silence.
2. The so-called "right to silence" at trial, being the immunity from being called as a witness against oneself, developed during the eighteenth century as lawyers became involved in the criminal trial process.
3. The general privilege available to any witness who is compelled to give evidence under oath which may incriminate that witness and lead to the imposition of a penalty, and where failure to answer may attract a penalty which may be imposed by law or by an authority having the power to impose a penalty. This is the privilege against self-incrimination<sup>3</sup> - a privilege reposing in witnesses (other than the accused) who are called to give evidence at a trial or some other hearing or inquiry to refuse to answer questions which may involve self-incrimination.<sup>4</sup>

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3 See *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191, 193; *Triplex Safety Glass Co Ltd. v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395, 403 per du Parq LJ, quoting *Lamb v Munster* (1882) 10 QBD 110, 111 per Field J. See also Bisson J in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461, 485.

4 An accused facing allegation A may be cross-examined about that charge. He can claim the privilege in respect of cross-examination about allegation B for which he is not facing trial.

### 1.3 *The Scope of the Privilege*

The privilege is testimonial and communicative. It may be invoked by a witness who claims that oral or sworn evidence that he or she may be compelled to give is incriminatory. Being asked to produce documents may also justify the invocation of the privilege, although those documents are admissible if proven by other means such as a lawful search. Issues of documentary self-incrimination, as we shall shortly see, generally arise in the context of discovery.

The privilege may be invoked in a non-judicial context where there is an obligation to answer questions, give information or disclose or produce documents pursuant to a statutory requirement. The privilege cannot be invoked to prevent the taking of blood samples or other “real” evidence. In New Zealand and England corporations may invoke the privilege. In the United States it has been held that Fifth Amendment protection against self-incrimination does not extend to corporations, and the High Court of Australia has held that a company cannot invoke the privilege in the context of document production.

## II. THE HISTORICAL BACKGROUND

Many cases turn to the historical background of the privilege in an effort to find a modern or relevant rationale for it, or alternatively to dismiss it as an anachronism.<sup>5</sup> The latter approach deems the Stuart and Tudor excesses of the State against the individual conscience to be irrelevant in the modern context of civil fraud and the necessity for documentary or interrogatory disclosure.

In my opinion, fascinating though the historical study may be, it approaches the privilege in isolation rather than as an ingredient in an entire legal and political system that was undergoing convulsive changes. Furthermore, such an approach ignores the development of a cluster or interwoven matrix of rights, privileges and procedures surrounding the development of the criminal and civil trial. Finally recent scholarship has challenged some basic historical assumptions about the development of the privilege.

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<sup>5</sup> See Lord Templeman in *A.T. & T. Istel Ltd v Tully* [1992] 3 All ER 523, 529.

### 2.1 *The Wigmore-Levy Interpretation*

The “traditional” view of the development of the privilege<sup>6</sup> is that it had its origins in the abuses of the procedure of the Star Chamber and the High Commission. In the late Elizabethan and early Stuart period investigations by these bodies were frequently associated with incursions upon freedom of conscience.

At the same time conflicts and rivalry arose between the prerogative courts, utilising civil law concepts and the common law courts which used their own procedures to thwart prerogative court inquiry by allowing utilisation of a form of the privilege. After the Commonwealth and during the later Stuart period it is claimed that the privilege became an accepted principle of the developing law of evidence.

The traditional view of the privilege is essentially “Whiggish” in that it developed as a reaction to the excesses of the Stuarts and was a part of the development of legal and political rights following the Glorious Revolution. This approach has been the subject of recent challenge.

### 2.2 *The Langbein Moglen Interpretation*<sup>7</sup>

The starting point for the challenge is from M.R.T. McNair<sup>8</sup> who asserts that the privilege had been recognised in Chancery for some time prior to the seventeenth century, and limitations on self-incriminatory questioning were applied by those courts using Roman-canon procedure. Equity procedure was radically different from that of the common law in that it required a defendant to answer a plaintiff’s allegations on oath.

This argument is taken up by Professor Helmholtz who traces the origins of the privilege to the canon procedures of the *ius commune* in Europe which were utilised in England for some considerable period prior to the

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<sup>6</sup> Propounded by Wigmore J, *Evidence (Vol 8) McNaughten* (rev.ed, 1961), para 2250 et seq; McGuire, Mary Hulme *Attack of the Common Lawyers on the Oath ex officio as Administered in the Ecclesiastical Courts in England*; Wittke (ed) *Essays in Honour of Charles McIlwaine* (1936), 199-229 and Levy, L *Origins of the Fifth Amendment* (2nd ed, 1986).

<sup>7</sup> Langbein, “The Historical Origins of the Privilege Against Self-Incrimination at Common Law” [1994] 92 Michigan LR 1047. Moglen, E “Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination” [1994] 92 Michigan LR 1086. Professor Langbein is Chancellor Kent Professor of Law and Legal History at Yale University and Professor Moglen is Associate Professor of Law at Columbia.

<sup>8</sup> “The Early Development of the Privilege Against Self-Incrimination” (1990) 10 Oxford Jnl of Legal Studies 66.

seventeenth century.<sup>9</sup> His assertion is that there was nothing novel about the privilege and its invocation at the time of the abuses of the Star Chamber and the High Commission.

Quite clearly the privilege was not adopted by the common law until after the fall of the Star Chamber, and it was only after changes in criminal procedure after 1688 that the privilege began to be invoked along with the right to have defence witnesses sworn, the right of an accused to have a copy of the indictment and a limited right to counsel.<sup>10</sup>

Professor John Langbein develops the matter further in considering the part that lawyers played in the development of the privilege and silence in the common law criminal trial. He concludes that the privilege developed not in the context of the high politics of the English revolutions but in the rise of the adversary criminal trial procedure at the end of the eighteenth century which was attributable to the involvement of defence lawyers in the trial process.<sup>11</sup> Langbein describes the criminal trial before lawyers became involved as the “accused speaks” procedure. The unrepresented accused, although unable to give evidence on oath, cross-examined prosecution witnesses and had an opportunity to put a case in person. He had no counsel and in the view of the judges needed none.

The involvement of defence counsel meant that the accused had a proxy. Counsel could challenge not only witnesses but the prosecution’s entire case thus providing a foundation for the development of the allocation of proof burdens and standards. The accused literally could sit back and let his proxy speak.

Professor Langbein points out that the privilege was never invoked by an accused at a felony trial or during preliminary examination by Justices of the Peace. The essence of the development of the privilege was that the accused had another to speak on his or her behalf. This became a right in the early nineteenth century.

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<sup>9</sup> See Wyatt Rosenson, R “Origins of the Privilege Against Self-Incrimination: The Role of the European *Ius Commune*” (1990) 65 NYULR 962.

<sup>10</sup> 7 William c 3 s.1 (treason) - there was no “right to counsel” in felony cases but counsel became involved *de facto* over the eighteenth century.

<sup>11</sup> Langbein *supra* note 7.

Professor Eban Moglen examines the development of the privilege in the colonies, taking Professor Langbein's thesis further.<sup>12</sup> Professor Moglen emphasises the significance of the jury trial process and the various rights and procedures associated with it which he calls "the trial rights cluster" and of which the privilege was one. These various rights were incorporated in state and federal constitutions, and the Fifth Amendment was utilised by lawyers as a foundation to exclude incriminating statements obtained pre-trial or at committal.

### 2.3 *The Rationale for the Privilege*

In *Murphy v Waterfront Commission*<sup>13</sup> Goldberg J enunciated the policy behind the privilege. It was founded primarily upon the "traditional" historical view. The privilege reflects many of the fundamental values in our society: the preference for an accusatorial and adversarial criminal justice system over an inquisitorial one; that self-incriminatory statements should not be elicited by inhumane treatment and abuses; that investigating authorities should not resort to the suspect for proof of offending or suspected offending; that there should be a fair state-individual balance that requires the state to leave a person alone until cause is shown to disturb him; that individuals are entitled to privacy and the inviolability of the human personality<sup>14</sup> and that individuals should not be subjected to the "cruel trilemma" of self-incrimination, perjury or contempt.

Reliability is an issue which justifies the privilege. How reliable is a statement elicited by threats, inducements or violence? Alternatively, a suspect may have an incentive to provide authorities with misleading information which is consistent with innocence. False statements or confessions may be made to avoid embarrassment or as a result of moral shame which is nevertheless not legal guilt. Interrogative susceptibility<sup>15</sup> and internal psychological characteristics may result in false confessions.<sup>16</sup>

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<sup>12</sup> *Supra* note 7.

<sup>13</sup> 378 US 52 (1964).

<sup>14</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346 echoed this and pointed out that balanced against this is the wider community interest in information which apprehends and identifies criminals.

<sup>15</sup> The willingness of a suspect to accept propositions put during interrogation. See Gudjonsson "Suggestibility and Compliance among Alleged False Confessors and Resisters in Criminal Trials" (1991) 31 *Med Sci Law* 151.

<sup>16</sup> Research establishes that false confessions are not confined to the mentally ill, illiterate or disabled. See Brandon & Davies *Wrongful Imprisonment - Mistaken Convictions and Their Consequences* (1972); Gudjonsson & MacKeith "A Proven Case of False Confession: Psychological Aspects of the Coerced-Compliant Type" (1990) 30 *Med Sci Law* 3.

In New Zealand, Maori suspects may be susceptible to pressures to make a statement as a result of confusion or a lack of awareness of rights. Cultural shame (whakamaa) may compel a young Maori to seek a quick resolution of an awkward situation.<sup>17</sup>

The privilege also has a basis in the protection of human rights and it is recognised in international conventions.<sup>18</sup> Although the privilege is not incorporated into the European Convention on Human Rights, the right to a fair and public hearing embraces a substantive right to remain silent and to not contribute to incriminating oneself.<sup>19</sup>

All of these reasons may be reduced to the following proposition: that the rationale and the policy for the privilege lies in the fundamental values that underpin the adversarial and accusatorial trial procedure which draws a line between the State and the individual over which the State shall not cross. Associated with that is the aspect of privacy, a zone within which the State is prohibited from venturing. The privilege gives flesh and reality to these values, and I discuss this in greater detail later.

### III. CONFRONTING THE PRIVILEGE

I shall now move to examine the difficulties posed by the privilege and examine the way that those difficulties have been approached in England, Australia and New Zealand. The privilege does not arise automatically. It must be invoked by a witness; however, a court may warn a witness of the privilege where it appears there may be a danger of self-incrimination.<sup>20</sup> The privilege is not available for the asking. Appropriate grounds to invoke must be established and it is in the context of whether a witness may invoke the privilege that the cases have been decided.

#### 3.1 *Disclosures in Civil Proceedings*

The privilege is frequently invoked when a witness testifies in civil proceedings. The common law scope of the privilege protects witnesses in civil proceedings. Section 4 of the Evidence Act 1908 expressly

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<sup>17</sup> Jackson, Moana *The Maori and the Criminal Justice System: A New Perspective: He Whaipanga Hou* (1988 Dept of Justice, Wellington) 134.

<sup>18</sup> The International Covenant on Civil and Political Rights provides that in the determination of any criminal charge a person shall not be compelled to testify against himself or confess guilt.

<sup>19</sup> *Funke v France* (1993) 16 EHRR 297.

<sup>20</sup> *R v Goodyear-Smith* unreported, High Court, Auckland, 26 July 1993 (T332/92), Anderson J.

preserves the privilege for the testifying *parties* to a civil action. The privilege provides protection against testimonial incrimination<sup>21</sup> and extends to the production of incriminating documents.<sup>22</sup> As yet the New Zealand Courts have not decided whether or not the privilege attaches to the contents of the document as well as to its production.

In the United States the testimonial production requirement is essential to a valid claim of self-incrimination. The act of producing evidence has communicative aspects of its own aside from the contents of the documents.<sup>23</sup> In New Zealand it would appear that self-incrimination invocation is upheld regardless of whether or not testimonial assertions would be involved in the act of production. In limited circumstances the privilege will extend to the compelled production of objects.<sup>24</sup> The testimonial or communicative requirement for the availability of the privilege means that it does not extend to fingerprinting or blood and tissue samples.<sup>25</sup>

### 3.2 *Disclosures at Inquiries*

The privilege against self-incrimination may be invoked by a witness before a Commission of Inquiry. Pursuant to the provisions of the Commissions of Inquiry Act 1908, the Commission may require persons to produce documents or information extracted therefrom.<sup>26</sup> It may summon witnesses.<sup>27</sup> It is an offence for a witness to refuse to answer any question that he or she is lawfully required to answer<sup>28</sup> and where a witness refuses to give evidence without offering any just excuse certain powers may be exercised by a Commissioner who is a retired High Court Judge.<sup>29</sup> It is within the areas of "lawful requirement to answer" and "just excuse" that the privilege against self-incrimination may be invoked before a Commission of Inquiry.

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<sup>21</sup> Mathieson, (ed) *Cross on Evidence* (4th NZ Ed),(1989) 242.

<sup>22</sup> *Taranaki Co-Op Dairy Co Ltd v Rowe* [1970] NZLR 895.

<sup>23</sup> *Fisher v United States* 425 US 391 (1976).

<sup>24</sup> *New Zealand Apple and Pear Marketing Board v Master & Son Ltd.* [1986] 1 NZLR 191 where it was held that the act of producing an object may have a sufficiently testimonial aspect to enable the privilege to be invoked.

<sup>25</sup> *King v McLellan* [1974] VR 773; *Schmerber v California* 384 US 757 (1966).

<sup>26</sup> Section 4C.

<sup>27</sup> Section 4D.

<sup>28</sup> Section 9.

<sup>29</sup> Section 13A.

### 3.3 *Tensions Between Civil Proceedings and Criminal Prosecution*

The existence of the privilege creates a tension between the civil and criminal procedures. A witness or a party may invoke the privilege thus eliminating what may be crucial evidence from the proceedings to the disadvantage of a litigant. In addition, the evidence is not available to convict a wrongdoer in criminal proceedings although its existence may be made apparent.

The privilege has been described by Lord Templeman as “an archaic and unjustifiable survival from the past”.<sup>30</sup> His Lordship considered that the privilege could be justified on only two grounds: that it discouraged the ill-treatment of suspects and the production of dubious confessions.<sup>31</sup> The privilege should not be available to prevent disclosure of documents in the possession of a witness where the documents speak for themselves, thus suggesting that documents may fall into the category of “real” evidence.<sup>32</sup>

This highlights the tension that has arisen as a result of the development of Anton Piller orders and Mareva Injunctions. The privilege may be invoked and thereby prevent discovery and presentation of all available evidence germane to the civil proceeding. The invocation of the privilege in civil proceedings places innocent parties at a disadvantage in the interests of protecting the potential criminal.

The privilege can be circumvented if proper safeguards or immunities are established. This has been done in the context of the Fifth Amendment in the United States<sup>33</sup> and has been attempted in New Zealand<sup>34</sup> and to a limited degree in England.<sup>35</sup> An attempt by the Court of Appeal of New South Wales<sup>36</sup> was disapproved by the High Court of Australia.<sup>37</sup>

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<sup>30</sup> *A.T. & T. Istel Ltd v Tully* [1992] 3 All ER 523, 529.

<sup>31</sup> *Ibid.*

<sup>32</sup> It remains for this issue to be fully addressed. Given the House of Lords approach to the privilege, legislative intervention will probably be required to remove documents which speak for themselves from the protection of the privilege.

<sup>33</sup> *Murphy v Waterfront Commission* 378 US 52 (1964); *Kastigar v US* 406 US 441 (1972); *Ullmann v US* 350 US 422 (1956); *Counselman v Hitchcock* 142 US 547.

<sup>34</sup> *Busby v Thorn EMI Video Programmes Ltd* supra note 3.

<sup>35</sup> *Istel v Tully* supra note 30.

<sup>36</sup> *Reid v Howard* (1993) 31 NSWLR 298.

<sup>37</sup> *Reid v Howard* (1995) 184 CLR 1.



There is a policy issue which arises: should the resolution of a dispute between private individuals take precedence over criminal proceedings which are instituted for the protection of the wider community? By allowing a private litigant relief by the provision of immunities, self-incriminatory evidence may be available for civil proceedings, but it cannot be used for a criminal prosecution. The alternative scenario is that absent the availability of immunities, and given the existence of the privilege, the evidence is unavailable for either civil or criminal proceedings. The casualties are truth and the perception that justice has been done.

The next section examines how the Courts have attempted to maintain the protection that the privilege provides for witnesses whilst enabling incriminatory testimony to be given.

#### IV. VARYING APPROACHES TO THE PRIVILEGE

##### 4.1 *The English Approach*

In England the general judicial attitude is that any changes to the privilege should be made by Parliament. Another feature that complicates the English approach in developing judge-made immunities is that the Courts in their civil jurisdiction are unable to bind those in their criminal jurisdiction. A solution was recently reached but it is neither satisfactory nor reliable.<sup>38</sup>

The starting point in any discussion on recent English developments is *Rank Film Distributors Ltd v Video Information Centre*.<sup>39</sup>

##### 4.1.1 *Rank Film Distributors Ltd v Video Information Centre*

Video Information Centre was alleged to be involved in the wholesale “pirate” copying of films the copyright of which was held by Rank. An Anton Piller Order was obtained by Rank requiring Video Information Centre to disclose the particulars of the suppliers of the tapes and the customers who purchased them. It was argued by Video Information that by such disclosure they may incriminate themselves. The likely criminal offences which they faced were breaches of the Copyright Act, conspiracy to commit a breach of the Copyright Act and conspiracy to defraud (a common law offence).

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<sup>38</sup> *Istel v Tully* supra note 30.

<sup>39</sup> [1981] 2 All ER 76.

In holding that the privilege could be invoked Lord Wilberforce observed that the potential offences under the Copyright Act faced by the respondents covered almost precisely the same ground as the basis for civil liability. He was reluctant (and used that language) to hold that in civil proceedings for infringement based on specified acts the defendants could claim privilege against discovery on the grounds that the same acts established a possible liability for a petty offence. The exposure of the respondents to a charge of conspiracy to defraud caused him concern. Much heavier penalties attached and “unless some escape can be devised from this conclusion the privilege must inevitably attach.”<sup>40</sup>

Lord Wilberforce pointed to the paradox and emphasised the tension that the privilege created: the more criminal a party’s activity may appear, the less effective the civil remedy that may be granted because of the availability of the privilege.<sup>41</sup>

He could not accept that a civil court could bind a criminal one as to the evidence that may be admissible in that Court. Although a discretion resided in the criminal court to exclude evidence that was unfairly prejudicial, a discretion was not as potent a protection as the common law privilege which the defendant could invoke.<sup>42</sup>

He pointed out that there was a statutory immunity provided by s 31 of the Theft Act 1968. A person is required by that Act to answer questions in proceedings for the recovery of property, but no answers are admissible in proceedings for an *offence* under the Act. However, in this case the Theft Act did not apply because infringement of copyright is not theft.

The indication by the House of Lords that it cannot compel a criminal court to exclude self-incriminatory evidence obtained as a result of civil discovery or civil proceedings has created difficulties for the English courts in subsequent decisions<sup>43</sup> although, as will be demonstrated, the *Rank* approach has not been followed in New Zealand.<sup>44</sup> Immediately after *Rank* the Westminster Parliament legislated to provide that defendants in

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<sup>40</sup> Ibid, 81.

<sup>41</sup> Ibid, 79.

<sup>42</sup> Ibid, 81.

<sup>43</sup> For example see *Khan v Khan* [1982] 2 All ER 60; *Sociedade Nacional de Combustiveis de Angola & Ors v Lundqvist & Ors* [1990] 3 All ER 283, especially the comments of Browne-Wilkinson VC at 302; *Tate Access Floors Inc v Boswell* [1991] Ch 512.

<sup>44</sup> *Busby v Thorn EMI Video Programmes Ltd* supra note 3.

intellectual property actions could not resist production of documents on the grounds of self-incrimination, but the documents so produced cannot be used in any subsequent proceedings.<sup>45</sup> The position has now been reached where the right in England to resist discovery on the ground of self-incrimination only now applies where there is a serious risk of prosecution for conspiracy.<sup>46</sup>

However, the decision in *Smith v Director of Serious Fraud Office*<sup>47</sup> set the environment within which the House of Lords could be more creative in its approach to the privilege.

#### 4.1.2 *Redefinition and Subset Analysis*

The issue in *Smith* was whether a person charged with fraud by the Police could be compelled to answer questions put pursuant to the powers of the Serious Fraud Office in a concurrent investigation arising out of the same circumstances. The House of Lords upheld his contention although it pointed out that while he could not be questioned about the offence with which he had been charged, he could still be questioned about other suspected offences.

The significance of *Smith* lies in Lord Mustill's redefinition of the right to silence and the privilege against self-incrimination. He did not consider that the "right to silence" embraced any single right, but was of the view that it was a convenient label for a "disparate group of immunities which differ in nature, origin, incidence and importance".<sup>48</sup>

Lord Mustill identified six immunities as follows:

1. A general immunity, possessed by all persons and bodies from being compelled on pain of punishment to answer questions posed by other persons or bodies.
2. A general immunity, possessed by all persons and bodies from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

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<sup>45</sup> Section 72 Supreme Court Act 1981.

<sup>46</sup> *Tate Access Floors Inc v Boswell* supra note 43.

<sup>47</sup> [1992] 2 All ER 456.

<sup>48</sup> *Ibid*, 463.

3. A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
4. A specific immunity possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
5. A specific immunity possessed by persons who have been charged with a criminal offence from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
6. A specific immunity (at least in certain circumstances which it is unnecessary to explore), from having adverse comment made on any failure
  - (a) to answer questions before the trial; or
  - (b) to give evidence at the trial.<sup>49</sup>

In considering whether Parliament had intended to abrogate the right to silence or the privilege Lord Mustill claimed that the starting point for an inquiry must be to identify the variety of the right being invoked and to ascertain the reasons for believing whether the right in question ought at all costs to be maintained. If one is to adopt this approach, the right is broken down into a number of subsets. One then examines the subset, determines the motive for the existence of the subset and then determines whether or not the conditions exist that justify maintaining the subset or abrogating it.

In dividing the right to silence and the privilege against self-incrimination into subsets, Lord Mustill is saying that personal liberty comprises a number of subsets of activity which may be permitted. To carry the analogy with personal liberty through, in considering the justifications for the right to silence as he later does in his speech, it is as if Lord Mustill were saying that the protection of each subset of personal liberty has to be considered on its own merit and quite apart from any notion of a fundamental right or a fundamental freedom. By following this reasoning it is quite easy to conclude that a subset of a particular right or liberty perhaps is no longer worth protecting or upholding.

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<sup>49</sup> Ibid, 463-4. The last immunity is no longer as absolute in England given the provisions of the Criminal Justice and Public Order Act 1994 where judges may comment on the silence of the accused in certain circumstances and may direct the jury to draw such inferences as appear proper from that silence.

#### 4.1.3 *Istel v Tully*

Subset analysis of the privilege was applied by Lord Templeman in *Istel v Tully*.<sup>50</sup> He considered Lord Mustill's six immunities and looked at each individual justification for each individual immunity. In *Smith* Lord Mustill had referred to the desire to minimise the risk that an accused would be convicted on the strength of an untrue confession. Lord Templeman accepted this as an important consideration and went on to deliver a stinging attack on the invocation of the privilege in civil proceedings.<sup>51</sup> Lords Lowry and Griffiths, like Lord Templeman, were critical of the invocation of the privilege in civil proceedings.

The facts in *Istel and Tully* were unremarkable, but the approach of the House of Lords was, in the light of *Rank*, innovative but expedient. The case was not significant for the enunciation of any principle or the overturning of *Rank*, but a utilisation of certain facts which will not necessarily be constant in the future but which indicated that in certain circumstances, English courts could be willing to consider abrogating the privilege where there is a protection provided.

The case involved issues of fraudulent management of a company purchased by Istels from Tully. Istels obtained a Mareva injunction requiring Tully to disclose and document certain dealings which was met by the invocation of the privilege against self-incrimination. In the Court of appeal Neil LJ was not prepared to create a judge-made substitution for the privilege, considering that it was a matter for Parliament. He expressed the opinion that the House of Lords may feel able to take such a step.

Before the House of Lords it was revealed that the police had been investigating Tully's activities and had accumulated a considerable amount of evidence. A letter from the Crown Prosecution service was made available claiming that it had enough evidence to proceed absent any incriminating evidence from Tully. There was no jeopardy faced by Tully in making the disclosures required, and the House held that he had to comply with the Mareva Injunction.

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<sup>50</sup> Supra note 30.

<sup>51</sup> See *Smith* supra note 47 at para. 2.1.3. Lord Templeman was a member of the Court of Appeal in *Rank* and expressed his concern for the privilege even then when he said that the plaintiff was not necessarily defeated and a defendant not necessarily assisted by relying on the privilege in that a civil court could draw conclusions where a criminal court may not *Rank*. [1980] 2 All ER 273, 292.

The Court of Appeal has since cast doubt upon the *Istel v Tully* approach. In *United Norwest Co-operatives Ltd v Johnstone*<sup>52</sup> it was held that the defence of self-incrimination could still be raised where there was no prosecution taking place and even where assurances had been given by prosecuting authorities that the material disclosed in the course of civil proceedings would not be used in any prosecution. It was held that the ability of a defendant to invoke self-incrimination did not depend upon the absence of assurances by the prosecuting authorities that any material disclosed in the course of civil proceedings would not be used in a prosecution. If the civil proceedings have the effect of charging a defendant with a criminal offence then that is sufficient to enable the privilege to be invoked and thus the defendant could refuse disclosure.<sup>53</sup>

The position of the privilege in the context of Anton Piller Orders has been strengthened in England. Where such an order would expose a defendant to a real risk of criminal prosecution for conspiracy, it could only be made and served if it contained a proviso which adequately protected the defendant's right to claim the privilege. The defendant would have to be informed in clear language of the right to invoke the privilege and he would have to expressly decline to invoke it.<sup>54</sup>

#### 4.1.4 *Conclusions on the English Approach*

It is unlikely that a judicial solution to the tensions raised by the privilege will be reached in England. Even in *Istel v Tully*, where a limited abrogation was allowed, the Law Lords reiterated that changes to the law regarding the privilege were the province of Parliament but they indicated that where an immunity could be provided the privilege need not necessarily be upheld. Certainly the legislative solution has been provided and legislative policy is to preserve the effect of the privilege by providing a use immunity. However, the English legislative approach has been piecemeal, reactive and expedient. The privilege is perceived as a rule requiring modification rather than a significant ingredient of an overall legal process. The potential provided by *Smith* for the approach to the invocation of the privilege does not bode well for the accusatorial and adversarial criminal justice system.

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<sup>52</sup> *The Times* 24 February 1994.

<sup>53</sup> Clayton, Nigel A, "Problems of Self-Incrimination in Seeking to Obtain Banking Records" [1996] 3 JIBL 115, 122.

<sup>54</sup> *IBM v Prime Data International Ltd* [1994] 4 All ER 748.

## 4.2 The Australian Approach

The Australian courts have confronted the privilege in a number of areas including Commissions of Inquiry<sup>55</sup> and in the area of administrative inquiry.<sup>56</sup> In terms of interpretation of the nature of the privilege, the Australian Courts have put an emphasis upon the privilege that differs from the English approach. As a result of this approach, the High Court of Australia has limited the extent of the invocation of the privilege.

### 4.2.1 *EPA v Caltex and Corporate Invocation*

It has long been the view in common law countries that the privilege can be invoked by corporations.<sup>57</sup> In the United States a different view has been developed regarding corporate invocation of the privilege contained in the Fifth Amendment. The privilege is available to natural persons and not corporations.<sup>58</sup> A corporate officer may not withhold testimony or documents on the ground that the corporation may be incriminated.<sup>59</sup> The rationale for the American approach is that the corporation is created by the State of incorporation for public benefit. There is reserved to the State a visitatorial power and oversight that is inconsistent with the privilege.<sup>60</sup>

In *Environmental Protection Authority v Caltex Refining Co Pty Ltd*<sup>61</sup> the oil company faced prosecution for offences against environmental legislation. The prosecuting authority sought a notice requiring production of documents which was resisted by Caltex on the basis that the privilege

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<sup>55</sup> *Hammond v Commonwealth* (1982) 152 CLR 188; *Sorby v Commonwealth* (1983) 152 CLR 281.

<sup>56</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Hamilton v Oades* (1989) 166 CLR 486; *Mortimer v Brown* (1970) 122 CLR 493; *Stergis v Commissioner of Taxation (Cth)* (1989) 89 ATC 4442; *Donovan v Commissioner of Taxation* (1992) 34 FCR 355; *De Vonk v Deputy Commissioner of Taxation* (1995) 82 A Crim R 150; Appeal Unreported. Federal Court of Australia Fed No. 994/95; 4/12/95.

<sup>57</sup> *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 All ER 613; *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation* [1978] AC 547; *Webster v Solloway Mills & Co* [1931] 1 DLR 831; *Klein v Bell* [1955] 2 DLR 513; *NZ Apple and Pear Marketing Board v Master & Son Ltd.* [1986] 1 NZLR 191.

<sup>58</sup> *Hale v Henkel* 201 US 43 (1906); *Wilson v US* 221 US 361 (1911); *Essgee Co v US* 262 US 151 (1923); *Campbell Painting Corp v Reid* 392 US 286,288 (1968).

<sup>59</sup> He may refuse to give oral testimony if to do so would result in personal incrimination. *Shapiro v US* 335 US 1, 27 (1944).

<sup>60</sup> *US v White* 322 US 694 (1944).

<sup>61</sup> (1994) 118 ALR 392 - referred to hereafter as *EPA v Caltex*.

against self-incrimination could be invoked. The High Court of Australia rejected that view and decided that the privilege was not available to corporations and could not be invoked to avoid production of documents where such is required either under the rules of the court or a statutory power.

The Court considered a number of matters. Mason CJ and Toohey J were of the view that the privilege was essentially a *human* right protected by *inter alia* an international treaty.<sup>62</sup> Brennan J examined the nature of a corporation and its artificiality as a person to whom the privilege may attach.

The Court also considered the relevant strength of a corporation vis-a-vis the State than the individual. Companies enjoyed resources and advantages many of which stemmed from incorporation which the natural person did not. The complexity of corporate structures and arrangements made corporate crime and complex fraud one of the most difficult areas for the State to regulate effectively. Thus the corporation occupied a different position in terms of the State/individual balance which the privilege protected.

This line of approach seems to assume that all companies are large organisations possessed of considerable resources, ignoring the rationale which found favour before the New South Wales Court of Criminal Appeal and the New Zealand Court of Appeal regarding the proliferation of small companies operating as the alter ego of natural persons.

#### 4.2.2 *Issues Arising from EPA v Caltex*

*EPA v Caltex* is not the last word on the subject of corporate self-incrimination. It is significant to note that the facts of the case were limited to the production of documents and not to the issue of testimonial incrimination. This issue will have to be addressed, although the High Court has made itself clear as to the general principle. The full scope of the decision is still undefined. Whether unions or partnerships can claim the privilege has yet to be decided.<sup>63</sup>

Use and derivative use will also have to be addressed. There is no suggestion in the majority decision that the use of incriminating evidence obtained from the corporation is limited to the prosecution of the

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<sup>62</sup> Article 14(3)(g) of the International Covenant on Civil and Political Rights.

<sup>63</sup> They may not do so in the United States.



corporation itself. A company may be compelled to produce incriminating documents which could be used to bring proceedings against the directors or managers who are required to produce them on behalf of the corporation.<sup>64</sup>

#### 4.2.3 *Reid v Howard*<sup>65</sup>

Reid was an accountant who had admitted to the Police that he misappropriated funds. His business papers were seized pursuant to a search warrant. Howard commenced proceedings in the Equity Division to protect racing rights. A Mareva Injunction issued with an order, subject to invocation of the privilege against self-incrimination, that Reid disclose his assets. Reid invoked the privilege. Criminal proceedings against him had not been commenced. At first instance his claim was rejected. He had confessed to the Police and was in no greater jeopardy if he made the affidavit.

The New South Wales Court of Appeal restated the law regarding the privilege. It underscored the fact that the privilege covered not only direct but indirect use<sup>66</sup> of material by prosecuting authorities. Furthermore, a trustee or other fiduciary could invoke the privilege in answer to compulsory discovery in civil proceedings brought by a beneficiary. This view was upheld by the High Court of Australia.

Most significantly, however, it held that the court had powers to mould its orders so as to effectively enforce a party's civil rights whilst protecting a witness against the risk of self-incrimination. The exercise of such jurisdiction did not depend upon the agreement of prosecuting authorities because such orders were enforceable by proceedings for contempt of court.

The court considered the approach of the New Zealand Court of Appeal in *Busby*<sup>67</sup> but held that it was not available. The restriction on admissibility would not protect against the indirect use of the information.

The High Court concluded that the orders that were made by the Court of Appeal were vitiated by an error of law. Deane J held that the privilege reflects a cardinal principle which lies at the heart of the administration of

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<sup>64</sup> Under a number of Australian statutes managers and directors are automatically deemed guilty of offences committed by the company *virtute officio*.

<sup>65</sup> *Supra* notes 36 and 37.

<sup>66</sup> This is referred to in the United States as use or derivative use.

<sup>67</sup> [1984] 1 NZLR 461. For discussion see *infra* Section 4.3.1.

the criminal law. He observed that it can be modified by the legislature. Otherwise it is unqualified and in particular should not be modified by judicially devised exceptions or qualifications. Unless the invocation of the privilege is unsustainable, it cannot be disregarded or overridden by the courts absent statutory warrant. The majority<sup>68</sup> of the High Court said:

it is inimical to the administration of justice for a civil court to compel self-incriminatory disclosures, while fashioning orders to prevent the use of the information thus obtained in a court vested with criminal jurisdiction with respect to the matters disclosed. Nor is justice served by the ad hoc modification or abrogation of a right of general application particularly not one as fundamental and as important as the privilege against self-incrimination.<sup>69</sup>

#### 4.2.4 *Conclusions on the Australian Approach*

*EPA v Caltex* is a departure from what has been a relatively rigorous approach to the privilege by the Australian Courts. By casting the privilege as a human right, and by reference to International Convention, the first step to limit the invocation of the privilege to natural persons has been taken. The High Court was very careful not to address the issue of the abrogation of the privilege, but was considering only the first step - whether or not it could be invoked.

In Australia the privilege has been the subject of legislative abrogation, and the Courts have been careful to examine the abrogating statute to ensure that abrogation or modification is by express legislative stipulation or necessary implication. As a result of the decision in *Reid v Howard* it is clear that any judicially created protection that is co-extensive with the protections afforded by the privilege will not be countenanced, notwithstanding such approach may be pragmatic or expeditious. The issue of abrogation is clearly a legislative one.

#### 4.3 *The New Zealand Approach*

The New Zealand Court of Appeal departed from the propositions advanced in *Rank* in a remarkably similar case. Indeed, the approach of the Court of Appeal has been to treat the privilege as an evidential rule akin to the rule against hearsay, and therefore capable of judicial modification.

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<sup>68</sup> Toohey, Gaudron, McHugh & Gummow JJ.

<sup>69</sup> *Supra* note 37 at 17.

#### 4.3.1 *Busby v Thorn EMI Programmes Ltd*

The approach that the Court of Appeal adopted in *Busby* is a solution that is not entirely satisfactory. It was held that information should be obtainable under Anton Piller orders, but if a defendant was required to provide information or documents which might include evidence of criminal offences, it should be on condition that they were not used for prosecuting him. A ruling was made that the documents and answers properly compelled under the Anton Piller order would not be admissible in criminal proceedings for an offence relating to intellectual property or other subject matter of the action in which the order had been made. The plaintiff was required to undertake that it would neither directly nor indirectly use:

- i) any document which was the subject of an order; and
- ii) any information obtained from such document; and
- iii) any answers by the defendant under the order for any criminal prosecution of the defendant, nor make the same available to the Police for any purpose.

The approach is custom-made for New Zealand conditions and, like the result in *Istel v Tully*, has a flavour of expediency about it without addressing real issues of principle. The New Zealand conditions referred to were:

1. Unified administration of civil and criminal trials and no separate divisions of the Court of Appeal
2. Wider judicial control over criminal trials in New Zealand. The inherent jurisdiction of the Court prevents abuse of process by the avoidance of unfairness
3. The field of evidence is one which the Court of Appeal has been ready to adapt to meet New Zealand conditions.

These issues persuaded the majority to supply a remedy rather than leave the matter to the legislature. Cooke J said that the Court could hold as a general rule regarding matter of criminal evidence that the documents would not be admissible in criminal proceedings for intellectual property offences. If there was self-incrimination for an offence not connected with intellectual property, the ordinary privilege could be claimed. Thus abrogation of the privilege was limited to the matters before the Court.

Certain comments give cause for concern. One of the arguments advanced for the appellants was that the Chief Justice at first instance had applied the wrong test in asking whether there was a mere faint possibility of a prosecution or a realistic chance of one. Cooke J held that he might have been entitled to ignore the possibility of a summary prosecution under the provisions of the (then) Copyright Act not because the offences on first conviction were comparatively trivial but:

[B]ecause the smallness of the penalties compared with the potential profits, and the fact that prosecutions provide in essence many ancillary remedies for copyrighters, mean that the possibility of such prosecutions could reasonably be dismissed in the present cases as too remote. So could the possibility of some charge of theft.<sup>70</sup>

This can be taken to mean that the nature of a possible prosecution or the nature of the penalties are matters which should be taken into account in considering whether or not the privilege should be invoked. The fact of the matter is that the privilege against self-incrimination goes not to the quantum of the penalty but to the fact that the deponent faces the jeopardy that a criminal prosecution may be brought, which will result in a penalty be it large or small. The inference can be drawn, as a result of Cooke J's comment in *Busby*, that the *de minimis* nature of the penalty should result in an abrogation of the privilege.

In making these observations Cooke J left some doors open. There was no threat to the public interest. The case involved private property rights. The law enforcement agencies of the State had no interest in prosecution and the public peace and protection of citizens from violence was not involved.

Somers J considered that judicial modification in the field of evidence did not apply to the privilege which he described as a fundamental cornerstone of the law. It went beyond mere issues of evidence. This is recognised by the High Court of Australia in *EPA v Caltex* when it classifies the privilege as a basic human right, citing international conventions in support. Somers J observed that the legislature had, in the past, been careful when abrogating the privilege, to consider whether or not safeguards should be provided for the witness. Judicial abrogation could not, with a broad formula, cater for the variety of individual situations which might arise.

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<sup>70</sup> [1984] 1 NZLR 461, 470.

Neither solution is entirely satisfactory. Legislative abrogation may or may not provide safeguards and immunities.<sup>71</sup>

#### 4.3.2 *Natural Gas v Grant*

The apparent shortcomings in the *Busby* approach were encountered by Barker ACJ in *Natural Gas Corporation Holdings Ltd v Grant*.<sup>72</sup> The first defendant had been arrested and charged with criminal offences which were concerned with matters which were the subject of the plaintiff's proceedings. The plaintiff had issued a Mareva injunction together with interrogatories. The defendant sought the protection of the privilege.

Barker ACJ said that he was bound to follow the general thrust of the decision in *Busby* and hold that with certain safeguards the defendant had to make the affidavit. He distinguished *Busby* on the basis that in that case there was no prosecution in contemplation. He referred to *Istel v Tully* observing that it was held that there was no reason for the defendant in civil proceedings to rely on the privilege where his or her own protection was adequately secured by other means. As an added safeguard to the defendant Barker ACJ held that he needed some intimation from the Crown Solicitor or Solicitor-General along the lines of the letter given by the Crown Prosecution service in *Istel v Tully*. Once such an intimation was to hand the defendants were required to comply with the order in a very short time.

In *Busby* the majority felt that use or derivative use issues were adequately protected by the Court's supervisory jurisdiction or by the making of undertakings. Barker ACJ seemed to move away from that very liberal approach towards a more conventional view of privilege abrogation. Although he adopted the method advanced in *Istel v Tully* he did not adopt the "litmus test" approach of Lord Templeman in using Lord Mustill's disparate group of immunities to see whether the privilege applied or not.

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<sup>71</sup> Consider the use immunities provided by *inter alia* s106 Commerce Act 1986; s22 Gas Act 1992; s116 Electricity Act 1992; s248 Electoral Act 1993; the very limited use immunity provided by s27 Serious Fraud Office Act 1990 and the absolute abrogation with no immunities or protection in the English legislation governing Securities and Department of Trade and Industry investigations demonstrated in *Re Arrows (No 4)* [1993] 3 All ER 861; *Hamilton v Naviede* [1995] 2 AC 75; *Re Jeffrey S. Levitt Ltd* [1992] 2 All ER 509; *R v Kansal* [1992] 3 All ER 844; *Re London United Investments plc* [1992] 2 All ER 841.

<sup>72</sup> [1994] 2 NZLR 252.

#### 4.3.3 *Radisich v O'Neil*

In *Radisich v O'Neil*<sup>73</sup> the privilege was raised in the context of the Matrimonial Property Rules 1988. An order for discovery had been made in the Family Court. One of the reasons advanced for resisting discovery was that disclosure of the appellant's financial affairs would breach the privilege. It was argued that he would be liable to the risk of prosecution by tax authorities and the imposition of substantial penalties.

Thorp J held that the privilege could not be invoked. The Inland Revenue Act required the compulsory disclosure of such information. In such a case it was conceded by counsel that the claim for the privilege could not stand.

In the course of argument, the respondent indicated that she would be prepared to give non-disclosure undertakings as were approved in *Busby* and in *Grant*. The Judge observed that these were not guarantees of confidentiality but would reduce any disadvantage from discovery to the minimum.

Thorp J indicated clearly that his decision did not purport to establish any broad principle about or limit on the right to claim the privilege in Family Court proceedings. That was a matter of such broad significance that it were better resolved by legislation rather than by curial determination. Although Counsel advanced the argument that the necessity for disclosure in matrimonial property proceedings superseded the normal rules relating to the privilege, Thorp J did not decide that point and indeed indicated that he would have had to give the matter further consideration. Yet Thorp J did not, as has elsewhere been suggested<sup>74</sup>, step away from the approach that was adopted in *Busby* or *Grant* other than observe that the cases showed a widespread judicial belief that the privilege in civil proceedings is profoundly unsatisfactory and is as likely to prevent as to promote injustice.

#### 4.3.4 *The Winebox Inquiry*

The privilege was advanced in the course of the hearings of the Commission of Inquiry into Certain Matters Relating to Taxation (the

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<sup>73</sup> (1995) 13 FRNZ 170.

<sup>74</sup> Mahoney, R "The Privilege Against Self-Incrimination" [1996] NZLR 69.

Winebox Inquiry). Objection was taken by certain witnesses to answering questions. By doing so they exposed themselves to liability for prosecution in the Cook Islands. Indeed, in certain circumstances, the giving of the evidence would amount to an offence under Cook Islands law. The issue was whether the privilege could be invoked regarding evidence given in New Zealand when it may incriminate the witness for offences in another jurisdiction.

#### 4.3.4.1 *The Commission's Approach*

The Commissioner delivered his decision on 27 September 1995. He held that there were several reasons why the common law privilege did not arise. In summary:

1. It had to be established that there are penal consequences in the foreign jurisdiction. That could only be determined by resolving the conflict between New Zealand and Cook Islands law with respect to answering questions in New Zealand.
2. The privilege normally arises where conduct has occurred and the right to be silent about that alleged conduct arises. It does not normally arise where the act of answering is said to be an offence.
3. If the first two approaches were incorrect, the balance of authority was against the privilege applying with respect to foreign law. One authority<sup>75</sup> held that the privilege did apply to penal consequences in a foreign jurisdiction; two held otherwise.<sup>76</sup>

On this issue the Commissioner concluded that there is no and never has been a privilege known to New Zealand law of refusal to give evidence on the grounds that to give evidence in New Zealand would be contrary to the provisions of foreign state law. The privilege against self-incrimination was limited to incrimination in respect of offences which had already been committed by the witness in New Zealand. The privilege had to be claimed in respect of acts already done, not in respect of something which the witness was currently required to do, namely to give evidence in New Zealand.

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<sup>75</sup> *US v McRae* (1868) 3 Ch App 79.

<sup>76</sup> *King of the Two Sicilies v Willcox* (1851) 1 SIM(NS) 301; 61 ER 116; *In re Atherton* [1912] 2 KB 251. The conflict of authority led to the passage in England of the Civil Evidence Act 1968 which provides that in legal proceedings the privilege applies only as regards criminal offences under the law of the United Kingdom. Conflict of authority in Australia was also cited. See *Adsteam v The Queensland Cement and Lime Co Ltd* (1985) 1 Qd R 127 and *FF Seeley Nominees Pty Ltd v El Ar Initiations (UK) Ltd* (1990) 96 ALR 468.

#### 4.3.4.2 *The Court of Appeal Approach*

The Court of Appeal in the majority accepted that the privilege was restricted to previous conduct and that to allow foreign law incrimination would be to extend the privilege. The Court resolved the conflict of authority essentially on a policy basis, but only Cooke P was prepared to enunciate that policy. He held that the New Zealand public interest was the justification for so holding. In reality what he was saying was that:

1. since there was no suggestion that the witnesses would be prosecuted for a crime in New Zealand; and
2. since the Winebox Inquiry involved issues regarding the efficiency of authorities in detecting and prosecuting tax evasion; and
3. since the only likely prosecution may be initiated in the Cook Islands; then
4. therefore the interests of achieving the goal of the Inquiry in New Zealand overrode the likelihood of prosecution of the witnesses in a foreign jurisdiction, such that the privilege should not apply.

The oblique reference to “the public interest” in *Busby* loomed large in the decision. Cooke P said “I think the cases can be disposed of on a broad and relatively simple ground, namely the New Zealand public interest.”<sup>77</sup> He made reference to an earlier “winebox” appeal<sup>78</sup> saying “the law will not protect confidential information if publication complained of is shown to be in the overriding public interest.”<sup>79</sup> In considering the development of a tax haven, Cooke P sounded a warning that older doctrines such as the privilege will not necessarily be apt when dealing with this sophisticated modern phenomenon. The public policy or interest of the country of the forum may properly require a different approach. A further reference to public policy was contained in the claim that by answering questions or providing documents the witness was at risk of prosecution under Cook Island law. The ground for this claim was rejected. The observation was made that the issue may be arguable if the privilege extended to incrimination under foreign law and after a very brief consideration of the conflicting authorities, Cooke P held unequivocally that for New Zealand law the privilege or immunity does not extend that far.

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<sup>77</sup> *Controller and Auditor General v Davison* [1996] 2 NZLR 285.

<sup>78</sup> *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] 3 NZLR 43.

<sup>79</sup> *Ibid.*



On one of the appeals McKay J dissented. After considering the conflicting authorities he observed that there seemed to be no distinction in principle between incrimination under domestic or foreign law where there was a reasonable likelihood that a charge will be preferred. He preferred the *McRae* view, observing that the US Supreme Court took that view in *Murphy v Waterfront Commission*.<sup>80</sup> Cooke P correctly dismissed reliance on *Murphy* because that case dealt with conflict of laws between the federal/state jurisdictions. It seems that argument was not based upon the only case where the US Supreme Court heard argument on the invocation of the privilege where a witness fears foreign prosecution. In *Zicarelli v New Jersey State Commission of Investigation*<sup>81</sup> the Court refused to uphold the witness's objection to six questions, not because the privilege was not available but because the questions did not seek answers concerning foreign involvement or criminal activity, did not relate to criminal acts, nor could the answers form a link in an evidence chain.

The American jurisprudence recognises that it cannot bind a foreign government by use or derivative use immunities. Thus the privilege can be invoked if certain criteria are fulfilled. These are that a prosecuting government:

1. must obtain custody of the witness;
2. gain access to his self-incriminating testimony or evidence derived from it;
3. criminally prosecute the witness; and
4. use the testimony or evidence derived from it to further the prosecution.

If any of these events cannot occur the likelihood of testimony aided prosecution is so low that the privilege cannot be invoked.<sup>82</sup>

#### 4.3.5 *Conclusions on the New Zealand Approach*

The approach in Britain where the conflict between the same authorities arose was to resolve the issue of foreign law incrimination by legislative amendment, and one is forced to wonder whether the Court took this approach as a validation for what it did.

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<sup>80</sup> 378 US 52 (1964).

<sup>81</sup> 406 US 472 (1972).

<sup>82</sup> For a detailed discussion of this issue see Bovino, Scott "A Systematic Approach to Privilege Against Self-Incrimination Claims When Foreign Prosecution Is Feared" (1993) 60 University of Chicago LR 903.

By returning to basics, the answer is this: the privilege protects against the *use* of testimony and not the *fact* of testifying. If the witnesses had demonstrated that the *content* of their answers could be used as *evidence* in foreign prosecutions then the privilege would have to be considered and the issues raised by *Zicarelli* would have to be addressed. With respect *Richardson, Henry and Thomas JJ* approached the privilege from the correct stand-point. Regrettably, they did not distance themselves from the warning that was sounded by *Cooke P* as to the possible future relevance of the privilege.

The New Zealand developments in this area over the last 12 years have demonstrated that judge-made modifications to the privilege are acceptable, whereas such an approach has been eschewed in Australia and has been approached gingerly in England. Although *Thorp J* was of the view that the solution to the problem in *Radisich v O'Neil* was legislative, nevertheless his expressed inclination to give the matter further consideration were he required to address the broader issue, indicated a willingness not to discount a judicial solution outright.

The consequences for the privilege in New Zealand are that it may well suffer erosion by judicial activity rather than legislative consideration, and that expedience may well dictate the outcome rather than principle. What *Cooke P* has done in the *Winebox* appeal is to advance a rationale based on public policy for declaring the privilege unavailable. This sounds an ominous warning for the future of the privilege which in New Zealand can be clearly abrogated by judicial fiat.

## V. IMMUNITY, OPTIONS AND ATTITUDES TO CHANGE

Is the provision of an immunity from prosecution a satisfactory solution to the problems posed by the privilege? If an immunity is to be provided should it be restricted to the use of the testimony for prosecutorial purposes? Should there be an immunity for what is referred to as derivative use: that is a signpost given by testimony which leads to evidence which incriminates the witness? The provision of use or derivative use immunity poses significant ethical problems. The law is quite accustomed to balancing competing interests in reaching a resolution.

### 5.1 *The Offender Walks Free for Evidence Given*

A defendant is required to respond to interrogatories. By doing so he will incriminate himself. He invokes the privilege. The Court recognises the privilege but provides an “immunity” whereby the incriminating testimony

cannot be used for the purposes of prosecution. The defendant provides the answers. He has to, because they will no longer incriminate him. The protection that the Court's immunity has given him is co-extensive with the protection he would otherwise receive from the privilege. In addition the Court has directed that the fruits of such testimony — signposts that an investigating authority could follow to obtain evidence — cannot be put before the Court. Thus, a potential criminal avoids prosecution. The real paradox that devolves from this is that the evidence is available and in existence. It simply cannot be used. To many ordinary citizens and the judiciary included, this may seem to be an absurdity.

### 5.2 *Revisiting the Tensions Caused by the Privilege*

The difficulties are further complicated by the tensions created by the privilege and to which I have referred. In balancing interests, the provision of use or derivative use immunity by the Court favours the private litigant over the interests of the community and the state in seeing that those who break the law are charged and convicted. In today's climate where the merits of "restorative justice" are being promoted, such a result may be seen to be quite consistent.

In civil proceedings at the interlocutory stage where recovery of misapplied funds is sought the balance is not entirely clear. On the one hand, the courts are anxious to protect the rights of those accused of fraud. On the other, a plaintiff has a different need: to see that his moneys are not dissipated.<sup>83</sup> If the courts hold that the privilege outweighs the need to preserve funds then the plaintiff could be out of pocket.<sup>84</sup> The provision of an immunity would protect the plaintiff and require the evidence to be given.

The anomaly still exists. The issue is whether the interests of the private civil litigant should supersede those of the State,<sup>85</sup> especially since it is the duty of the State to protect the rights of life, liberty and the pursuit of happiness and property by prosecuting and punishing those who, by fraud,

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<sup>83</sup> *Cloverbay Ltd v BCCI SA* [1991] Ch 90; *Derby & Co Ltd v Weldon* [1990] 1 WLR 1156.

<sup>84</sup> Although in England the issue could be addressed by inspection under the Bankers Books Evidence Act 1879 and Bankers Trust Orders - see Clayton *supra* note 53.

<sup>85</sup> It is significant to note that Cooke J in *Busby* did make reference to matters of public interest and to serious crime. One wonders whether the Court would have been so ready to decide in the way that it did if serious crime had been involved. It is also to be noted that no formal "use immunity" was provided.

coercion or other interference, prevent citizens pursuing or enjoying those rights. The power of the State to compel citizens to testify is a long-standing one in Anglo-American jurisprudence.<sup>86</sup> By 1742 it was a general common law principle that “the public has a right to every man’s evidence.”<sup>87</sup> The privilege presents a substantial impediment to that process.

In *Busby* Somers J observed that from time to time Parliament had legislated to limit or amend the scope of the privilege. Certain statutes which compel testimony actually provide a specific use immunity. The legislation clearly states that compelled self-incriminatory answers are not admissible in evidence in criminal proceedings save on a charge of perjury or making a false statement in respect of testimony. Given this legislative background, and the fundamental nature of the privilege as a principle of law, Somers J considered that the judicial function would become legislative if judge-made abrogations and co-extensive protections were to be advanced. A similar view was expressed by Deane J in *Reid v Howard*.

There are a number of options open if legislative change is to take place. One is to abolish the privilege entirely. A second is to abolish the privilege and set in place certain legislatively prescribed immunities that apply in certain circumstances. A third is to recognise the privilege, provide for compellability of testimony or disclosure in certain situations and provide use or derivative use immunities.<sup>88</sup> A fourth is to limit the scope of the privilege to provide that a person’s pre-criminal trial statements can never be introduced at a prosecution, but that the fruits of such information can be. Thus an accused will never be a witness *contra se* but the fruits of the compelled words will be.<sup>89</sup> A fifth is to recognise the privilege, provide for compellability or disclosure and, in the circumstances pertaining to the particular legislation, provide for no immunities for use or derivative use.<sup>90</sup>

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<sup>86</sup> Wigmore, *supra* note 6, para 2190; 5 Eliz 1 c 9 para 12 (1562); *Countess of Shrewsbury’s Case* (1612) 2 How St Tr 769, 788.

<sup>87</sup> See the remarks of the Duke of Argyle and Hardwicke LC in the debate on the Bill to Indemnify Evidence; (1812)12 T Hansard, Parliamentary History of England, 675, 693.

<sup>88</sup> As is the case in certain statutes in New Zealand.

<sup>89</sup> This is an extension of the current situation under the Serious Fraud Office legislation. For a detailed discussion of this option see Amar and Lettow “Fifth Amendment First Principles: The Self-Incrimination Clause” (1995) 93 Michigan LR 857.

<sup>90</sup> As is the case in certain Securities, Insolvency and Department of Trade and Industry legislation in Britain.

### 5.3 *Rights Talk*

A matter of concern is how change will be approached. The privilege has generated a large amount of angst for a considerable period of time.<sup>91</sup> Even though it has been described as a fundamental right, it may not be treated as such, especially since governmental focus in many areas appears to be upon economy of outcome. Such rationale can easily be applied to the criminal justice system. The disposition of the criminal trial would certainly be speeded up if there were substantial abrogations to the privilege against self-incrimination. Rights are seen as an impediment. Speaking of the situation in Britain, Gerard McCormack said:

As a generalisation it would be fair to suggest that the culture of rights in this jurisdiction is not particularly strong. Judges are not generally happy with rights talk. In an ideal world we would have a written constitution incorporating a bill of rights with express protection for the privilege against self-incrimination. But that, at the very least, is a long way off if not completely in the realms of fantasy. At the moment one might hope for express legislative consideration of the self-incrimination issue when entrusting investigatory powers to corporate regulators etc. On the other hand, legislating by sleight of hand may be preferable to administrators since it deflects attention away from the issue. Also, alleged corporate malefactors may not be the most meritorious of claimants for our attention. Against that, upholding their self-incrimination rights may forestall wider abridgments of their rights. Corporate wrongdoers might be pursued down other paths. One cannot say that the privilege against self-incrimination is the only obstacle between such persons and the prison gates.<sup>92</sup>

I suggest that there is a similar discomfort in New Zealand towards fundamental rights and freedoms.

### 5.4 *Judicial Attitudes to the Privilege*

Judicial pronouncements in Britain reveal an impatience with the privilege. The comments of Lord Templeman suggest that the privilege is relevant only in the police station or in the face of official investigative questioning.<sup>93</sup> Sir Nicolas Browne-Wilkinson VC (as he then was) expressed some very serious reservation about the implications of the

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<sup>91</sup> Consider Bentham's commentary in the 1820's in *A Rationale of Judicial Evidence*.

<sup>92</sup> "Self-Incrimination in the Corporate Context" (1993) *Journal of Business Law* 425, 442 - 443.

<sup>93</sup> *Istel v Tully* supra note 30. See also Templeman LJ as he then was in *Rank* [1980] 2 All ER 273, 292.

invocation of the privilege in corporate fraud cases, calling upon Parliament to remove the privilege in relation to all civil claims relating to property including damages, but providing for a use immunity of evidence or documents in criminal proceedings.<sup>94</sup> Lord Nolan justified the wide powers given to the Serious Fraud Office in strong language:

The type of fraud which led to the passing of the Criminal Justice Act 1987 is an exceptionally pernicious form of crime, and those who commit it tend to be as devious as they are wicked. It is not in the least surprising that Parliament should have entrusted the Serious Fraud Office with the power to call upon a suspected person to come into the open, and to disclose information which may incriminate him. It would be highly regrettable if the power has, in fact, been created in terms which go significantly wider than was intended. But that is a matter which only Parliament can debate and, if necessary, resolve.<sup>95</sup>

Essentially Lord Nolan is suggesting that fundamental rights can be put aside depending upon the nature of the evil that is to be addressed. In addition, if the power given was wider than was intended, the Courts should not “peg it back.”

### 5.5 *The Privilege in Context*

The proper way to approach any change to the privilege, be it judicial or legislative, is not to consider it as simply a rule of evidence but to view it within the total context of the criminal justice system.

Erwin Griswold described the privilege as expressed in the Fifth Amendment as a symbol when he said:

In considering these problems, the Fifth Amendment can serve as a constant reminder of the high standards of the Founding Fathers, based on their experience with tyranny. It is an ever-present reminder of our belief in the importance of the individual, a symbol of our highest aspirations. As such it is a clear and eloquent expression of our basic opposition to collectivism, to the unlimited power of the state. It would never be allowed by communists, and thus may well be regarded as one of the signs which

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<sup>94</sup> *Sociedade Nacional de Combustiveis de Angola & Ors v Lundqvist & Ors* [1990] 3 All ER 283 supported by Lord Donaldson in *Re O (Disclosure Order)* [1991] 1 All ER 330 and in the Court of Appeal in *Istel v Tully* [1992] 2 All ER 28. See also *Tate Access Floors Inc v Boswell* [1990] 3 All ER 303 and Dillon LJ in *Bishopsgate Investment v Maxwell* [1992] 2 All ER 856; *Re Arrows(No. 4)* [1993] 3 All ER 861.

<sup>95</sup> *Re Arrows (No 4)* [1994] 3 All ER 814, 828.

sets us off from communism.<sup>96</sup>

We find that there are similar values expressed within the accusatorial and adversarial criminal justice system. "Accusatorial and adversarial" is a descriptive phrase identifying two essential aspects of the Anglo-American criminal justice system. The word "accusatorial" deals with the values and norms upon which the system is based. The word "adversarial" identifies the process by which results are reached and within which the values and norms of the system are a vital part.

The basis of the values of the accusatorial system arise from a recognition of a social equilibrium in which the State is viewed as reactive rather than pro-active to criminal activity. The accusatorial system assigns great social value to keeping the State out of disputes, especially when there is a likelihood of stigma or sanction. The State can only act if an accusation has been made, and if there is evidence to substantiate the accusation. The person who alleges the crime cannot rely upon an assertion alone to place upon the accused the obligation of proving his or her innocence. The accuser must present reasonably persuasive evidence of guilt. Thus the presumption of innocence is at the heart of the accusatorial system. The accused is treated as if he were innocent and need give no assistance to those who seek his or her conviction.

The adversarial process is a means of conflict resolution. The prosecution and the defence perform mutually antagonistic roles in interpreting legal doctrine, adducing and testing the evidence. The judge acts as an impartial and disinterested referee, ensuring that there is compliance with the rules of evidence and that there is proper instruction in the law applicable to the case. The State maintains its essentially reactive role.

The accusatorial system places value upon the individual above that of the State. In addition to the complex matrix of presumptions, proof burdens and allocations, the nature of the offence (the *actus reus* accompanied by the requisite mental element) not only addresses issues of capacity but also of the value of choice in analysing the allocation of responsibility for behaviour. This emphasises the concept of individual free will.

The ultimate scenario of crime control in the Statist society would preempt criminal behaviour by making *contemplated* criminal conduct culpable without an accompanying *actus* or behaviour. Except in the limited example of conspiracy, such a concept is foreign to an accusatorial and reactive justice system.

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<sup>96</sup> *The 5th Amendment Today*, Chapter 3 (1955) 81.

Another significant ingredient of the accusatorial system is the value placed upon fairness and the integrity not only of outcome but also of process. The quality of the outcome is judged by the quality of the process. The process commences when the authorities apprehend a breach of the law. Evidence generally originates from sources other than the suspect. The suspect generally is the last port of call. Thus it is inherent that within this process the State as its accuser must make its case without the co-operation of the accused.

This process developed over the centuries as the various ingredients, available procedures and forms of action were utilised by the lawyers as they and the judges weaved the tapestry of the common law basis of and values for our present day criminal justice system.

### 5.6 *Recent Legislative Activity Tells a Story*

If there is to be legislative activity, it will probably be to limit the scope and applicability of the privilege. In New Zealand and Britain the Serious Fraud legislation was adopted virtually without demur. In the debate on that Bill, Mr. Paul East, currently Attorney-General, suggested that Parliament should consider the right of silence not just in terms of corporate fraud and serious fraud, but also in the wider criminal context.

In Britain the right to silence at trial and in the face of police questioning has been the subject of significant change in the Criminal Justice and Public Order Act 1994.<sup>97</sup> Sections 23(4) and 25 of the New Zealand Bill of Rights Act 1990 have been limited in their scope and certainly do not provide the protection of the privilege afforded by the Fifth Amendment to the Constitution of the United States. Thus, recent legislative activity suggests a restrictive rather than an expansive approach to the privilege.

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<sup>97</sup> The changes effected deal with the way in which the exercise of silence by a suspect at the police station or an accused at trial may be utilised at trial. First, both the prosecution and the judge may comment unfavourably about the defendant's silence or failure to mention a relevant fact during police questioning. Second, the court and prosecution can comment unfavourably on the accused's failure to go into the witness box and give evidence in the courtroom. Third, the court and the prosecution may invite the jury to draw adverse inferences from the defendant's failure, at police questioning, to explain marks or substances satisfactorily (blood on clothing, scuffs on shoes, traces of explosive on hands). Finally, if the suspect failed to give a satisfactory explanation of his or her presence at the crime scene when questioned by the police, the court or prosecution may invite the jury to draw adverse inferences. For a useful summary of the legislation see Zander, M "You Have No Right to Remain Silent: Abolition of the Privilege Against Self-Incrimination in England" (1996) 40 St Louis University LJ 659.



In New Zealand's legal environment the answer to a legal problem is to legislate a solution. Should the solution appear unsatisfactory or fraught with difficulty the solution again is to amend the legislation. The difficulties caused by the privilege are therefore easily solved. Replace the privilege with a statutory framework or, as has been the practice with specific pieces of legislation in the past, include a statutory immunity against use of compelled testimony or information in criminal proceedings.

Recent Parliamentary attitudes towards fundamental rights seem less than committed. None of the recent "rights-based" legislation — the Human Rights Act 1993 and the Bill of Rights Act 1990 — is entrenched. Indeed, although the Bill of Rights Act is perceived as "Constitutional" legislation, it is not. It is subject to specific legislation and it does not provide a "litmus" test against which specific legislation can be tested. It is hedged by the justifiable limitations clause and finally, it can be repealed virtually overnight. The only solace in such an eventuality is that unless Parliament specifically said so, the common law "fundamental rights" would remain.

The comments of Lord Mustill in *Smith* seem to suggest a possible statutory framework, whereby the privilege can be replaced with a number of immunities. In such a situation the invocation of the immunity could be tested against the category or subset thereof.

If Parliament were to abolish the privilege and replace it with a statutory regime, the consequences of repeal of the statutory structure would be that the privilege would no longer be a part of the law. It is unlikely that Parliament would entrench a statutory regime of self-incriminatory protection if it has not entrenched legislation as "fundamental" as the Bill of Rights Act.

## VI. CONCLUSION

To seek a rationale in history for today's relevance of the privilege is interesting but of limited utility, for it attempts to pare away the privilege from the development of other legal processes of which it has been an integral part.

If there is a common thread with history it involves the contest between the rights and inviolability of the individual and the interests of the State. In the seventeenth century the privilege was invoked in cases of conscience against a background of the development of the modern State. Today the power of the State is greater, more sophisticated and more intrusive. The "conscience" of the religious and political dissenters of the seventeenth century has become the "privacy" of the twentieth.

Today the privilege against self-incrimination is more than a symbol. It is an integral and vital part of the accusatorial and adversarial system. It embodies and realises the values expressed in the word "accusatorial". It is a part of the process described as "adversarial". Whatever its origins or its early rationales, it is an integral part of the matrix of values and procedures that underpin the Anglo-American criminal justice process. That being so, it is impossible to isolate the privilege and "deal with it" without doing violence to the entire process and all its values and presumptions. Although the criminal process has developed to its present point in disparate ways and in response to different stimuli it is a settled matrix of fundamental principles.

Therefore, if we profess allegiance to the values and presumptions of the accusatorial and adversarial system, we must maintain allegiance to the privilege against self-incrimination, for the modern rationale for the privilege is the accusatorial and adversarial system of justice. If there is to be any abrogation, protections co-extensive with the privilege must be provided as they are at the moment. It is incorrect to say the wrongdoer will go unpunished, for by providing evidence which exposes him to civil liability means that restoration by way of damages will follow, notwithstanding that the State is unable to use that evidence in a prosecution. But if the State has other evidence and need not rely upon that given in the civil forum, it may still seek to prove the criminal act, for the co-extensive protection is not an immunity from prosecution but an immunity from the use or derivative use of the testimony.

For those who seek a more fundamental change to the status of the privilege, inquiry should be directed not to the privilege, but to the system of justice. As Brennan J said:

To no small extent, legal professional privilege, like the privilege against self-incrimination, is an established facet of our adversarial system of justice. In the context of the complicated electronic and sophisticated forms of criminal activity which pervade modern society, it may be arguable that the adversarial system of administering criminal justice itself requires re-examination and at least some modification.<sup>98</sup>

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<sup>98</sup> *Carter v Northmore, Hale, Davy & Leake & Ors* (1995) 129 ALR 593.

# RACISM AND THE LAW

BY ROBERT WHITE\*

## I. INTRODUCTION

This paper is an Objectivist review of the relationship between racism and the law in New Zealand. Objectivism is the name that the twentieth-century Russian-American novelist-philosopher Ayn Rand gave the systematic philosophy of reason that she forged in such best-selling novels as *The Fountainhead* (1943) and *Atlas Shrugged* (1957). An Objectivist analysis of racism and the law goes to the very heart of our legal system, providing a revealing critique of the role of the law in New Zealand race relations. In the Objectivist view, racism is not a mere byproduct of certain laws, but is a constitutive element of the statist legal system.<sup>1</sup>

In this study I focus on the relationship between racism and laws that initiate physical force, particularly anti-discriminatory legislation. I argue that to oppose racism and to support anti-discriminatory legislation is to commit a logical fallacy; that there is in fact an internal contradiction between opposing racism and supporting anti-discriminatory legislation. Finally, I examine this contradiction in its systemic context and argue that the statist legal machinery is a reciprocally reinforcing cause and effect of racism.

## II. THE BLOOD COLLECTIVE: RACISM DELINEATED

Racism is the doctrine that an individual's character is determined by genetic predisposition; that a person should be judged not by his or her volitional actions, but by the (actual or assumed) actions of those who

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<sup>1</sup> Statism is the principle of concentrating extensive economic, political and related controls in the state, of which socialism and fascism are two specific variants. Rand, A "The New Fascism: Rule by Consensus" (1965) in Rand, A *Capitalism: The Unknown Ideal* (2nd ed, 1967) 202. Objectivism transcends the left-right dichotomy, recognising the left and right of the political spectrum as sides of the same coercive coin. As political activist and Objectivist Lindsay Perigo explains: "We have no truck with either Left or Right, since both favour coercion *in principle*, and differ only on the degree, form and purpose of its exercise." Perigo, "Editorial: As If Freedom Mattered"(May 1994) 1 *The Free Radical* 2.

share the same genetic lineage. A racist is a person who judges others on the basis of their real or assumed genetic lineage, and who seeks to be judged on the basis of genetic predisposition. The racist seeks to negate reason and morality by claiming that the content of an individual's consciousness, a person's convictions, values and character, are genetically inherited. Thus, a New Zealand magazine edited by "racialist" and "Satanist" Kerry Bolton claims that ...

The intellect is a subordinate tool of the instinct, which is inherited and primal. At the base of human nature is still the limbic brain ... which modern science affirms is responsible for the choices an individual makes. Thus the Satanic conception of human behaviour is genetic - sociobiological. Intelligence, creativity and subsequent behaviour are predominantly genetically-based.<sup>2</sup>

Likewise, a guide to racial physique prepared by an Australian National Socialist claims that "[p]eople of mixed blood always inherit conflicting thoughts and opinions, resulting in them not being able to make up their minds about anything."<sup>3</sup> The assumption is that "thoughts and opinions" are genetically inherited. Racism is thus premised on biological determinism.

### 1. An Objective Definition of 'Racism'

Before one can understand the relationship between racism and the law, it is necessary to first Objectively define the concept "racism". This is particularly important when dealing with the issue of racism, as the concept "racism" is often invalidly formed or defined by a non-essential; such as the sociological definition of racism as "*power plus prejudice*."<sup>4</sup> Thus the Objectivist definition differs from the more commonly used definitions of racism.

A concept is formed through a cognitive process of abstraction, integration and differentiation. One forms the concept "racism" by abstracting the attributes of actual situations from their "measurements," and integrating them with and differentiating them from commensurable situations.<sup>5</sup>

<sup>2</sup> Bolton, "Sinistra Vivendi"(January-March 1994) 7 *The Heretic* 22, 24. See Spoonley, P *The Politics of Nostalgia* (1987) 167-71 for a profile of Kerry Bolton.

<sup>3</sup> Tom Graham quoted in Harcourt, D *Everyone Wants To Be Fuehrer* (1972) 86.

<sup>4</sup> Spoonley, P "Racism and Ethnicity" in Spoonley, P Pearson, D and Shirley, I (eds) *New Zealand Society: A Sociological Introduction* (2nd ed, 1994) 81, 83.

<sup>5</sup> See Peikoff, L *Objectivism: The Philosophy of Ayn Rand* (Meridan ed 1993) 73-109 and Rand, A *Introduction to Objectivist Epistemology*, eds Binswanger, H & Peikoff, L (expanded 2nd ed, 1990) 10-18 for an explanation of the Objectivist view on concept-formation.

Consider this example:

John, a European, describes Rangi, a Maori, as “lazy”, because “all Maoris are lazy.”

One abstracts the attributes of the situation: a person of one race (or genetic lineage) is judging a person of a different race by qualities imputed to that race; while omitting the “measurements:” the actual people involved (i.e. John/Rangi), the assumed genetic lineage of the people (i.e. European/Maori), and the type of judgement (i.e. negative). Thus, the concept “racism” refers to every act of racism past, present, and future, regardless of any variations among them. For example:

Wong, a Chinese man, describes Kieran, an Irish man, as “stupid”, because “all Irish are stupid.”

The “measurements” differ, but the attributes of the situation are the same: a person of one race is judging a person of a different race by qualities imputed to that race. The attributes of this situation may be integrated with the attributes of commensurable situations, such as the Nazi who proclaims racial supremacy; both base their judgement on genetic inheritance. Likewise, these attributes may be differentiated from the attributes of other commensurable situations, such as a person of one race praising a person of a different race for writing an insightful study on social theory; the latter judgement is based on work produced by the other person through volitional effort, whereas in the former situation the judgement is based on a non-volitional criterion.

A definition is formed by identifying the *essential* characteristic of a concept that differentiates it from concepts that share a common denominator. Concepts such as “racism” and “sexism” share a common conceptual denominator, as they are both “collective judgements,” meaning that they both involve judging an individual on the basis of qualities imputed to an identifiable group. Thus, the compound concept “collective judgement” is the *genus* of both “sexism” and “racism,” and the purpose of a definition is to isolate the *differentia* that distinguishes the two concepts. The essential characteristic of “racism” that differentiates it from other collective judgements, is that an individual is being judged on the basis of qualities imputed to a group identified by the person’s (real or imaginary) genetic lineage. “Racism” is therefore properly defined as the doctrine that an individual’s character is determined by genetic predisposition.

This means that the claim that “All white men are racist” is itself racist, as it is imputing qualities to an identifiable group on the basis of genetics. Likewise, to claim that “Rajni is kind because all Africans are kind” is

equally racist, despite being an ostensibly positive value judgement. Nor does the skin colour or economic position of the person uttering the genetic-differentiated judgement alter the racist nature of the statement.

## 2. *Racism as an Objective Wrong*

Objectivity has two attributes: (a) Context; and (b) Hierarchy. To be Objectively valid an idea has to be capable of integration without contradiction into the full context of available knowledge, and one must be able to trace the hierarchy of the concepts on which an idea depends back to the perceptual level of awareness or to an axiom.<sup>6</sup>

The Objectivist view needs to be distinguished from the traditional view of objectivity which holds that abstractions exist independently of the human mind, as external existents intrinsic in reality.<sup>7</sup> Objectivism argues that concepts exist neither in reality independent of consciousness, nor in consciousness independent of reality,<sup>8</sup> but are the result of an interaction between consciousness and reality. In the Objectivist view, objectivity demands the volitional adherence to an epistemological method appropriate to the subject.

Let's apply each attribute of objectivity to the racist premise:

(a) Context: Does the concept "racism" contradict previous ideas within the full context of available knowledge? As one cannot hold the full context of available knowledge in one's mind at a given time, one must integrate an idea by relating it to previous ideas in any field. If one identifies a contradiction, the contradiction must be eliminated by either rejecting the idea or by rejecting previously held ideas.

One must integrate an idea into the full context of available knowledge, as existence and knowledge constitute a single totality. This view is confirmed by Rand's intellectual protege, Leonard Peikoff, who argues

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<sup>6</sup> See Kelley, D *The Evidence of the Senses* (1986) for an Objectivist defence of perceptual realism. See Peikoff, supra note 5, at 110-51 for an explanation of the Objectivist view of objectivity.

<sup>7</sup> Rand developed the term "intrinsicism" to denote the classical realist position and to distinguish it from her own epistemology. The main proponents of intrinsicism are Plato and Aristotle.

<sup>8</sup> The latter is termed nominalism, and is propounded by such skeptic philosophers as Hume and Wittgenstein.

that “everything in reality is interconnected ...[,] no aspect of the total can exist ultimately apart from the total.”<sup>9</sup> Just as reality is non-contradictory, so is knowledge. Objectively, no aspect of one’s knowledge can contradict any other aspect of one’s knowledge; there can be no contradiction between law and psychology, or economics and anthropology. Each is examining a different aspect of the same totality. To identify a contradiction is to admit an error in one’s thinking. To evade a contradiction is to cease dealing with reality.<sup>10</sup>

The doctrine of racism considers it possible to judge an individual on the basis of genetic predisposition. How does this idea relate to previously held ideas such as the metaphysical nature of a human being,<sup>11</sup> the concept of “judgement,”<sup>12</sup> philosophical determinism,<sup>13</sup> psychological

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<sup>9</sup> Peikoff, *supra* note 5, at 123. As intellectual historian and political theorist Chris M Sciabarra explains: “Rand was a rare philosophic phenomenon: she was an epistemological realist who recognized the relational character of existence and knowledge.” Sciabarra, C M *Ayn Rand: The Russian Radical* (1995) 58.

<sup>10</sup> Rand, A *Atlas Shrugged* (35th anniv. ed, 1992) 934.

<sup>11</sup> I.e., what is a “human being”? Is man a soul encased in flesh? A Hobbesian brute? Perhaps a Shakespearian fatalist? Or a Randian hero? Cf. Rand, “What is Romanticism?” (May-July 1969) in Rand, A *The Romantic Manifesto* (2nd ed, 1975) 99.

<sup>12</sup> I.e., upon which concepts do the concept of “judgement” logically and genetically depend? As the concept of “judgement” presupposes a volitional entity capable of evaluating data, it is illegitimate to both propound genetic predisposition and employ the concept of “judgement” or any of its lexical derivatives.

<sup>13</sup> Thomas Nagel describes determinism as the claim that the “circumstances that exist before we act determine our actions and make them inevitable.” Nagel, T *What does it all mean?* (1987) 51. Philosophical determinism contradicts the volitional aspect of the identity of consciousness.

behaviourism,<sup>14</sup> Deweyian pedagogy,<sup>15</sup> criminal law,<sup>16</sup> Treaty of Waitangi jurisprudence,<sup>17</sup> or the volitional aspect of the identity of consciousness?<sup>18</sup> Objectivism considers racism to be wrong because it contradicts the identity of consciousness (see below).<sup>19</sup> To support racism one must deny the identity of consciousness, which is precisely what racists do. To oppose

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- <sup>14</sup> The founding father of behaviourism, John Broadus Watson, describes this branch of psychology as a “purely objective experimental branch of natural science. Its theoretical goal is the prediction and control of behavior.... The behaviorist, in his efforts to get a unitary scheme of animal response, recognizes no dividing line between man and brute.” Quoted in Wozniak, R H “Theoretical Roots of Early Behaviourism” in Wozniak, R (ed) *Theoretical Roots of Early Behaviourism* (1993) ix, ix-x. Behaviourism is philosophical determinism applied to psychology.
- <sup>15</sup> John Dewey, possibly one of the most influential pedagogues of the twentieth-century, sums up his views on education as: “I believe that all education proceeds by the participation of the individual in the social consciousness of the race.... [The only true education is where the child is] stimulated to act as a member of a unity, to emerge from his original narrowness of action and feeling, and to conceive of himself from the standpoint of the welfare of the group to which he belongs.” Dewey, J “My Pedagogic Creed” in Garforth, F W (ed), *John Dewey: Selected Educational Writings* (1966) 44, 44-45.
- <sup>16</sup> Criminal law is substantially premised on the idea that human beings have free will (i.e. volition), with the corresponding implication that: (i) Human beings can be held responsible for their actions; and as a corollary (ii) Culpable intent is a prerequisite for criminal liability. Cf. Section 167 of the Crimes Act 1961.
- <sup>17</sup> Maori land claims are racist to the degree they are premised on the idea that individuals of European or colonial descent are morally and legally liable for the real or imaginary acts of their genetic forbears. If the capricious incarceration of an innocent is a blight on a criminal justice system, then one can think of no greater an injustice than consciously holding a people culpable for acts they did not commit.
- <sup>18</sup> The volitional aspect of the identity of consciousness is discussed infra note 19. I provide these examples purely as an indication of the wide range of ideas to which the doctrine of racism can be related, in the hope that the reader will critically examine his or her own previously held ideas on these and other areas of human thought.
- <sup>19</sup> The law of identity, “A is A,” is a variation on Aristotle’s law of noncontradiction. As Rand explains: “To exist is to be something, as distinguished from the nothing of non-existence, it is to be an entity of a specific nature made of specific attributes. ... *A is A*. A thing is itself. ... Existence is Identity, Consciousness is Identification.” Rand, supra note 10 at 934. As consciousness exists, it too has a specific identity; it is a something of a specific nature made of specific attributes. To state that consciousness *has* identity is to acknowledge that consciousness is a *something*. To *recognise* the identity of consciousness is to recognise the specific attributes of consciousness, such as volition. See Peikoff, supra note 5 at 48-52 for a discussion on the identity of consciousness, and Sciabarra, supra note 9 at 138-43 for an explanation of the law of identity. The significance of the identity of consciousness in epistemology is discussed in Kelley, supra note 6 at 22-24 and 40-41.



racism and to deny the identity of consciousness is to commit the fallacy of context-dropping, i.e. to compartmentalise “racism” as something separate from the rest of one’s knowledge, and to fail to integrate one’s opposition to racism into the full context of available knowledge by rejecting previously held ideas on the identity of consciousness.

If one decides to reject previously held ideas that contradict the identity of consciousness, one must examine how this impacts on other ideas in every field, including the law. When one does this it becomes clear why one cannot oppose racism and support legislation that initiates physical force, without maintaining a contradiction. To oppose racism is to *recognise* the identity of consciousness. To support legislation that initiates physical force is to *deny* the identity of consciousness. One cannot both recognise *and* deny the identity of consciousness without maintaining a contradiction. Thus: *Racism and legislation that initiates physical force, including anti-discriminatory legislation, are internally related as they both deny the identity of consciousness.* (See Part III below). In practice, this means that there is a correlation between laws that initiate physical force and the prevalence of racism in a society (see Part IV below).

This idea may be related back to the definition of “racism.” The *genus* of “racism” is the compound concept “collective judgement,” which is itself subsumed by the broader abstraction “collectivism.” Legislation that initiates physical force is premised on the idea that sovereignty is vested in the collective (the state, the nation, the tribe), and is thus itself subsumed by the concept “collectivism.” Epistemologically, this means that at a high level of abstraction both racism and legislation that initiates physical force are subsumed under the same concept; and that any intellectual defence of one necessarily lends support to the other.

(b) Hierarchy: One could claim that racism is wrong because it contradicts previously held ideas, but how does one know that these previously held ideas are right? Why should one prefer these previously held ideas to the racist premise? This is why objectivity demands both context and hierarchy; for an idea to be valid one must also be able to trace the hierarchical structure of an idea back to the perceptual level, or to an axiom.<sup>20</sup>

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<sup>20</sup> It is important to note that like her Russian philosophic forbears, Rand rejected the empiricist-rationalist distinction. As Sciabarra explains: “Rand’s Objectivism preserves the indissoluble connection between percepts *and* concepts, experience *and* logic, emotion *and* reason. It seeks to end the compartmentalization of the social sciences and the atomistic fragmentation of knowledge, aiming for an organic view of society that is both critical and revolutionary.” Sciabarra, *supra* note 9 at 222. Thus, while Rand concurs with the empiricist claim that an inductive observational method is the necessary foundation for all knowledge, to categorise Objectivist epistemology as empiricist is to commit the fallacy of reification.

Fortunately, because of the nature of racism this is a relatively straight forward exercise. The racist premise hierarchically depends on biological determinism, which is contrary to the volitional identity of consciousness. As the volitional identity of consciousness is an axiom, one cannot deny it nor can one prove it since the concept “proof” itself presupposes the volitional identity of consciousness. One can, however, validate it. An axiom is something that one must use even in an attempt to refute it. As Objectivist scholar Harry Binswanger explains:

Our ability to control our thinking is what makes a procedure of verifying our conclusions necessary [i.e. proof].... A determined mind would be incapable of objectivity and hence could not consistently assert that any idea is objectively superior (or inferior) to any other - not even the idea that determinism is superior to the advocacy of free will.<sup>21</sup>

As the volitional identity of consciousness is an axiom, racism can never be justified. No scientific discovery can contradict an axiom.<sup>22</sup> Even if it were scientifically established that there are radical physiological differences between “races,” all this would establish is that people of different races process information differently. It would not alter the fact that individuals create their own character through volitional effort.

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<sup>21</sup> Binswanger, “Volition as Cognitive Self-Regulation” (December 1991) 50, 2 *Organizational Behavior and Human Decision Processes* 154, 173-75. See also Peikoff, *supra* note 5 at 69-72 for a discussion on the axiomatic nature of volition. An axiom is not an arbitrary assertion. To be axiomatic a proposition must possess two attributes: (i) It must be an irreducible primary, meaning that it cannot be analysed or broken into constitutive elements; and (ii) In denying an axiom one commits a logical fallacy by using that which one is trying to disprove. See Rand, *supra* note 5 at 55-61; Sciabarra, *supra* note 9 at 134-38; and Rand, *supra* note 10 at 956-57 for a discussion on axiomatic concepts in Objectivism. Binswanger observes that formulations of the self-evident have “fallen into undeserved disrepute due to the frequent practice of claiming as ‘self-evident’ what is actually the result of inference.” For example, the claim that it is self-evident that the Earth is flat is a mistaken inference to a scope beyond direct perception. The self-evident is directly observable without the need for inference. Binswanger, *supra* note 9, at 173-74.

<sup>22</sup> All scientific inquiry logically depends on the validity of the concept “proof”. As the concept “proof” presupposes the necessity of a *volitional* adherence to an epistemological method, any “scientific discovery” that purported to “disprove” volition would reduce itself to absurdity: the “proof” contra volition presupposes volition. To employ the concept of “proof” in this context is to commit the fallacy of the stolen concept, which Nathaniel Branden defines as “*the act of using a concept while ignoring, contradicting or denying the validity of the concepts on which it logically and genetically depends.*” Quoted in Smith, G H *Atheism: The Case Against God* (1979) 139.

Likewise, to claim that racism is wrong on the basis that the concept “race” has no scientific validity is misguided. It is tantamount to claiming that as there is no scientific evidence for “race” one won’t be racist, but if any scientific evidence is discovered then one must revise one’s decision.<sup>23</sup> Thus, some anti-racists find it necessary to oppose any scientific inquiry into possible genetic differences between “races” or statistical research involving race. Objectively, however, no scientific discovery or statistical correlation can ever justify judging an individual on the basis of his or her genetic lineage.

### III. ANTI-DISCRIMINATORY LEGISLATION

It is unsound to consider anti-discriminatory legislation to be self-evidently right. To claim that anti-discriminatory legislation is right on the basis of the wrongness of the discrimination it seeks to eliminate, is to endorse a form of subjectivism. It amounts to a claim that an *intention* to eliminate certain types of discrimination is sufficient to achieve the desired result. Objectively, one cannot fight racism using means inimical to one’s desired outcome. Anti-discriminatory legislation can never eliminate racism because it is internally linked to the racist premise: they both contradict the identity of consciousness.

Let’s examine what I shall call the “anti-discriminatory syllogism:”

- (a) Discrimination on the basis of race is wrong.
- (b) It is good if nobody discriminates on the basis of race.
- (c) Therefore it is right to proscribe racial discrimination.

Re (a): To discriminate against an individual on the basis of his or her (real or illusionary) genetic lineage is wrong. It is important to grasp, however, that such discrimination is wrong for a reason. Racial discrimination is wrong because it contradicts the identity of consciousness, meaning that it is irrational. Individuals earn the values

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<sup>23</sup> See McConnochie, K Hollinsworth, D and Pettman, J (eds) *Race & Racism in Australia* (1988) 16-17. The authors list a number of conclusions that can be drawn about the relationship between biology and the concept “race”, implying that racism is wrong as the concept “race” itself has no biological basis.

that make them desirable employees or tenants through volitional effort.<sup>24</sup> To discriminate on the basis of genetic lineage is to negate the virtue of justice by basing one's judgement on a non-volitional criterion. Obversely, a person who grants justice to prospective employees or tenants decides on the basis of rational criteria, engaging in a process of thought that is non-contradictory within the context of available knowledge and is connected to reality.

Outside the context of reason, the proposition that racial discrimination is wrong becomes arbitrary. To claim, for example, that racial discrimination is wrong because it contradicts society's values, is to imply that morality is subjective and that in a society whose values are conducive to racial discrimination, such discrimination is morally palatable. Thus, according to the logic of this claim, to oppose the attempted extermination of Jews and other minorities in Nazi Germany is merely a cultural prejudice. The point is that, as racial discrimination is wrong for a particular reason, one cannot fight racism using means that contradict that reason; the same premise that invalidates racism also invalidates the initiation of physical force as a means to fight racism.

Re (b): It would be good if no one discriminated on the basis of race, as one would be living in a society in which people engaged in a process of thought that is non-contradictory and connected to reality. A society in which no one discriminated on the basis of race would be a society in which people habitually engaged in rational thought. This is a "good" because of the immeasurable benefits one would gain from living in such a society. In this context, the most obvious benefit would be that when one applied for a job one would be judged not on the basis of one's race,

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<sup>24</sup> "Value", as Peikoff explains, "denotes the object of an action: it is that which some entity's action is directed to acquiring or preserving." Peikoff, *supra* note 5 at 208. See also Rand, *supra* note 10 at 930-31 and Lugenbehl, "The Argument for an Objective Standard of Value" (Spring 1974) 55, 2 *The Personalist* 155, 159-61 (Although Lugenbehl misrepresents certain epistemological aspects of the Objectivist theory of value, he elucidates some of the problems in understanding the concept). To state that one "earns ... values" is to claim that one gains values through volitional effort, as opposed to inheriting the material values earned by another. In the context of employment, the employee exchanges the values that he has earned (academic qualifications, competency, and the like) for the values offered by the employer (a salary, a pleasant working environment, etc.).

but by the values one has earned.<sup>25</sup> As with (a), it is only a “good” within the context of reason. Outside this context, no one discriminating on the basis of race ceases to be a “good.”

An implicit assumption of the anti-discriminatory syllogism is that physical force is a means to achieve the good. One may therefore insert into the syllogism:

(b1) The initiation of physical force is a means to achieve the good.

Legislation may be differentiated on the basis of whether a law initiates physical force or whether it is limited to the retaliatory use of physical force. The former type of law includes taxation legislation, tobacco advertising restrictions, immigration regulations, and anti-discriminatory legislation. Often the initiation of physical force by the state is penumbral, and only becomes salient when victims refuse to sanction their own subjugation.<sup>26</sup> The latter type of law includes those that proscribe murder, rape, theft, and fraud. The former type of law contradicts the identity of consciousness, the latter type is consistent with the identity of consciousness.

The initiation of physical force implicit in anti-discriminatory legislation is penumbral. For example, if *y* contravenes s 131 of Human Rights Act 1993 by publishing material intended to incite “racial disharmony,” *y* is liable to be imprisoned for up to three months or to a fine not exceeding \$7000. Physical force will be initiated against *y* for refusing to submit to imprisonment or trying to escape incarceration. Likewise, force will be initiated if *y* refuses to pay the \$7000 fine or attempts to protect his or her property from the bailiffs. Even the conciliation process under s 80 of the

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<sup>25</sup> A rational society need not be a society in which everyone achieves the intellectual hubris of a philosopher, any more than a Christian society is a society populated by theologians. It would be a society in which the majority of people, each to the degree of his or her intellectual capacity, habitually engages in a non-contradictory reality-based cognitive process. In a rational society children would most likely be raised by Montessori pedagogy, meaning that they would follow Objectivist epistemological principles automatically, in the same way that language and walking become automated. See Lewis and Lewis, “As the sun shows itself at the dawn ...: A tribute to Maria Montessori” (August/September 1996) 20 *The Free Radical* 4, for a comparison between Montessori pedagogy and Objectivist epistemology.

<sup>26</sup> See Rand, *supra* note 10 at 445-47 in which the industrialist Hank Rearden refuses to sanction his own victimisation by explicitly identifying the fact of his enslavement. For a discussion on the sanction of the victim premise, see Peikoff, *supra* note 5 at 333-34 and Sciabarra, *supra* note 9 at 301-02.

Act is marred by the possibility of physical force being initiated, as the threat of a summons ensures that that y has no choice but to submit to the conciliation process. Nor can y deliberate the possibility that racial disharmony is undesirable - y must simply defer to the conclusion arrived at by another, or face the legal consequences.<sup>27</sup>

Re (b1): Nothing is a “good” if achieved through the initiation of physical force.<sup>28</sup> The “good”, explains Rand, is “*an evaluation of the facts of reality by man’s consciousness according to a rational standard of value.*”<sup>29</sup> Thus, the “good” presupposes a cognitive process performed by a human mind.

Every act or threat of physical force is aimed at the human mind. If someone were willing to perform an act volitionally, force would be unnecessary. If people were willing to give a mugger the cash in their wallets, there would be no need for the mugger to threaten force. Likewise, if individuals were to base their employment criteria on rational grounds, there would be no need to threaten physical force against them—to *force* them to select *rational* criteria, to *force* them to judge a person *rationally*, to *force* them to engage in a process of *thought* that is reality based.

Reason and force, or mind and force, are opposites. As Rand explains:

To interpose the threat of physical destruction between a man and his perception of reality, is to negate and paralyze his means of survival; to force him to act against his own judgment, is like forcing him to act against his own sight. Whoever, to whatever purpose or extent, initiates the use of force, is a killer acting on the premise of death in a manner wider than murder: the premise of destroying man’s capacity to live.<sup>30</sup>

<sup>27</sup> See Coddington, “Human Rights Legislation: Orwellian Doublespeak” (May 1994) 1 The Free Radical 8 and Everton, “The Wronging of Rights (Part I)” (December 1996/ January 1997) 22 The Free Radical 10 for a pro-freedom discussion on the Human Rights Act. See Perigo, “Defending the Indefensible” 15 The Free Radical 8 for a transcript of Chief Human Rights Commissioner Pamela Jefferies being interviewed by Lindsay Perigo on the now defunct Radio Liberty. Perigo is interviewed on his opposition to the Human Rights Commission in Wright, “Human Rights and Wrongs” (16 September 1996) 21 *Nexus* 24. See also Calvert, “Letters to the Editor: Human rights” *New Zealand Herald* (14 December 1996) A16 for a libertarian view on human rights.

<sup>28</sup> See Peikoff, *supra* note 5 at 310-23 and Sciabarra, *supra* note 9 at 270-73 for a discussion on the nature of physical force.

<sup>29</sup> Rand, A “What is Capitalism?” (1965) in Rand, *supra* note 1 at 11, 22. Values exist neither intrinsically in reality independent of consciousness nor in consciousness independent of reality, but result from an interaction between consciousness *and* reality; i.e. values are neither *intrinsic* nor *subjective*, but *objective*. The “rational standard of value” Rand refers to is man’s life qua man qua rational being.

<sup>30</sup> Rand, *supra* note 10 at 940.

A person who arrives at a rational conclusion or makes a rational decision, does so by volitionally raising his or her consciousness to the conceptual level of awareness, and integrating a new idea without contradiction into the full context of available knowledge. From the simplest task of obtaining food to the most complex task of technological innovativeness, a human being needs to volitionally initiate a process of thought.<sup>31</sup>

Force precludes thought: one must simply accept a conclusion or decision. No degree of force can make a person think. Threatening someone with force does not make a person come to the conclusion that  $2 + 2 = 4$ . Such a person merely parrots the conclusion arrived at by another. Likewise, a mugger cannot make victims want to hand over their cash, all a mugger can do is force victims to act against their own judgement. Volition presupposes choice. Force negates choice. Volition and force are opposites.

Force makes the mind impotent to an individual's survival, by making it irrelevant. A person who is threatened with force to think that  $a + a = 2a$  is cut-off from reality: if he or she identifies a contradiction and follows it, nothing is achieved - the person has to come to the conclusion that  $a + a = 2a$ , he or she has to "think" what the forcer has prescribed or risk physical harm. Notice how a woman physically abused by her husband rarely leaves him of her own volition - she cannot, her mind has been invalidated as her tool of survival.<sup>32</sup> Psychologically, she has to lower her focal awareness to the perceptual level to escape the horror of the abuse. The full context of available knowledge becomes irrelevant to the victim of force - he or she must simply obey. As the mind is the human tool of survival, a person is doomed by reality for failing to think, and doomed by the forcer for thinking: force creates a lethal cognitive contradiction.<sup>33</sup>

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<sup>31</sup> Ibid, 930.

<sup>32</sup> See Walker, L E *Terrifying Love* (1989) 49-53. Walker discusses the idea of "learned helplessness" as applied to battered woman.

<sup>33</sup> Sciabarra, *supra* note 9, at 272. Verbal abuse or "mental cruelty" is not the same as physical force. Maliciously calling a person "ugly" for example, while cruel, still leaves the victim capable of initiating an efficacious cognitive process. That is to say, the victim can come to the conclusion "I am good looking" without endangering his physical survival; he can intellectually retaliate against the verbal abuse, or physically leave an undesirable situation. The mind is impotent only *viz-a-vie* physical force, as the only attack that cannot be fought intellectually is that which does not rely on intellectual means.

Let's relate this idea to our other ideas: force is wrong because it contradicts the identity of consciousness. This is consistent with our condemnation of racism as being contrary to the identity of consciousness: *to oppose racism is to oppose the initiation of physical force*, and therefore one cannot oppose racism and use force to combat racism without maintaining a contradiction. Likewise, one cannot force people to judge others rationally without contradicting not only what one is trying to achieve, but also the faculty by which one judges it to be the "good." Nothing is a "good" if the price is the surrender of one's means of survival. Nor can one claim that one is correcting an injustice without invalidating the faculty by which one determines it to be an injustice.

Re (c): As the initiation of physical force is not a means to achieve the good, the anti-discriminatory syllogism is false. It is not right to proscribe racial discrimination. One must not commit the fallacy of context-dropping - to compartmentalise a principle from which a conclusion is derived, and fail to consistently apply that same principle to comparable situations. It is contradictory to oppose racism and to support anti-discriminatory legislation, because such legislation involves the initiation of physical force. The same principle applies to *all* legislation that initiates physical force: one commits a logical fallacy if one opposes racism and supports *any* law that proposes to initiate physical force.

#### IV. THE SYSTEMIC CONTEXT

Having argued that opposing racism and supporting laws that initiate physical force is contradictory, I now examine the systemic implications of this.<sup>34</sup> Reality is a non-contradictory interrelated totality. One can refuse to identify a contradiction, but one cannot avoid the consequences of allowing a contradiction to enter a system. Racism, laws that initiate physical force, and anti-discriminatory legislation constitute and are constituted by a wider anti-rational cultural corruption that may be examined at three levels of abstraction: the personal, the cultural, and the structural. The personal and cultural levels give rise to and provide the context for the statist legal system, and the statist legal system has a reciprocally reinforcing effect on the personal and cultural levels. (The

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<sup>34</sup> White, "Racism: A Radical Critique (Part I)" (October/November 1996) 21 *The Free Radical* 12 to White, "Racism: A Radical Critique (Part IV)" (April/May 1997) 24 *The Free Radical* 18. In this four part study I examine the issue of racism diachronically, and argue that colonisation and the Maori sovereignty movement are in fact sides of the same statist coin.



legal system being an aspect of the structural level.) While it is possible to isolate and abstract these various aspects of the whole, it must be kept in mind that they are interrelated constituents of a *single* totality, that each level is internally related to and is a constitutive element of the statist legal system.<sup>35</sup>

### 1. *The Personal Level*

Racists have an anti-conceptual concrete-bound psycho-epistemology. "Psycho-epistemology" refers to an individual's habitual means of dealing with the content of his or her consciousness. While proper human relationships are based on shared values, the anti-conceptual mentality bases relationships on non-intellectual grounds, which require minimal conceptual effort, such as race or geography. The anti-conceptual mentality claims that we are part of one community because we are united by accident of birth.

Human relationships demand moral judgement: Is this person for me or against me? Do we share the same values, or do our values conflict? The racist seeks to avoid the effort of a rational judgement by judging others on the basis of race, by a perceptual criterion rather than intellectually held values.<sup>36</sup> Likewise, the racist seeks to be judged by a perceptual criterion. This results from the racist's own sense of inferiority and his or her inefficacy at dealing with reality. Thus, National Socialists claim that members of their race are effortlessly "intelligent, attractive, innovative and noble" by accident of genetic heritage; that the white race is superior

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<sup>35</sup> Sciabarra, *supra* note 9 at 297-300. The tri-level method of social analysis is Sciabarra's interpretation of Rand's critique of power relations. Sciabarra explains internal relations in Objectivism: "In her social analysis .... Rand recognized a vast network of interrelationships between and among various, seemingly separable factors. Ultimately, she viewed these factors as she would those relational properties that organically constitute any *single* entity. She focused on the *internal* relationships between identifiable components within a single social totality." Sciabarra, *supra* note 9 at 178; Rand, *supra* note 5 at 270-73; cf. Ollman, B *Dialectical Investigations* (1993) 33-38. While the dialectic is commonly identified with Marxism, Sciabarra argues that Rand's most important contribution to radical social theory was her conjunction of a dialectical method with a realist-egoist-individualist-libertarian content.

<sup>36</sup> The eminent Objectivist scholar David Kelley argues that the racist's psycho-epistemology and the psycho-epistemology of those who refuse to pass moral judgement are sides of the same anti-conceptual coin. The relativist who refuses to judge merely replaces mindless bigotry with mindless acceptance - both are equally irrational and equally unjust. Kelley, *D Unrugged Individualism: The Selfish Basis of Benevolence* (1996) 57.

to “negroes” because its gene pool produced the masterpieces of Michelangelo and Leonardo da Vinci.<sup>37</sup> Joachim Fest aptly describes National Socialism in his book *The Face of the Third Reich*, as a “politically organised contempt for the mind.”<sup>38</sup>

The racist is a social metaphysician. Rand’s intellectual protege, the biocentric psychologist Nathaniel Branden, coined the term “social metaphysician” to describe “*the psychological syndrome that characterizes a person who holds the minds of other men, not objective reality, as his ultimate psycho-epistemological frame of reference.*”<sup>39</sup> Lacking an autonomous sense of self-efficacy and self-worth, the racist seeks an illusionary sense of self-esteem from the acts of his or her genetic forbears, and through degrading and attacking those of other races. Racists are psychologically dependent on the people they vilify; their primary focus is their fantasies about the minds of those they despise. This is exemplified in National Socialist works alleging a secret Jewish conspiracy, such as *The International Jew: The Truth About “The Protocols of Zion”* by Eric Butler of the Australian League of Rights.<sup>40</sup>

The anti-conceptual mentality “feels” threatened by foreigners, especially foreigners of differing physiology, language and culture. Rand argues that the threat is not existential, but psycho-epistemological.<sup>41</sup> The traditions of those who share the same concretes as the xenophobe, protect that person from the necessity of raising the level of his or her awareness to the conceptual level. Foreigners, anyone outside of “the group”, demand a higher level of conceptual awareness from the xenophobe. The experience of the “other” requires that such concepts as “human”, “language” and “culture” move beyond the perceptual level of the norms to which the xenophobe has heretofore been exposed, to a higher level of abstraction that integrates the norms of “the group” with those of the foreigner.<sup>42</sup>

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<sup>37</sup> Harcourt, *supra* note 3 at 86-87.

<sup>38</sup> Quoted in *ibid*, 109.

<sup>39</sup> Quoted in Sciabarra, *supra* note 9 at 306.

<sup>40</sup> Harcourt, *supra* note 3 at 89. *The Protocols of Zion* is unquestionably a forgery, originally written as a satire in the 19th century. See Spoonley, *supra* note 2 at 131-36 for a profile of Butler and his relationship to the New Zealand League of Rights and the social credit movement.

<sup>41</sup> Rand, A “The Missing Link” (1973) in Rand, *A Philosophy: Who Needs It* (Signet ed 1984) 35, 41.

<sup>42</sup> See “Asian bashing denied” 24 August 1996, *Waikato Times* 3, concerning a complaint made to the Race Relations Conciliator about an anonymous letter published in *Nexus*, the magazine of the Waikato Students’ Union, claiming that Asian students should go back to where they came from. The writer complained about Asian students speaking their own language.

Thus, nationalism and racism share a common psycho-epistemological root; like the racist, the nationalist bases judgements on a concrete-bound criterion: his or her loyalty is not to intellectually held values, but to those people who identify with a geographical area.<sup>43</sup> Epistemologically, racism and nationalism are both subsumed under the broader abstraction of "collectivism". Nationalism is the idea that one's primary loyalty is to those who share the same geographical origins as oneself, and that, as a corollary, it is permissible to judge others on the basis of their (real or assumed) geographical origins.<sup>44</sup> Both racism and nationalism elevate the group above the individual, both contradict the volitional identity of consciousness.

## 2. *The Cultural Level*

The anti-conceptual mentality stresses loyalty to those people united by the same concretes. This manifests itself in such nationalistic and anti-moral slogans as "Buy New Zealand Made," "New Zealand First," and "New Zealand for New Zealanders." Such slogans are anti-moral, as they negate the virtue of justice: they place the accident of birth above the values earned by an individual through volitional effort. As products of the anti-conceptual collectivist mentality, cultural manifestations of nationalism are both symptomatic of and internally related to the presence of racism in a society. Thus, cultural practices that promote the anti-conceptual mentality and that acquiesce collectivism be it in the form of post-modern art or Maori tribalism are a cause for concern.

The New Zealand education system manufactures the anti-conceptual mentality of the racist and is a breeding ground for social-metaphysicians.<sup>45</sup> Such anti-cognitive and anti-conceptual pedagogical methods as rote memorisation, repetition, and concrete-bound association stunt a child's cognitive faculty. An emphasis is placed on "social adaptation" and "conformity." The child's sense of intellectual efficacy and moral independence undermined, he or she must join a group in self-protection; adapt to the rituals and beliefs of the pack or become a social

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<sup>43</sup> To defend the founding principles of a country, providing those principles are rational, is not a variant of nationalism, but an application of the virtue of integrity.

<sup>44</sup> Economic nationalism is judging a product or financial investment on the basis of its geographical origins. Ethnonationalism is where the geographical area is allegedly linked to a particular ethnic group.

<sup>45</sup> See Rand, A "The Comprachicos" (1970) in Rand, A *The New Left: The Anti-Industrial Revolution* (2nd ed 1975) 187 and Sciabarra, supra note 9 at 325-27 for a discussion on Deweyian pedagogy.

outcast in the schoolyard at the mercy of the class “goons.” Loyalty is to the group, to those who share the same concretes, rather than to principles and ideas. This, as political theorist Chris M Sciabarra explains, “serves as the psycho-epistemological root of pressure-group warfare, especially in its racist incarnations.”<sup>46</sup>

Apothegms promoting the “local ownership” of “New Zealand”, and opposing the sale of land and other assets to foreigners, and Asians in particular, are used to mask individuals’ racism. These people invoke such invalid concepts as the “common good” to convince people to place loyalty to the group above the virtue of justice, and then sanction the initiation of physical force to prevent dissenting individuals from behaving morally. Invoking the principle of altruism, the nationalist implies that New Zealanders who sell land, businesses, or who seek investors, are morally obliged to put the interests of “the country” ahead of their own. Thus, the now Deputy Prime Minister Winston Peters has argued that hospitals should prefer New Zealand medical graduates to foreign doctors - that a hospital is morally obliged to choose a New Zealander over a foreigner; that patients should be willing to sacrifice their health and well-being to the “greater good” of providing New Zealand medical graduates with employment; that the geographical location of an individual’s birth is a relevant criterion for human relationships.

The Western cultural emphasis on the “family” is a vestige of European tribalism and a form of racism, a form of basing a relationship on the accident of birth, on genetic ties, rather than on volitionally held ideas and values. This form of mini-racism manifests itself in a number of ways, such as the mother who examines the family tree of a prospective son-in-law to determine his “suitability”, the notion of “family solidarity”, and the unaccomplished individual deriving a sense of self-worth through celebrating a familial relationship to a distinguished family member.<sup>47</sup>

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<sup>46</sup> Sciabarra, *supra* note 9 at 326.

<sup>47</sup> Sciabarra notes that “Rand did not object to the need of individuals to take pleasure in their familial or ancestral backgrounds .... What Rand objected to was the practice of those who sought to substitute their lineage for an authentic self-esteem. Self-efficacy and self-worth cannot be derived from others - past or present.” Sciabarra, *supra* note 9 at 344. Rand discusses undesirable forms of “ancestor worship” in Rand, A “Racism” (September 1963) in Rand, A *The Virtue of Selfishness* (1964) 147.

### 3. *The Structural Level*

Statism institutionalises the means for legalised predation, fragmenting society into warring pressure groups. Anyone who is not a member of a group is put at a disadvantage in the political process. For the anti-conceptual mentality, the easiest group to join in self-protection is that in which one is automatically a member of by virtue of birth: race or nationality.

This is consistent with the epistemological contradiction of opposing racism and supporting legislation that initiates physical force, such as anti-discriminatory legislation. To reiterate: *racism is internally related to every law that initiates physical force*, be it tobacco regulations or the goods and services tax. Nationalistic legislation is symptomatic of the cultural prevalence of the anti-conceptual mentality, and thus brings into focus the reciprocal relationship between the racist's psycho-epistemology and ostensibly unrelated phenomena.

The existence of the welfare state means that every new immigrant has a potential claim against the lives of those already living in New Zealand, thus pitting the interests of immigrants against the interests of New Zealand citizens.<sup>48</sup> The fact that immigration is regulated means that someone must decide who is a desirable immigrant. Considering the prevalence of the anti-conceptual mentality in this country, it is unsurprising to find that the immigration service has a history of maltreating non-white immigration applicants while favouring white applicants.<sup>49</sup>

The idea that businesses should prefer New Zealand born employees is reflected in work visa restrictions.<sup>50</sup> The idea that land should be owned

<sup>48</sup> In McLoughlin, "Immigration: Out of Control" (May 1994) *North & South* 44, 50-51 the then immigration minister Roger Maxwell indicates that a lecturer in Asian studies at the University of Otago had his application for permanent residency declined so that the lecturer's daughter would not become eligible for "free" [sic] education in New Zealand.

<sup>49</sup> Ibid. Rand - herself a Russian Jew - points out that while institutionalised anti-Semitism was abolished in Soviet Russia, discrimination continued under the guise of "political purges." Rand, *supra* note 47 at 150.

<sup>50</sup> See Immigration Act 1987, ss 5, 13A, 14 and 14D; and Immigration Regulations 1991 (SR 1991/241), ss 6 and 16. See also *New Zealand Immigration Service Instructions* 11.15.3 (Dec. 1992) which states that "[b]efore granting approval for an employer to recruit overseas an immigration or visa officer must be satisfied there is no New Zealand citizen or resident job seeker on the local register of unemployed who is suitably qualified and experienced to do the job." As with the Human Rights Act, the employer must defer to a conclusion arrived at by another or will be prevented *by force* from acting on his own independent judgement.

by “New Zealanders” is reflected in legislation limiting the ownership of farm land by “foreigners”.<sup>51</sup> The idea that businesses and individuals should prefer New Zealand born investors is reflected in foreign investment regulations.<sup>52</sup> All of these laws are inherently collectivist and nationalistic. They embody the view that human relationships should be guided by the best interests of a geographically defined collective, with loyalty to those who share one’s birth origins as superior to intellectually held values. The fact that the same culture also gives rise to anti-discriminatory legislation is not a contradiction, but a paradox: while all racists have an anti-conceptual psycho-epistemology, not all anti-conceptual mentalities are consciously racist. An anti-conceptual mentality incapable of identifying the abstractions that unite ostensibly disparate concretes, is incapable of identifying the link between racism and the support of laws that initiate physical force, such as foreign investment regulations.

One should not be surprised to find young white men forming gangs such as White Power, and violently attacking businesses owned by ethnic minorities.<sup>53</sup> Such people are consistently practising the premises

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<sup>51</sup> See the Overseas Investment Act 1973 as amended by the Overseas Investment Amendment Act 1995, which provides that consent is required by the Minister of Lands for the acquisition by “overseas persons” of any land exceeding 5 hectares. Under the National-NZ First coalition agreement, consent will be required from the Overseas Investment Commission for the purchase of foreshore farm land exceeding 0.2 hectares. “What the deal means to you” *New Zealand Herald* 12 December 1996 A1. This means that a property owner is unable to act on his own independent judgement; he must obey the decision arrived at by a governmental authority or face the legal consequences.

<sup>52</sup> See Overseas Investment Act 1973 as amended, which makes “provision for the supervision and control of overseas investment in New Zealand.” Section 14A(2), which lists criteria for consent for overseas investment in New Zealand, makes it clear that the investment must be for the greater good of New Zealand as a collective. For example, s 14A(2)(a)(i) includes as a criterion for the consent to overseas investment in New Zealand that the overseas investment must be likely to result in the “creation of new job opportunities in New Zealand or the retention or (sic) existing jobs in New Zealand that would or might otherwise be lost.” The National-NZ First coalition agreement provides that “substantial and identifiable benefits to New Zealand” is to be the primary consideration in the consent to overseas investment. “What the deal means to you,” supra note 51. The language of the legislation obscures the fact that it makes “provision for the supervision and control” of human lives and that dissenters are to be dealt with by force.

<sup>53</sup> In 1979 for example, three members of a White Power gang threw a molotov cocktail into an Indian owned shop. The members claimed that they were dedicated to “getting rid of coloured people in New Zealand.” Spoonley, supra note 2 at 154. It is unsurprising that 1979 was a period of extensive economic and social regulation in New Zealand.

embodied in our culture and reflected in our laws. More fundamentally, laws that initiate physical force affect an individual's psycho-epistemology. The more intrusive the laws, the less individuals have to raise their focal awareness; they do not have to encounter foreigners, they have only to deal with those who share the same concretes as themselves. As the economy of a country becomes isolationist, there is a corresponding isolationism in the consciousness of individuals - anyone who is united by different concretes becomes a psycho-epistemological threat. While such laws are ostensibly aimed at foreigners, they necessarily affect internal race relations, as individuals begin to relate to each other by perceptual criteria rather than shared values. The person who fears the different culture and language of foreigners, will fear the different culture and language of an indigenous minority: the psycho-epistemological root is identical.<sup>54</sup>

Laws that initiate physical force have a deleterious effect on an individual's cognitive and conceptual faculty. Every law ostensibly aimed at foreigners, is in fact aimed at the minds of New Zealanders. Such laws are preventing New Zealanders from exchanging values with whom they like; they are forcing New Zealanders to act without judgement and to deal almost exclusively with those who share the same geographical origins as themselves.

To the degree that physical force is initiated or threatened, the efficacy of the mind is hampered. To the degree that an individual's life is at the mercy of the political system, his or her mind and its efficacy at grasping reality are undermined; the individual's primary focus, his or her psycho-epistemological frame of reference, becomes other people. The statist system lowers an individual's focal awareness to the perceptual level, while manufacturing social metaphysicians. Thus, at the same time as the statist legal machinery fragments society into warring pressure groups there is a corresponding lowering of focal awareness among the populace, predisposing individuals to unite in self-protection on the basis of race and geography.

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<sup>54</sup> The same principle applies to the indigenous minority: the person who fears the different culture and language of foreigners will fear the different traditions and ideas of an ethnic majority.

## V. CONCLUSION

There is an internal relationship between racism and legislation that initiates physical force. This means that it is contradictory to oppose racism and to support *any* law that initiates physical force, including anti-discriminatory legislation, nationalistic legislation, tobacco regulations, taxation, and the like. This is not merely an exercise in intellectual polemics: providing one's concepts are derived from and remain connected to the facts of reality, there can be no duality between theory and practice. As a metaphysical contradiction is a logical impossibility, the sanction of an epistemological contradiction is necessarily cataclysmic: the attempt to eliminate racism by proscribing it (including the corresponding acquiescence to statism and collectivism) can only have the obverse effect of intensifying the incidence of racism in society.



# INDIGENOUS PEOPLES AND INTELLECTUAL PROPERTY RIGHTS

BY PETER W JONES\*

## I. INTRODUCTION

In an increasingly globalised trading environment, businesses are seeking not only markets but also sources of innovation in and from the world's indigenous peoples.<sup>1</sup> Indigenous peoples, individually (by person and by people) and collectively, are, not surprisingly, seeking to protect their resources and their heritages.<sup>2</sup> A recent focus of their attention has been the use of intellectual property law for such protection and calls have been made to include cultural heritage protection in both the international and domestic schemes of intellectual property law. The reaction of intellectual property lawyers and bodies, however, has not been entirely favourable and indigenous claims have met with some difficulty. I suggest that part of this difficulty stems from the different perceptions that the two groups have of the content and context of intellectual property law.

The requirements of indigenous peoples, for example, are heritage protection for the survival of the distinct culture of the peoples concerned, rather than principally being concerned with monopolies or gaining the economic benefit of commercial exploitation.<sup>3</sup> However, the principal

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<sup>1</sup> See, eg, in the USA: Carroll, AE "Not Always the Best Medicine: Biotechnology and the Global Impact of US Patent Law" (1995) 44 American Univ LR 2433; Hut, MJ "Indigenous Peoples and Drug Discovery Research: a Question of Intellectual Property Rights" (1995) 89 Nw U L Rev 1678; Peterson, K "Recent Intellectual Property Trends in Developing Countries" (1992) Harv Int'l L J 277; Yano, LI "Protection of the Ethnobiological Knowledge of Indigenous Peoples" (1993) 41 UCLA L Rev 443.

<sup>2</sup> See Section II, *infra*. See also submissions to World Intellectual Property Organisation of the African nations, *infra* note 46 and accompanying text; and "Stopping the Rip-Offs. Intellectual Property Protection for Aboriginal and Torres Strait Islander People," discussion paper, Australian Attorney-General's Department (1994, 15 pp).

<sup>3</sup> As characterised by Moutsakas, indigenous peoples' cultural property tends to be "property for grouphood," and promotes group development and flourishing. See Moutsakas, "Group Rights in Cultural Property" (1989) Cornell L Rev 1179 at 1185.

purpose of intellectual property rights for their proprietors is control of commercial exploitation. Thus the different property rights require to be monopoly rights, for the time for which they exist.

Indigenous requirements are often directed to protection of ideas or styles; whereas there is no property in an idea in current intellectual property law. The intellectual property rights which do exist flow from a particular expression, manifestation, or application of an idea. Indigenous requirements are also characterised by a desire to restrict release of culturally important material into the wider world.<sup>4</sup> This is as opposed to the policy supporting the recognition and enforcement of national and international intellectual property rights, which is that the grant of monopoly rights, limited in duration, promotes the early release of innovation and creative work.

In this article I describe the existing intellectual property regime, the indigenous calls for protection and (mis)perceptions of current intellectual property law, and the international reaction to these claims. Finally, I suggest that, despite the different perceptions of the aims of intellectual property protection, there are some extensions of existing law that could properly and effectively accommodate the wishes of indigenous peoples in the protection of such things as traditional remedies, recipes, and rituals, as well as allowing development and commercial benefit. However, any greater or more extensive protection will first require the implementation of a very different system from that which presently exists.

## II. EXISTING INTELLECTUAL PROPERTY REGIMES

### *1. Property and ownership*

It is important to recognise that intellectual property law worldwide centres on essentially European concepts of “property”. Some European concepts of property evident in intellectual property law are that:

- ◆ property is in some legally definable thing, tangible or intangible;
- ◆ property is not limited in time separate from the time during which the thing exists;
- ◆ property is held by some identifiable legal person or persons as owner;

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<sup>4</sup> UNESCO Special Rapporteur report, *infra* note 29.

- ◆ property is capable of being alienated from one owner to another;
- ◆ property is concerned with the allocation rather than the use of resources;<sup>5</sup>
- ◆ property is a relation between the owner and other people in relation to things.<sup>6</sup>

Ownership of property implies rights to alienate, modify, assign for a limited period, and even destroy the property right. It is important to note that the ownership is of the right, which is not necessarily the same as the thing itself. There are thus layers of ownership inherent in the concepts. For example, the “full” owner of a thing can create a lease in it, and the lease then can have a separate owner. The subordinate ownerships are of subordinate property.<sup>7</sup>

Waldron<sup>8</sup> observes that ownership is a term “peculiar to systems of private property.” However, ownership, being transferable from one owner to another, can be limited in time for any one owner. Ownership in the general sense of the ability for someone, anyone, to own, is more the idea that we try to convey using the word “property,” or at least the expression “property in.”

The thing, the property, and the ownership, are all three capable of independence. The three relate and are linked by notions of control and rights. Those notions are imposed or implied by law. The controls and the rights are all exercisable by legal persons and by governments.<sup>9</sup>

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<sup>5</sup> See generally Waldron, J “What is Private Property?” (1985) 5 *Oxf Jnl of Legal Studies* 313; also Waldron, *The Right to Private Property* (1988), at 31.

<sup>6</sup> See Cohen, “Property and Sovereignty” (1927) 13 *Cornell L Q* 8, at 12.

<sup>7</sup> In the example of the lease, the lessee as owner of the lease can terminate the lease by agreement, can assign it, can sublease it (ie lease the lease), but can do no more with the thing being leased than the lease itself permits. The lease can be terminated for reasons extraneous to ownership of the thing being leased - such as arrival of the end of the lease’s term or non-payment of rent - and thereupon the property in the lease comes to an end, without affecting the property in the thing itself. Property in the leasehold interest continues as long as the lease does, no more but no less; a shorter property interest given by the lessee on the same terms as the lease is a sublease, which has its own property in it.

<sup>8</sup> Waldron, *supra* note 5.

<sup>9</sup> Although, note that where the rights are held and exercised by governments, they are still private law rights; see Declarations to the text of GATT/TRIPS: “*Recognising that intellectual property rights are private rights*”.

Different municipal legal systems define in their own terms just what rights are enshrined in and flow from property and ownership, and the extent to which the rights grant control and are subject to external controls. In my discussion in this article, therefore, unless otherwise expressed I use the term "rights" in the restricted sense of defined legal rights rather than some more general sense of that which is good and proper. Even then, usually what I will discuss are rights attaching to ownership, proprietorship, and property. The discussion is about intellectual property rights. The global legal system is very clear on what those rights are, since they have been defined for decades.

### III. INTELLECTUAL PROPERTY RIGHTS

As mentioned above, under current intellectual property laws there is no property in an idea. The property is of a particular expression, manifestation or application of an idea. The purpose of protection is to control commercial exploitation, and the policy is that such intellectual property rights promote creative work and public release of its products.

Current measures for the protection and exploitation of intellectual property rights worldwide stem from three significant international conventions concerning intellectual and industrial property.<sup>10</sup> There are four broad areas of formal intellectual property right protection: trademarks and service marks; design rights; patents; and copyright. All four allow for their own set of monopoly rights in use and exploitation, and all four prescribe time limits for which their own monopolies run. In addition, all four provide for systems of ownership and subsidiary rights, assignment, and different levels of property interest. There is increasing convergence between domestic legal systems and the international norms as expressed in the intellectual property conventions and the updates of the international conventions.<sup>11</sup>

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<sup>10</sup> The Paris Convention for the Protection of Industrial Property 1883 (current version the Stockholm Text 1967), for patent, trademarks and service marks; the Berne International Convention for the Protection of Literary and Artistic Works 1886 (current version, the Paris Text 1971), for copyright; and the Universal Copyright Convention 1971. Also of significance are a number of other more specific conventions, such as the Rome Convention for the Protection of Producers of Phonograms and Broadcasting Organisations 1961.

<sup>11</sup> See generally and for a local example in Australasia, the discussion in Brown, A "Intellectual and Industrial Property" [1996] NZ Law Review 125 at 125-128 and particularly the comments as to the GATT/TRIPS-stimulated reforms.

### *1. Trademarks and Service Marks*

Trade and service marks are distinctive symbols used to authenticate the particular product or service which a manufacturer or provider is releasing into a market. The mark is meant to serve as a method of verifying origin, and can also be a powerful marketing tool in the differentiation of products and services from those provided by commercial competitors of the manufacturer or provider. Differentiation in the market is a prized objective of many marketers, particularly where there is a wish to project an image of high quality.

The rights to use trade marks and service marks are conferred through registration systems. Acceptance for registration revolves around the distinctiveness of the mark, its use and potential use in a market, and in some jurisdictions prior established use and reputation. Breach occurs by use of someone else's mark after registration. The world-wide registration systems depend on international treaty and convention arrangements for their enforcement.

### *2. Design Rights*

The local definitions and exercise of design rights vary to some extent, but again depend on a registration system. In order to register a design, the applicant must demonstrate the exercise of artistic endeavour and originality. Questions of style do not come into consideration, as the originality may be and often is within some recognised style or genre.

"Design" is interpreted in many jurisdictions to be purely artistic embellishment, though it would appear that the tide is turning so that the majority of countries with design legislation will accept for registration items of industrial or applied design. Breach occurs by use of someone else's design after registration. The world-wide registration systems again depend on international treaty and convention arrangements for their enforcement.

### *3. Patents*

Patents are created through another system involving rights granted and held, and exercisable, pursuant to registration. The system had its origin in the English Crown grant of monopolies by letters patent. Patenting depends on invention of novel items, objects, and processes which have

proven utility. They have to be able to work.<sup>12</sup> Patented inventions have to have had their novelty, and their effectiveness to perform their design task, demonstrated before acceptance for registration.

That is not to say that the design task has to be of any particular utility or benefit to society, and a patent holds good even if the invention turns out to have some entirely unexpected useful application.

The patent holds good against subsequent entirely independent invention and application of the same thing, and the monopoly rights give a time typically of 20 or 25 years from grant or sealing of the patent, together with interim protection while a patent application is being processed.<sup>13</sup> This is an illustration of the commercial function of protection.

Breach occurs by use or application of the patented invention after registration. As for the specific intellectual property protection systems discussed above, the rights are created by statute and international convention, carry rights of assignment and use together with enforcement, and are applicable overseas in other Convention countries upon creation of the right by registration in the country of origin.

#### 4. Copyright

Copyright is its own thing to a much greater extent than are the other three classes of intellectual property protection. There are several points of difference in the schema of copyright compared with those for the other three classes.

- ◆ Copyright exists by virtue of the creation of an original work. The registration regimes present in some countries are not essential, and many countries — including Australia and New Zealand — do without any form of registration system for copyright.
- ◆ Copyright, except in respect of some of the rights which flow from it, does not have to be asserted in any way unless local legislation calls for claims of copyright to be expressed.

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<sup>12</sup> For example, in New Zealand, no punter's betting system has been patented although applications have been made. However, computer software patent applications have been accepted. The Hughes Aircraft Corporation decisions by the New Zealand Patent Commissioner on 3 May 1995 were the first examples of this; see Moon, K "Software Inventions Now Patentable in New Zealand" [1995] EIPR 203.

<sup>13</sup> Hence the description "Patent pending."

- ◆ Copyright has many more layers of rights and potential property interests than do the other forms of intellectual property protection.
- ◆ Copyright can be extended conceptually to overlap considerably with each of the other three systems. In New Zealand, copyright has almost superseded design rights, for example.<sup>14</sup>
- ◆ Copyright is still a monopoly right, but there are different types of copyright.<sup>15</sup>
- ◆ Copyright may still exist in a work which infringes someone else's rights.
- ◆ Copyright can subsist in different renditions of the same thing.<sup>16</sup>
- ◆ Copyright grew out of protection of artistic and literary endeavour, but in some countries and in particular in the common law world aesthetic judgement is not applied to determine the existence of copyright.

Copyright applies to all sorts of expressions of creativity. Literary works (with which copyright had its origins), artistic works, works of artistic craftsmanship, architectural works, plans, performances, broadcasts, and computer software are all within the protections provided by copyright.

The international systems for copyright protection also arise out of treaty and convention arrangements. Breach of copyright occurs where the material in question is copied without permission; and proof of copying in some form or another, direct or indirect, is an essential element of a successful claim for breach of copyright.

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<sup>14</sup> See, e.g., Thomas J in *Franklin Machinery Ltd v Albany Farm Centre Ltd* (1992) 23 IPR 649 (a case concerning farm gate latches, where His Honour recognises the place that copyright has come to take in New Zealand copyright law, but is critical of the extension the principles have been given so as to cover the most basic and utilitarian of articles). A three-dimensional item can infringe copyright in a two-dimensional plan, and a two-dimensional plan can infringe copyright in a three-dimensional object.

<sup>15</sup> For example, Crown copyright in statutes and court judgments in the common law of the British Commonwealth; see Monotti, A "Crown Copyright" [1992] EIPR 305.

<sup>16</sup> For example, an edited version of a trial transcript: *Warwick Film v Eisinger* [1969] 1 Ch 508.

#### IV. INDIGENOUS CLAIMS

Indigenous peoples have made various claims to protection of their intellectual property, in both domestic and international fora. For example, in New Zealand, at the domestic level, Maori currently have a pan-tribal claim before the Waitangi Tribunal for ownership of rights in relation to New Zealand's indigenous flora and fauna, including intellectual property rights arising from those resources, as well as cultural and intellectual property generally and moveable cultural property.<sup>17</sup>

At the international level, indigenous peoples have been organising and pressing their claims at various international fora, trying to get acknowledgement of their claims and recognition of their claimed rights in international law. One such forum, for example, is the UN Working Group on Indigenous Peoples, where indigenous representatives have attempted to get a statement of their rights acknowledged in the Draft Declaration on the Rights of Indigenous Peoples.<sup>18</sup> The most

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<sup>17</sup> Wai 262. The claim is expressed as follows:

protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation, and restriction on the use and transmission of the knowledge of New Zealand's indigenous flora and fauna and the genetic resource contained therein.

The claimants go on to claim that:

te tino rangatiratanga was and is an absolute authority which incorporated and incorporates the right to determine intellectual property rights in the knowledge and use of indigenous flora and fauna, in the preservation of biodiversity, and in the ongoing development of a philosophy of eco-ethnic ethics.

The claim does extend to ownership of natural resources and includes bioprospecting and biotechnical development of genetic material from flora and fauna native to New Zealand. The applicants now wish the claim to cover Maori cultural and intellectual property rights and also moveable cultural property in the nature of artefacts. The Wai 262 claim has been accorded urgency, but it appears that the hearing will not be until late 1997. Personal conversation with Judge Richard Kearney, Waitangi Tribunal member in Wai 262 claim, Hamilton, New Zealand, 23 May 1997.

<sup>18</sup> This was achieved in draft Article 12:

Indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

See Draft Declaration as agreed upon by the members of the Working Group as its Eleventh Session, UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (20 April 1994).



comprehensive statement of their claims, however, has been the Mataatua Declaration, which resulted from a 1993 conference of indigenous peoples convened solely to discuss issues relating to the protection of what they termed indigenous intellectual property.

### *1. Mataatua Conference 1993*

In June 1993 the Nine Tribes of the Mataatua Confederation of the Bay of Plenty in New Zealand convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples (“the Mataatua Conference”). As expressed in subsequent United Nations documentation:

Over 150 delegates from 14 countries attended, including indigenous representatives from Ainu (Japan), Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Suriname, the United States and Aotearoa [New Zealand]. The Conference met over six days to consider a range of significant issues, including the value of indigenous knowledge, biodiversity and biotechnology, customary environmental management, arts, music, language and other physical and spiritual cultural forms.<sup>19</sup>

The core declaration of the Mataatua Declaration is as follows:

WE

Declare that indigenous peoples of the world have the right to self-determination, and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property;

Acknowledge that indigenous peoples have a commonality of experiences relating to the exploitation of their cultural and intellectual property;

Affirm that the knowledge of the indigenous peoples of the world is of benefit to all humanity;

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<sup>19</sup> Mead, A “First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples,” (Report to the Eleventh Session of the UN Working Group on Indigenous Peoples, July 1993). The report makes clear that the Mataatua Conference was attended also by participants from Brazil, Chile, and from organisations such as the World Bank, UNDP, UNESCO, the World Wildlife Fund, Greenpeace, museums and research institutions and official representatives of two governments. *Ibid.*, at 1-2.

Recognize that indigenous peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community;

Insist that the first beneficiaries of indigenous knowledge (cultural and intellectual property rights) must be the direct indigenous descendants of such knowledge;

Declare that all forms of discrimination and exploitation of indigenous peoples, indigenous knowledge and indigenous cultural and intellectual property rights must cease.<sup>20</sup>

What is most immediately noticeable is the use in the Declaration of the expressions “intellectual property” and “rights”. Firstly, it is noted that the use of “rights” here is in the natural law sense rather than the positivist approach taken by most legal systems and lawyers. That is, most legal systems hold that a right exists only once it is recognised and granted protection in law; whereas these claims argue that the (natural) right already exists and that all that remains is for states to recognise it. This is the primary indicator of the very different perceptions that states and indigenous peoples have of their claims.<sup>21</sup>

Secondly, “property” is used as if that term of art already applied to the interests sought to be protected. As will be realised from the short explication of world intellectual property law systems given above, there are no property rights as such of the sort claimed. Further, something else again from what is commonly known as intellectual property rights is intended: something more akin to *rangatiratanga* over *taonga* than to proprietorship rights limited in time applied to defined individuals’ property. Indeed, the conference organiser’s report uses the term “indigenous cultural and intellectual property” — and, in particular, “cultural and intellectual property” — on several occasions, without explaining in any detail what is intended by the term. It is clear from a reading of the report that the intention is to cover a much broader range of

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<sup>20</sup> The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, contained in *Other Matters Including Meetings and Seminars and the Voluntary Fund for Indigenous Populations*, UN Doc. E/CN.4/Sub.2/AC.4/1994/12 (6 June 1994), 12, at 12-13.

<sup>21</sup> For further discussion of this point — of the different perceptions of rights and their recognition — see Iorns, “Indigenous Peoples and Self-Determination: Challenging State Sovereignty” 24 *Case Western Reserve Jnl of Int’l Law* 199, esp. at 224-228.

rights and interests than current international intellectual property law begins to contemplate. The report, for example contains the following passage:

In the rounds of fund raising we encountered attitudes which certainly highlighted the need for the issue of cultural and intellectual property rights to be addressed. We were forewarned by one senior New Zealand Government official to 'stop reaching for caviar and to concentrate instead on fish and chips.' We were told by another senior official that our conference could not meet his Ministry's standards of scientific or even social research because it involved the re-circulation of old knowledge rather than the development of new 'unknown' knowledge. [This is] A disturbing perspective for a national agency to adopt post-UNCED especially given its task of administering the largest research fund in the country.<sup>22</sup>

It appears as though there was a fundamental misunderstanding in the exchanges just recounted. Worldwide, legal systems define and thereby recognise what intellectual property as a legal concept is. Intellectual property is property in a new product of the application of intellect, in a form which is capable of being protected in one of the methods described above, or by some other legal mechanism.<sup>23</sup> The use of the term "intellectual property" to describe cultural expressions and forms which are not capable of protection in the legal system as presently constituted is bound to confuse the intellectual property lawyers and those responsible for determining what the law is. It would seem that the use tends also to confuse the callers for protection of wider cultural heritage by way of international law.

As likely to cause confusion, and indeed resentment, is misunderstanding of the time limits of intellectual property protection. Again to quote from the Mataatua Conference organiser's report:

A... profound and wise statement originating from an African elder says 'THE WORLD WAS NOT LEFT TO US BY OUR PARENTS, IT WAS LENT TO US BY OUR CHILDREN.' This proverb has been promoted internationally through UNICEF. The elder's name, tribe, or even country are not acknowledged. The original context of the statement is not identified and subsequently no date can be ascertained. The proverb therefore becomes part of that vast lonely void known as the 'public domain' where proverbs and other aspects of indigenous and cultural property are used, most

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<sup>22</sup> Mead, *supra* note 19, at 2.

<sup>23</sup> Such other legal mechanisms include the common law actions of passing-off and breach of confidence.

often without permission, taken out of context with no acknowledgment given to the original individual (author, composer, healer, elder etc.). UNICEF is now using this proverb in its international line of stationery to raise funds for its activities. No one would begrudge UNICEF for fund raising. UNICEF is an important worthwhile international agency. We merely wish to illustrate that even the best intentioned are unwittingly contributing to the exploitation of indigenous peoples and their knowledge.<sup>24</sup>

Intellectual property law would draw the distinction between a proverb<sup>25</sup> and an aphorism.<sup>26</sup> The latter may well be subject to copyright, but the former very unlikely to be. The difficulty of identification of author in an item that has gained general currency is a reason for the limits in time of and scope of protection afforded by intellectual property law under the copyright conventions.

Regardless of the possibility of defining an aphorism's authorship, if it gains general currency and becomes a proverb, then at about that stage the usual temporal limitation of copyright would apply and copyright cease to apply by the effluxion of time. Typically, copyright expires after the life of the author or creator of the work plus fifty years. For copyright, as for the other formal intellectual property protections, the right to protection is a limited monopoly right given to encourage material out into the world so that in due course it may become a part of the general currency. I use the expression "the general currency" as an alternative to the description in the above passage of "that vast lonely void known as the 'public domain.'" The public domain, in the sense of being the general currency of humankind, is vast and is growing, but it is not a void, and is not lonely, being full of human invention.

While this description is not comprehensive, it is enough to illustrate the difficulties of discussion over law reform when the two 'sides' mean different things by the same term.

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<sup>24</sup> Mead, *supra* note 19, at 2.

<sup>25</sup> A proverb is "a short pithy saying in general use, held to embody a general truth." *Concise Oxford Dictionary* (9 ed) (1995).

<sup>26</sup> An aphorism is "a short pithy maxim." *Concise Oxford Dictionary*, *ibid*.

## 2. Support for indigenous claims

In 1994 Mme. Erica-Irene Daes, as Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, released her report "Study on Protection of the Heritage of Indigenous Peoples."<sup>27</sup> In preparing this Report, Mme. Daes drew extensively on the Mataatua Declaration and indigenous conceptions of heritage and measures necessary for its protection.<sup>28</sup> However, in doing so, many elements stressed by the Special Rapporteur and adopted in her Report again clearly do not fit within existing intellectual property laws. Further, I suspect that some of these will not fit, no matter how hard the laws are made to stretch.

The non-commercial aim of protection is stressed by the Special Rapporteur with the concomitant ambit of protection being full knowledge systems, rather than just collections of manifestations of expression. Indeed, the ambit of "heritage" is extremely wide:

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<sup>27</sup> UN Doc. E/CN. 4/Sub.2/1994/31 (8 July 1994).

<sup>28</sup> See her comments:

6. In elaborating the principles and guidelines, contained in the annex to this report, the Special Rapporteur has drawn extensively on the Kari-Oca Declaration of the World Conference of Indigenous Peoples on Territory, Environment and Development (Kari-Oca, Brazil, 15-30 May, 1992), and the Mataatua Declaration of the First International Conference on Cultural and Intellectual Property Rights of Indigenous Peoples. Their own conception of the nature of their heritage and their own ideas for ensuring the protection of their heritage are central to the 'new partnership' with indigenous peoples symbolised by the International Year of the World's Indigenous People in 1993.

7. The Special Rapporteur wishes to underscore the fact, emphasized by the Mataatua declaration, that indigenous peoples have repeatedly expressed their willingness to share their useful knowledge with all humanity, provided that their fundamental rights to define and control this knowledge are protected by the international community. Greater protection of the indigenous peoples' control over their own heritage will not, in the opinion of the Special Rapporteur, decrease the sharing of traditional cultural knowledge, arts and sciences with other peoples. On the contrary, indigenous peoples' willingness to share, teach, and interpret their heritage will increase.

*Ibid.*, at 2.

11. The heritage of indigenous peoples is comprised of all objects, sites and knowledge, the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular peoples, clan or territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.

12. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works, such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the phenotypes and genotypes of flora and fauna; human remains; immoveable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotape or audiotape.

Difficulties with such a wide ambit include that a fundamental element of intellectual property law is that ideas and knowledge as such do not sustain protection; knowledge is instead considered to be the common heritage of humankind and ideas are not to be confined. In addition, styles influenced by or even based on imported ideas and expressions are characteristic of any culture which has contact with a world outside its own. Further, phenotypes and genotypes, unless derived by genetic engineering, have no novelty and therefore are incapable of intellectual property law protection; and in many countries, including the USA, human genetic material as such is incapable of receiving such intellectual property protection.<sup>29</sup>

A second type of problems with the scope of matters to be protected is the ownership of intellectual property rights. The Special Rapporteur recommends that:

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<sup>29</sup> This incapability exists regardless of publicity to the contrary, which claims that US patent 5,397,696 "claims a cell line containing unmodified Hagahai [from Papua New Guinea] DNA and several methods for its use in detecting HTLV-1 related retroviruses." (1995) 4:5 Human Rights Defender 3 (Human Rights Centre, University of New South Wales). Inspection of the patent application cited indicates that it does not make a claim to patent the unmodified DNA. Similar comment may be made about the discussion concerning the W R Grace patent as to neem tree pesticide: the patent application is for the method of fixing the pesticide, not for the pesticide in the seeds of the tree; there is no novelty in the pesticide, and it is not the product of invention anyway — being entirely natural — so is incapable of bearing patent protection for anyone.

13. Every element of an indigenous peoples' heritage has traditional owners, which may be the whole people, a particular family or clan, an association or society, or individuals who have been specially taught or initiated to be its custodians. The traditional owners of heritage must be determined in accordance with indigenous peoples' own customs, laws and practices.

As described above, the protections depend, in most countries, on there being identifiable authors or creators of "works." Group ownership, where the group includes everyone within the group as defined only by itself from time to time, is impossible in the current systems. Precise authorship and precise ownership of the various rights (since enforcement is to be by "right holders" if not by "authors") must be able to be determined.

In addition to the scope of the matters to be protected, the scope of protection is similarly expansive. The Rapporteur's Principle 5 reads:

Indigenous peoples' ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people.

The primary difficulty with this from the point of view of implementation is that permanent and inalienable intellectual property rights are impossible in a system predicated on time-limited rights of tradeable property.

Additional suggested principles are:

8. To protect their heritage indigenous people must also exercise control over all research conducted within their territories, or which uses their people as subjects of study.

9. The free and informed consent of the traditional owners should be an essential precondition of any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage.

10. Any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage must be revocable and ensure that the peoples concerned continue to be the primary beneficiaries of commercial application.

These, too, raise difficulties with protection. For example, collective rights are notoriously difficult to enforce in a system which depends initially on registration (which leaves copyright as the only element under which some

development could usefully take place for protection, a point I address below). In addition, a system which allows different applications of rules according to local custom makes for lack of understanding and makes impossible of any degree of certainty (although my own view is that this is a weak objection). Further, no business engages in commerce unless it intends itself to be the primary beneficiary of its commercial effort.

The Special Rapporteur's draft then moves on to set out proposals as to transmission of heritage:<sup>30</sup>

14. Each indigenous people's rules and practices for the transmission of heritage and the sharing of its use must be recognized generally in the national legal system.

15. In the event of a dispute over the custody or use of any element of an indigenous people's heritage, judicial and administrative bodies should be guided by the advice of indigenous elders who are recognised by the indigenous communities or peoples concerned as having specific knowledge of traditional laws.

Pragmatically, formal attempts to give primacy in legal systems to customary law have not met much recent success in our part of the world.<sup>31</sup> While legal dualism may be something we need to work toward in New Zealand, we would have extreme difficulty in attempting to apply a major part of the legal system in accordance with traditional laws in the foreseeable future.

A further suggestion that runs into practical difficulties is Principle 46:

46. Artists, writers and performers should refrain from incorporating elements derived from indigenous heritage into their works without the informed consent of the traditional owners.

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<sup>30</sup> Supra note 27, at 6.

<sup>31</sup> Consider the place of customary law enshrined in the Papua New Guinea Constitution of 1975, and then compare with that the place that custom law has taken in actual cases. PNG may be an extreme example because of the sheer number of different cultures in the country, but in New Zealand we are still grappling with the intricacies of dealing with different customs, customary laws, and customary law systems between hapu within iwi (roughly, family and subtribal groups within tribes). Even though custom and customary law are meant to be of guidance in relation to Maori land matters, the Maori Land Court rather more functions under its own statute and its own jurisprudence as yet.



It is no small objection to mention the difficulties of identifying the “traditional owners” in many societies which have concepts of ownership different from those underpinning intellectual property law, as described above. However, in terms of implementation, it is a difficulty easier to overcome than some of those more at odds with the whole intent of intellectual property law.<sup>32</sup> A larger difficulty is the point made earlier in relation to the difficulty of attributing artistic inspiration: styles influenced by or even based on imported ideas and expressions are characteristic of any culture which has contact with a world outside its own. It would be hard, practically speaking, to police this suggestion. Further, in many, if not most or even all, societies, parody is a method used by members of the society to comment on aspects of the society, sometimes for deeper social purposes and sometimes only to amuse. This guideline would seem capable of stifling parody within society.

There are, however, some concepts and proposed practices which could fit into the accepted paradigms of intellectual property law. Both consent to the use and application by others, and the concept of attribution as conditions of use and application, are familiar and capable of early achievement. The Special Rapporteur makes some suggestions that, while subject to the same comments about determining traditional owners in some circumstances, would be more easily implemented in national laws<sup>33</sup> and practice:<sup>34</sup>

26. National laws should deny to any person or corporation the right to obtain patent, copyright, or other legal protection for any element of indigenous peoples’ heritage without adequate documentation of the free and informed consent of the traditional owners to an arrangement for the ownership, control and benefits.

27. National laws should ensure the labelling and correct attribution of indigenous peoples’ artistic, literary and cultural works whenever they are offered for public display or sale. Attribution should be in the form of a trademark or an appellation of origin, authorized by the peoples or communities concerned.

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<sup>32</sup> Note, however, that this is not solely a matter internal to indigenous peoples. See, e.g., the difficulty caused in the Morning Star Pole case in Australia, *Yumulul v Reserve Bank of Australia* (1991) 21 IPR 481. There has been some progress in assimilating into Australian copyright law some aspects of customary Aboriginal laws: *Milpururru & Ors v Indofurn Pty Ltd & Ors* [1995] AIPC 91-116.

<sup>33</sup> *Supra* note 27, at 7,8.

<sup>34</sup> *Ibid.*, at 8.

35. Researchers and scholarly institutions must refrain from engaging in any study of previously-undescribed species or cultivated varieties of plants, animals or microbes, or naturally-occurring pharmaceuticals, without first obtaining satisfactory documentation that the specimens were acquired with the consent of the traditional owners, if any.

36. Researchers must not publish information obtained from indigenous peoples or the results of research conducted on flora, fauna, microbes or materials discovered through the assistance of indigenous peoples, without identifying the traditional owners and obtaining their consent to publication.

## V. MOVEMENT TOWARD SOME SOLUTIONS

### *1. Modifying Existing Law*

I would not like my commentary above to be taken to indicate that I have little sympathy with the needs of indigenous peoples to preserve and protect their cultural heritage through the intellectual property law system. Far from it: I wish to find some solutions, ones that can be put into effect by way of international treaty and national laws, and soon. But my discussion shows some of the difficulties with using current intellectual property rights regimes to do so. I thus suggest that a very different regime will ultimately be necessary. That said, there are some possible modifications to the current regime that could allow for some measures of protection.

Some very general initial thoughts as to practicalities may dispose of most of the alternatives. First, protections by registration are going to be impracticable for most indigenous peoples. The problem of travel and access to the system, whatever it be, is one difficulty. The strong possibility of abuse by prior registration by commercial interests with more knowledge of systems and ability to buy advice is another. Trademark, design, and patent protection are all unlikely to be useful on these grounds.

Within existing intellectual property law, therefore, we are then left with either copyright or such things as the common law remedies of passing off or breach of confidence. The passing-off action depends on established commercial presence, and very often what an indigenous people is trying to do is to prevent any commercial presence, its own or anyone else's, being established. Breach of confidence is a tort requiring a commercial relationship between the parties to have been breached by the unauthorised use of private information. Once again, this is just not suitable for the requirements of protection of the rights of indigenous people to their knowledge systems and cultures.

We are left with copyright, which has several current advantages and fewer disadvantages than the other intellectual property law alternatives. Its primary advantages are its flexibility — in New Zealand at present copyright is our main intellectual property protection<sup>35</sup> — and the ease of obtaining protection: copyright exists by reason of the existence of the work and there is no extraneous judgement of quality or value — it is not for anyone other than a holder of a right to say whether it should be protected. Additional advantages include that the system of protection is a world-wide one which is relatively untrammelled by national boundaries;<sup>36</sup> that multiple layers of ownership and exercises of rights are available, so that licensing use is available; and that rights to control applications are available, in the moral rights area, even once “economic” rights, the rights to commercial application, are disposed of. Finally, some things which can be patented can be protected also by copyright; for example, a traditional remedy bears copyright if written down, in the written version. If a remedy or a way of preparation of food is not written down but, say, chanted or sung, then that version is copyright. Indirect copying is still actionable: even though the copyist’s version may bear its own copyright, it infringes the original.

However, there are disadvantages for indigenous people in relying on current copyright law, and only some of these can be overcome or minimised by appropriate modifications to the law. The biggest problems are in relation to what can be protected. The protection is not for the idea or for knowledge as such — the protection is of expression — and there is a requirement of originality of expression, though not of novelty.<sup>37</sup> Thus undocumented knowledge systems, traditional remedies, cultivation methods for plants or cooking techniques are likely incapable of protection in their own right. The novelty requirement can be countered in relation to works of cultural expression with the principle that individual renditions of works can each bear their own copyright. There is still a problem with traditional remedies if there is not a rendition in writing or performance.

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<sup>35</sup> It covers such utilitarian items as toilet pan connectors (*Johnson v Bucko Enterprises* [1975] 1 NZLR 311), kiwifruit tray plastic liners (*Frank M Winstone (Merchants) Ltd v Plix Products Ltd* [1985] 1 NZLR 377), plastic flying discs (*Wham-O Manufacturing v Lincoln Industries* [1984] 1 NZLR 641), as well as the more obvious artistic works such as books, musical and architectural works, and (now, by statute) computer programs.

<sup>36</sup> Some nations, such as Papua New Guinea, have no copyright law, but most have some law as parties to the Berne Convention (*supra* note 10), which provides in Article 3(1) for copyright protection to extend automatically to other member States if it exists in the country of origin. Article II.1 of the Universal Copyright Convention has a similar provision to the Art. 3(1) provision in the Berne Convention.

<sup>37</sup> “... the starting point is that the work is not copied and originates from the author.” Holyoak, J and Torremans, P *Intellectual Property Law* (1995), at 149.

The solution appears easy: express the idea, and preferably ensure the expression is recorded in some way. However, this may not be as easy as it sounds, quite apart from practical problems such as access to recording materials. Thus, for example, documentation of undocumented knowledge systems may not allow for preservation of the richness of those knowledge systems. This will not get over the difficulty that styles rather than individual works have no protection. This is linked to the disadvantage that derivatives from cultural heritage material may be incapable of being controlled.<sup>38</sup> The only remedy for this appears to be the application and extension of the concept of moral rights. This is a concept present in many common law countries such as Australia, New Zealand, and the UK as well as continental Europe, where it originated.

A second set of problems arise in respect of ownership of copyrights. The only way for these problems to be overcome would be by modifying the law. For example, the concept of moral rights could be expanded so that group proprietorship of moral rights becomes justiciable, not just personal individual moral rights.

Even once problems of the definition of the property and its ownership were overcome, the law would have to be modified to overcome the (short) length of copyright protection currently enjoyed. This, however, could be overcome with the application of the concept of moral rights<sup>39</sup> as, in many jurisdictions, moral rights continue for the benefit of an author's descendants as well as being, in almost all jurisdictions, inalienable by way of trade.

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<sup>38</sup> See, for example, the German product "Kavakava," chemically synthesized to mimic kava and blatantly trading on the name of a drink carrying huge cultural significance. *Waikato Times* March 23, 1996 at 2; also New Zealand Intellectual Property Journal, May 1996, at 102.

<sup>39</sup> This gives authors the right to attribution, the right to object to derogatory treatment, and the right to control the method of release of material.

## 2. Current NZ Reform Proposals

New Zealand is currently considering intellectual property law reform, for various reasons: ensuring compliance with GATT TRIPS;<sup>40</sup> the fact that each of the three statutes dealing with patents, trademarks, and designs<sup>41</sup> is now 43 years old; and the need to remove the overlaps between the areas covered by these three statutes and the Copyright Act 1994. The Ministry of Commerce intends the introduction of an all-encompassing Intellectual Property Law Reform Bill to achieve reform. The expected introduction date is now some time in 1997.

The suggested reforms are to take into account the views and interests of Maori, and Maori have been consulted. Indicative of the usual official view of intellectual property law is the fact that the proposed statutory reforms in New Zealand are under the purview of the Ministry of Commerce as the responsible department. Maori have expressed some dissatisfaction with the attitudes taken by the Ministry in the reform process to date, including concerns about inadequacies in time allowed for submissions to be prepared and the extent of Maori consultation.<sup>42</sup> These procedural problems must be overcome because the Ministry needs to have a clear picture of the particular needs of Maori in relation to protection of their cultural heritage. I suggest that current intellectual property law, and particularly copyright law, needs to be modified in order for it to be able to protect the kinds of things that Maori are arguing for. Even if New Zealand does modify its law, extensions to cover some Maori intellectual property rights will not apply worldwide unless international protection regime is changed as well.

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<sup>40</sup> The General Agreement on Trade and Tariffs, side agreement on Trade-Related aspects of Intellectual Property (Marrakech, 15 April 1994).

<sup>41</sup> These are the Patents Act 1953, Trademarks Act 1953, and Designs Act 1953.

<sup>42</sup> Minutes of meeting on patentability of biotechnology, Ministry of Commerce, Wellington, 19 April 1995; and McNeill, M "Intellectual Property reform and the Marginalisation of Maori," *Proceedings of the Inaugural NAMMSAT Conference*, Te Puni Kokiri (Ministry of Maori Development), Wellington, at 25. [NAMMSAT stands for National Association of Maori Mathematicians, Scientists and Technicians.]

### 3. Reform of International Law

There have been several attempts by indigenous peoples to persuade the World Intellectual Property Organisation (WIPO) to recognise indigenous claims. To date, indigenous peoples have been relatively unsuccessful. However, there is one significant aspect of indigenous peoples' claimed intellectual property rights which has been supported by some states and which has very recently received protection: folklore.

The need to protect folklore has been recognised by WIPO since before 1985, when WIPO and UNESCO jointly published WIPO's Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.<sup>43</sup> The model law indicates that there is provision in both the 1967 Stockholm and the 1971 Paris Acts of the Berne Convention for legislation to be passed providing for copyright protection for unknown authors of unpublished works, which would clearly allow for State protection of folklore.

There have, however, been difficulties with this model law. Firstly, all the texts, and also the international treaty on the topic,<sup>44</sup> regard "works of folklore as part of the cultural heritage *of the nation*."<sup>45</sup> Secondly, the time duration for copyright protection is still too restrictive because the As a result of the push for change, WIPO recently adopted a Protocol to

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<sup>43</sup> This model law followed local attempts in a series of countries, from Tunisia's attempt in 1967, through to the Guinea law in 1980, to include folklore protection in municipal copyright law.

<sup>44</sup> The Bangui text of the 1977 Convention concerning the African Intellectual Property Organisation, commonly known as the OAPI Convention.

<sup>45</sup> Introductory Observations prepared by the Secretariats of the United Nations Educational, Scientific and Cultural Organisation and the World Intellectual Property Organisation on the Model Law on Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Geneva, 1985), at 4, para.5; emphasis added. "Property of the nation" is, of course, not the same as property of an indigenous people.

provisions and indeed the Model Law are structured to fit within the existing copyright law framework. Because of such difficulties, several states — most notably African countries — have pushed for change in the model folklore protection law.<sup>46</sup>

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<sup>46</sup> A joint submission to WIPO in the lead-up to the December 1996 conference, made by a number of African countries notes that:

<sup>32</sup> African countries have consistently maintained that folklore, as an integral part of the cultural heritage of a country, is bound up with the identity and self-expression indigenous communities within that country. Incidentally many other countries outside Africa share the view that folklore is a wholistic system of rules which gives meaning to human existence within the framework of culture as a continually evolving living functional tradition of society.

<sup>33</sup> Folklore is accepted as a basis for the cultural identity and a most important means of a nation's self-expression at domestic and international levels. Unfortunately the creations of many developing countries, most of which are based on their traditional artistic heritage, are being plundered and seriously endangered by accelerating technological development. In the course of exploitation they are commercialized without due respect for the cultural sensitivity and commercial interest of the respective communities. African countries, like many other developing countries have therefore suffered from the contextual distortion and abuse of their folklore without adequate economic remuneration.

<sup>34</sup> It is accepted that folklore in many developing countries has an intimate bearing on the creative lives of the people and should not be dismissed as relics of a primitive past as is often argued in the industrialized countries. Rather, it should be given adequate protection in order to accelerate creative development. Such manifestations of culture as folktales, myths, legends, proverbs, anecdotes, music, drama, etc. qualify to be protected especially in the face of more aggressive exploitations in the field of sound recording, broadcasting and cinematography.

See Proposals of Burkina Faso, Cameroon, Cote D'Ivoire, Egypt, Ghana, Kenya, Malawi, Namibia, Nigeria, Rwanda, Senegal, Sudan, Togo, Tunisia, and Zambia made to the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, Fifth Session, Geneva, 1-9 February 1996, WIPO document INR/CE/V/12 (February 2, 1996), at 5. The submission goes on to recognise the failings of the Stockholm revision and the Model Laws to achieve protection of folklore, and recommends evolution of a *sui generis* right in respect of folklore, by way of a separate international instrument addressing the peculiar character of folklore. The submission remarks that the nations "are mindful of some of the practical problems associated with the protection of folklore at the international level, such as the non-availability of a workable mechanism for identifying ownership of "regional folklore." Ibid, at 6,7.

the Berne Convention concerning performers' rights. In this Protocol, protection is granted for "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore."<sup>47</sup> The focus is on the fixation of performances and the right of performers to control such things as attribution and release of their performances. The question of the origin of the item of folklore that the performer is performing is not addressed. The importance of this in the context of this article is that there is now explicit recognition in a major international instrument regarding intellectual property of some of the claims indigenous peoples have been making.

## VI. CONCLUSION

There is great distance between the claims of indigenous peoples to protection of what they term their intellectual property and the coverage of current intellectual property protection regimes. There has been discussion as to narrowing or closing this distance in order to protect indigenous culture and heritage. However, there have been two primary impediments to this protection. First, the content of existing intellectual property law does not provide for the types of protections that indigenous people seek, so it is unable to be applied to their benefit. Second, the claims for protection and discussion in this area appear, on their face, to be based on misunderstandings of the content of existing intellectual property law by indigenous peoples and their advocates. I thus suggest that perhaps the appropriation of terms of art without recognition of the limits imposed by the use thereof has hindered the discussion on solutions.

Despite the difficulties to date, I suggest that the existing New Zealand and international intellectual property law system does hold the potential to resolve many of the demands of indigenous peoples for proper regard for their cultural heritage, and for protection. While there will need to be some modification to existing laws for more effective and meaningful protection, some expansion of the existing copyright systems could cover considerable ground towards workable solutions. This should be a continuing process, with New Zealand implementing positive developments in international law — such as those concerning folklore — but at the same time continuing to work on reform of New Zealand laws, which may in turn be extended to greater worldwide protection for all indigenous peoples.

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<sup>47</sup> Draft Treaty for the Protection of the Rights of Performers and Producers of Phonograms, WIPO document CRNR/DC/5, at 15, Article 2 Definitions; adopted by WIPO in December 1996.



# CONSUMERISM AND PACKAGING: ENVIRONMENTAL EVILS AND THE NEW ZEALAND RESPONSE

BY DAVID ALSOP\*

## I. INTRODUCTION

You get into a car that you haven't finished paying for yet and drive out of town very slowly, not by choice, but because everyone else is doing the same. You park in a huge concrete carpark (that used to be a real park) and enter an anonymous aircraft-hanger-style super clean warehouse with piped music and bored looking security "personnel" guarding the doors. You choose from a selection of over-priced, overwrapped, this size only, identical pre-cut sheets of wood, grab a packet of nails in a Houdini-proof plastic box from a 30 metre long neon-lit display rack and begin to queue at the counter. Six minutes later you pay by handing over your (membership has its privileges) credit card to a tired (I'll work 60 hours this week so I can buy that VCR) worker trapped behind the video-monitored checkout booth. You then drive home, slowly through gridlock, but enjoying the quality sound from the CD shuttle system and the cool breeze of the airconditioning blowing on your face. You suddenly wonder why you feel like you've spoken to no-one in the last two hours. A landfill creates an eye-sore on the side of the motorway and pricks your conscience. You start to worry about the environmental consequences of all that packaging and shrinkwrap.

Packaging and consumption are interrelated. They are environmental problems viewed from different perspectives. On one hand, producers use packaging to sell goods and, on the other hand, consumers purchase these goods. Modern day consumerist patterns create large volumes of waste. This is largely because of the increased amount of packaging used in production processes.

The purpose of this article is to examine New Zealand's response to the increased levels of packaging waste brought on by consumption. The article begins by examining the concepts of consumerism and packaging. It then analyses the international guidelines regarding consumption and packaging. The final part evaluates New Zealand's reaction to the international guidelines pertaining to packaging.

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## II. CONSUMERISM

The word “consumerism” is derived from the Latin term “consumere” which means “to take up wholly, to consume, waste, squander or destroy.” Consumerism, or perpetual consumption, is a social and economic creed that encourages humans to aspire to an ever-increasing share of the world’s resources regardless of the consequences. Consumerism encourages people to buy for the sake of buying, with little regard for the true utility of what is bought.

The environmental consequences of natural resource consumption are often borne by people other than those to whom the benefits of that consumption accrue. People living in industrialised countries, collectively known as the North, constitute a quarter of the Earth’s human population, yet at present, they consume a large majority of the world’s natural resources.<sup>1</sup> While the Northern countries are the largest producers and consumers of natural resources, less efficient methods and technologies and fewer effective controls in developing countries mean environmental degradation is relatively more severe in those countries.

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<sup>1</sup> The following statistics serve to illustrate this point. In 1991, the North consumed 86 percent of the world’s share of aluminium, 86 percent of copper and 80 percent of iron and steel. Extraction, refining, dispersive use, and the disposal of metals and industrial minerals may cause significant local environmental problems. Mining can degrade land and create quarries and leaching from tailings or abandoned mines and the disposal of chemicals used in refining are significant sources of water pollution in mining regions. In the same year, the North consumed 47 percent of the world’s share of cotton and wood fabrics. Synthetics which would drastically alter these figures are excluded. The USSR and China are also excluded due to non-availability of information. Cotton is the cause of a number of local environmental problems, most of which stem from extremely heavy use of pesticides. Contamination by pesticides and herbicides is a problem in the soil, water, and food chain of many cotton growing countries, and their overuse can devastate local ecosystems. In 1991, the North consumed 48 percent of the world’s share of cereals, 72 percent of milk (cow, buffalo and sheep) and 64 percent of meat (beef, veal, pork, mutton and lamb). There are a wide range of environmental problems associated with raising livestock. Overgrazing contributes to soil degradation and devegetation; in arid lands, overgrazing can lead to desertification. See Porter G & Welsh Brown J *Global Environmental Politics* (1996) 113.

### III. PACKAGING

Packaging today is the epitome of the modern consumer society. Growth in the use of packaging has come about from the increased consumption of goods as living standards have risen over the last few decade.<sup>2</sup>

The Oxford Dictionary defines “packaging” as “[a]ny manufactured product or any material specifically designed for the containment, protection, transport or marketing of goods or produce.” In other words, it is the products used to contain, convey, and present goods. Packaging is made from a variety of materials, including plastic, metal, glass, and paper. The purpose of packaging is threefold: packaging contains goods; packaging eases distribution; and it is a key marketing tool.

### IV. UNCED & AGENDA 21

Irrefutable evidence has shown that there is an intricate interdependence of both the world’s economy and ecology. It is now understood that the issues of poverty, population growth, industrial development, depletion of natural resources and the destruction of the environment are all very closely interrelated. Seemingly local problems are now known to have global effects.<sup>3</sup>

The seeds of the global reaction to these problems were planted over a span of many years. In 1972, the United Nations convened the Conference on the Human Environment in Stockholm. This was the first global meeting to focus on the unfolding environmental crisis. In 1987, the United Nations World Commission on Environment and Development linked the issue of environmental protection to the concept of global economic growth and development. The Commission also thrust the concept of “sustainable development” into the mainstream of world debate. By 1989, the urgency of the problems of global economic growth and development led the General Assembly of the United Nations to call for an unprecedented meeting - a meeting of all the nations of the world: The United Nations Conference on Environment and Development (“UNCED”).<sup>4</sup>

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<sup>2</sup> Ministry for the Environment, *Packaging in the New Zealand Environment: Issues and Options* (1987) 6.

<sup>3</sup> See Meadows, D H, Meadows, D L & Randers, J *Beyond the Limits* (1992).

<sup>4</sup> The United Nations Conference on Environment and Development was held in Rio de Janeiro, Brazil during June of 1992 and was attended by 116 Heads of State or Government, 172 States, 8000 delegates, 9000 members of the press and 3000 accredited representatives of non-governmental organisations. See Robinson, N A (ed) *Agenda 21 and the UNCED Proceedings* (1993) xiii.

The prelude to UNCED required a global effort. In four pre-conference sessions, the Preparatory Committee<sup>5</sup> coordinated a global approach to confronting the problems of the earth.<sup>6</sup> It was during these sessions that world consumption patterns were first debated at the international level. The pre-conference sessions culminated in the formulation of a document that evolved to become the central agreement of UNCED: Agenda 21.<sup>7</sup> It is important to note that Agenda 21 is not a legally binding text. However, it is an example of a text which has moral, if not legal force. The document *should* serve to underpin both national actions and subsequent, possibly more stringent, international agreements in specific areas.<sup>8</sup> Agenda 21 has been adopted by nations representing over 98 percent of the Earth's population.<sup>9</sup>

Chapter 4 of Agenda 21 ("Changing Consumption Patterns") addresses the need to change unsustainable patterns of production and consumption that lead to environmental degradation, aggravation of poverty and imbalances in the development of countries. The chapter has two main aims: to focus on unsustainable patterns of production and consumption, and to develop national policies and strategies to encourage changes in unsustainable consumption patterns. Of relevance to this paper is clause 4.19 "Minimising the generation of wastes." This states:

At the same time [as encouraging greater efficiency in the use of energy and resources], society needs to develop effective ways of dealing with the problem of disposing of mounting levels of waste products and materials. Governments, together with industry, households and the public, should make a concerted effort to reduce the generation of wastes and waste products by:

- a) Encouraging recycling in industrial processes and at the consumed level;
- b) Reducing wasteful packaging of products; ...

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<sup>5</sup> The Preparatory Committee consisted of all the member states of the United Nations as well as non-member states such as Switzerland.

<sup>6</sup> Many countries gave input into the pre-conference sessions by submitting national reports to the Preparatory Committee. New Zealand's National Report entitled *United Nations Conference on Environment and Development: Forging the Links* was published by the Ministry for the Environment in December 1991. In the section detailing waste management, the Ministry reports at 69: "Certain elements of the domestic waste stream are growing disproportionately. Most notable is packaging, which currently accounts for about 40% of the volume."

<sup>7</sup> Also adopted at the conference was the Rio Declaration on Environment and Development and the Statement of Principles on Forests. See Johnson, S P *The Earth Summit: The United Nations Conference on Environment and Development (UNCED)* (1993) 4.

<sup>8</sup> Sands, P (ed) *Greening International Law* (1994) 1-20.

<sup>9</sup> Sitarz, D (ed) *Agenda 21: The Earth Summit Strategy to Save our Planet* (1993) 1.

Closely related to Chapter 4 is Chapter 21 "Environmentally Sound Management of Solid Wastes and Sewerage Related Issues." Solid waste as defined in this chapter includes packaging. The action required by this chapter is that:

21.9. Governments, according to their capacities and available resources and with the cooperation of the United Nations and other relevant organisations, as appropriate, should:

- a) By the year 2000, ensure sufficient national, regional and international capacity to access, process and monitor waste trend information and implement waste minimisation policies;
- b) By the year 2000 have in place in all industrialised countries programmes to stabilise or reduce, if practicable, production of wastes destined for final disposal, including per capita wastes (where the concept applies), at the level prevailing at that date.

In order to co-ordinate and report on the implementation of Agenda 21 world-wide, the Commission on Sustainable Development ("CSD") was established in February 1993.<sup>10</sup> The CSD consists of 53 member countries, elected equitably by geographic distribution from the members of the United Nations. In the four (annual) CSD sessions to date<sup>11</sup> the principles regarding changing consumption patterns have been reaffirmed.<sup>12</sup> Numerous post Agenda 21 conferences focussing solely on changing

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<sup>10</sup> The Ministry for the Environment intends to report regularly to the CSD. See *Ministry for the Environment Environment 2010 Strategy: A Statement of the Government's Strategy on the Environment* (1995) 61; and *Environmental Policy and Law* 23/5 [1993].

<sup>11</sup> See *Environmental Policy and Law* 23/5 [1993] for report on first session; *Environmental Policy and Law* 24/5 [1994] for report on second session; *Environmental Policy and Law* 25/4/5 [1995] for report on third session; and United Nations Department for Policy Co-ordination and Sustainable Development (online) for report on fourth session.

<sup>12</sup> In the fourth and most recent session, the CSD reaffirmed that the major cause of degradation of the global environment is unsustainable consumption and production, particularly in industrialised countries. To help design optimal mixes of instruments for achieving more sustainable patterns, the CSD recommended the adoption of environmental management systems such as International Organisation for Standardisation Series, ISO 14000. The New Zealand packaging industry has adopted ISO 14000 as a form of environmental management. See United Nations Department for Policy Co-ordination and Sustainable Development (online); and *infra* section VI (5) of this paper for discussion on this point.

consumption patterns have also been held.<sup>13</sup> Similarly, these conferences re-emphasised the principles of Agenda 21. Of note is a comment made by the Chairman of the 1995 Conference:

Sustainable production and consumption will involve long term structural change to our economies and our lifestyles. *Governments must take responsibility for putting the necessary framework in place.*<sup>14</sup>

## V. THE NEW ZEALAND RESPONSE

The first documented Government response to packaging was a 1975 report regarding reuse and recycling of beverage containers.<sup>15</sup> The next significant document came in November 1987, when the Minister for the Environment published a discussion paper entitled *Packaging in the New Zealand Environment: Issues and Options*. The main objective of this initiative was to investigate the environmental and social impacts of packaging.

### 1. Packaging Industry Advisory Council

The packaging industry in New Zealand has been divided because different merchants have different needs according to the type of material used. Other limiting factors have been the absence of good quality data and the cost of sourcing materials and freighting them for recycling.<sup>16</sup> To alleviate

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<sup>13</sup> The Soria Moria Symposium: Sustainable Consumption and Production, Oslo, January 1994; OECD Experts Seminar on Sustainable Consumption and Production Patterns, Massachusetts Institute of Technology, December 1994; Oslo Ministerial Roundtable Conference on Sustainable Production and Consumption Patterns, February 1995; Experts Meeting on Changing Production and Consumption Patterns: The Role of Governments and the Business Community, Brazil, February 1996; and the International Conference on Sustainable Industrial Development, Amsterdam, February 1996. New Zealand did not participate in any of these conferences but did receive the report of the Oslo Roundtable: Rob Ogilvie (Ministry for the Environment) Personal Communication, 24 September 1996. Conferences but did receive the report of the Oslo Roundtable: Rob Ogilvie (Ministry for the Environment) Personal Communication 24 September 1996.

<sup>14</sup> Thorbojn Bernsten, Norwegian Minister of the Environment, at the Oslo Ministerial Roundtable in February 1995; emphasis added.

<sup>15</sup> See Department of Trade & Industry, Commission for the Environment *Beverage Containers - Possibility of reuse and recycling*, Wellington (1975).

<sup>16</sup> See Anon, "Special Feature: Packaging" August 1993 *Recycle Today* 20, 27; and Brett Kelly, "Green thinking takes deep root in the mind of the consumer" 3 October 1992 *NBR* 31, 31.

these problems, the packaging industry united on the environmental issue in August 1992. The result was the Packaging Industry Advisory Council ("PIAC") which includes both manufacturers and major users of packaging.

### 2. *The Waste Analysis Protocol*

In November 1992, the Ministry for the Environment released a Waste Analysis Protocol to assist waste managers (particularly in local government) in assessing their classification of waste. The project was funded jointly by the Ministry for the Environment and the Christchurch City Council.

The Waste Analysis Protocol was developed for three key reasons. Firstly there was the need for reliable data on which to base national waste strategies. Second, there was a need for guidelines as to which regional authorities could monitor waste under the Resource Management Act 1991. Thirdly, and perhaps most importantly, increasing attention was being focused on waste management by individuals, communities and media. The Waste Analysis Protocol focuses on measuring waste in landfills, households and hazardous waste created by businesses.<sup>17</sup> It continues to play an important part in the waste management arena by providing a platform of reliable and substantive data upon which decisions can be based.

### 3. *The Current Government Waste Management Policy*

In 1992, the Government adopted its current Waste Management Policy. The policy seeks to ensure as far as practicable that waste generators meet the costs of the waste they produce. It also encourages the implementation of the internationally recognised hierarchy of reduction, reuse, recycling, recovery and residual management by all involved in waste generation and management.<sup>18</sup>

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<sup>17</sup> Blake, E (Ministry for the Environment) Personal Communication 13 September 1996.

<sup>18</sup> See Ministry for the Environment, *supra* note 10 at 7; and Packaging Environmental Advisory Group (PEAG), *Minimising Waste: A National Strategy for Minimising the Volume of Packaging Waste in New Zealand* (1996) 14.

## VI. THE NEW ZEALAND PACKAGING ENVIRONMENTAL ADVISORY GROUP

In 1994, the Minister for the Environment instructed PIAC to create a report detailing initiatives to minimise packaging waste. The report was to complement the reservoir of information gathered under the Waste Analysis Protocol.<sup>19</sup> In response, PIAC assembled a working group: The Packaging Environmental Advisory Group ("PEAG"). The group contained representatives from central and local government, industry and environmental and consumer groups. In June 1996, PEAG released its report *A Strategy to Minimise Packaging Waste*. The key findings of this report are presented below.

### 1. *Composition of landfills*

In New Zealand, 2.7 million tonnes per year are estimated to be landfilled in legitimate facilities.<sup>20</sup> This volume equates to 790 kg of waste per person per year in New Zealand.<sup>21</sup> Landfill waste, is however, only estimated to be about 30 percent of a country's total waste stream.<sup>22</sup>

### 2. *The Magnitude of Packaging in Landfill*

The amount of packaging cannot be simply calculated by summing the volumes of glass, plastic, paper and metal because non-packaging sources constitute a significant proportion of these figures. In order to estimate the weights of packaging, PEAG used information on packaging production and imports and exports of packaging to produce an overall balance. PEAG concluded that packaging waste constitutes 11.8 percent of total landfill waste.<sup>23</sup> The calculation assumed that packaging not collected was landfilled.

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<sup>19</sup> "PIAC was surprised at how little information was available on the composition of waste streams. [E]xtensive data collection took place ... and ... relied largely on landfill data gathered using the Waste Analysis Protocol" See PEAG, *supra* note 18 at 6.

<sup>20</sup> The 2.7 million tonnes is made up of: 39 percent organic material, 13 percent construction materials, three percent potentially hazardous materials, seven percent plastic, 20 percent paper, three percent glass, six percent metal, and nine percent miscellaneous.

<sup>21</sup> Each person in New Zealand produces an estimated 2.5 kg of waste each day. See Auckland Regional Council, Teaching Unit 2, "Waste" (April 1996) 33.

<sup>22</sup> Warburton D, & Webber, J *Municipal Waste and the Contribution of Discarded Packaging* (1995) 18.

<sup>23</sup> PEAG, *supra* note 18 at 24.



### 3. *Imported Packaging*

Information regarding imported packaging was rare before the PEAG report and still remains scarce. The only conclusion drawn by PEAG was that imported packaging was not less than 128,000 tonnes. When considering the overall volume of New Zealand landfill waste, this figure for imports is of little significance. However, as a percentage of packaging in landfills, it is of greater importance. Imported packaging makes up 40 percent of total landfilled packaging.<sup>24</sup> This has considerable ramifications given that some imported materials are not compatible with domestic recovery schemes.

### 4. *The Importance of Recycling and Reduction*

Progress in reducing weights and volumes of waste has proceeded on two basic fronts: reduced use of materials, and recycling. The catalysts for change include environmental pressure from consumers; the realisation by organisations that increased environmental performance can be profitable; and technological advancements making reductions possible. A useful illustration is the process of lightweighting.

Lightweighting refers to the use of lightweight materials in the production process. For example, the plastic wrapping on a loaf of bread has thinned down 40 percent due to technological advancements.<sup>25</sup> Lightweighting and recycling combined have been a positive driving force behind packaging reduction in New Zealand.<sup>26</sup> But in spite of specific reductions made by such technological advancements, it is important not to dismiss the possibility of an increase in total waste due to increased economic activity, population growth and changes in consumption patterns.

### 5. *Code of Practice*

PEAG was responsible for evaluating a number of different management options. Of the 11 surveyed, two were highly recommended: a Code of Practice, and User Pays<sup>27</sup> for waste collection and disposal.<sup>28</sup>

A Code of Practise (CoP) for the packaging industry was launched on 30 June 1996.<sup>29</sup> Eighty organisations have joined the accord between the

<sup>24</sup> Ibid, 26.

<sup>25</sup> Brett Kelly, *supra* note 16 at 31.

<sup>26</sup> In total, 233,610 tonnes of packaging waste were avoided in 1994 (compared with 1985 product use) due largely to these factors. See PEAG, *supra* note 18 at 29.

<sup>27</sup> See *infra* section VI (6) of this article.

<sup>28</sup> The other management options (and PEAG's comments) were: local authority collection and recycling schemes (Advocated ("A")), internalisation of costs (Advocated within parameters), standardisation of packaging (A), positive labelling (A), ecotaxes (not advocated ("NA")), minimum recycled material content (NA), deposit legislation (NA), ban on depositing specific packaging items in landfills (NA), and, bans on types of packaging materials (NA).

<sup>29</sup> Webber, J (Packaging Industry Advisory Council) Personal Communication, 5 July 1996.

packaging industry and central government. These organisations are currently formulating their policy with regard to the CoP. Adhering to the accord is a prerequisite to signing the CoP. Of the 80 accord members, 40 have signed the CoP. Approximately three organisations are joining the accord per week.<sup>30</sup>

The CoP is an environmental management tool designed to improve the environmental performance of companies. It is a consultative approach which obtains commitments from signatories to accept ownership of the CoP, to operate with transparency and provide for self audit and reviews. Such a mechanism is termed a “best endeavour” approach because its ultimate success lies with the independent signatories: it is up to them to follow it. As part of the CoP, PEAG recommended three additional factors. The first is an independent complaints procedure. The second is a commitment to positive labelling meeting ISO guidelines and the third is the adoption of the ISO 14000 series of environmental management standards.<sup>31</sup>

The main strength of a CoP (according to PEAG) is its flexibility in allowing organisations to achieve agreed waste management practices. It provides, in effect, a covenant between signatories on a voluntary, non-confrontational basis which can lead to successful results as opposed to reluctance when outside constraints are imposed. The formal complaints procedure complements the CoP, allowing open and democratic dispute resolution. This should enhance public confidence in the CoP and provide successful outcomes if and when disputes arise.<sup>32</sup>

The main problem with such a management technique is lack of compliance. There are no sanctions in place for those “subscribers” who do not comply with the terms of the CoP. The lack of a simple enforcement method ultimately undermines the credibility of the program because the creators of the problem are the masters of their own destiny. The scheme could also risk being overrun by superficially green organisations, using the CoP as an environmental marketing ploy. The success of the CoP ultimately depends on the degree of market adoption and the policing of the offenders.

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<sup>30</sup> Webber, J (Packaging Industry Advisory Council) Personal Communication, 17 September 1996.

<sup>31</sup> The International Organisation for Standardisation (ISO) is the accepted world body for the establishment of standards. Series 14000 is applicable to environmental issues including environmental management systems and ecolabelling. The adoption of the ISO 14000 series is consistent with the direction of the fourth CSD Conference. See *supra* note 12.

<sup>32</sup> PEAG, *supra* note 18 at 10.

## 6. *User Pays*

In accordance with New Zealand's 1992 Waste Policy, PEAG recommends that waste generators should meet the costs of the waste they produce. This is expected to make users aware of the true costs of their actions. Further, it has the potential to have impact on both consumption and production as consumers are also waste generators. PEAG suggests that: importers should bear the cost of disposal of packaging no longer required for local transport or sale; a producer should bear the costs of disposal of packaging for raw materials brought to the place of manufacture; a wholesaler should bear the cost of disposal of packaging no longer required for bulk transport; a retailer should bear the cost of disposal of packaging no longer required for product transport; and that a consumer should bear the cost of disposal of packaging which was no longer required for product containment purposes.<sup>33</sup>

PEAG supports user pays on the grounds of equity. Although beneficial in the sense of targeting waste generators, such a scheme may be regressive for certain levels of consumption. It is conceded that people with higher disposable income generally purchase more products, however, there is a certain base amount of waste that all individuals generate. The user pays process could impose onerous financial burdens on those with minimal disposable income.

The degree to which user pays will impact on packaging is not quantified. PEAG simply states that user pays "transfers the costs from taxpayer/ratepayer to the user of the service."<sup>34</sup> The rate at which this cost is transferred is another issue, involving education and gradual phasing out of a societal norm, namely, regular rubbish collection.

## 7. *The Shortcomings*

PEAG is an industry based group and accordingly provided a set of recommendations and findings with an industrial flavour. As this article has illustrated, the packaging debate is two sided. The responsibility for excess waste and packaging also rests with consumers. PEAG recognises this in its report by emphasising the need to develop "educational material for schools and information for consumers which will promote a consistent message."<sup>35</sup>

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<sup>33</sup> Ibid, 41.

<sup>34</sup> Idem.

<sup>35</sup> Ibid, 60.

In Hamilton, information pertaining to recycling for households already exists.<sup>36</sup> This is distributed to households annually. Notwithstanding these efforts, there would still seem to be definite scope for local and central government to encourage recycling further.<sup>37</sup> One possible way to increase recycling could be to introduce an incentive system. For example, one cent could be paid per aluminium can.

## VII. CONCLUSION

There are three important players fundamentally involved in the packaging debate: industry, government and households. The packaging industry is taking positive steps to reduce the amount of packaging waste it produces. The establishment of PIAC and the 1996 CoP and accord with central government is direct evidence of this. Recycling, reducing the weight of packaging and user pays schemes, have been highlighted as other key strategies in reducing packaging waste levels even further. This is in accordance with clause 4.19 of Agenda 21.

The government has also acted positively in a number of ways. The former Minister for the Environment directed PIAC to formulate an initiative to reduce packaging waste. The result was PEAG and the subsequent CoP. This is consistent with clause 21.9(a) of Agenda 21. Similarly, New Zealand's strategy to access, process and monitor waste trend information

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<sup>36</sup> The chart details recycling locations for oils, organic matter, clothing, tin cans, lead acid batteries, aluminium cans, scrap metal, cardboard, paper, glass and plastic. It also gives a phone line for more information and advice on recycling. At present there is kerbside recycling of paper and glass in Hamilton.

<sup>37</sup> Various arms of central government already encourage government "purchasers" to recycle and purchase "environmentally friendly" products. The initial vehicle for this move was the March 1994 Ministry of Commerce publication *Government Purchasing in New Zealand: Policy Guide for Purchasers*. A subsequent publication by the Ministry for the Environment entitled *Going Green: Your Easy Guide to an Environmentally Friendly Office* endorses this same policy. This booklet is aimed at the private sector as well. In April 1996, the Auckland Regional Council published a booklet entitled "Buy it Back: The Buy Recycled Resource Guide for Business". This guide (endorsed by Franklin District Council, Manukau City Council, Waikato Regional Council, North Shore City Council, Papakura City Council, Rodney District Council and Waitakere City Council) encourages businesses to complete the recycling loop by buying back recycled products. No such booklet exists for households. This appears to be the next phase of recycling education required.

(Waste Analysis Protocol) is consistent with clause 21.9(a). New Zealand's other national strategy, the Waste Management Policy, accords with clause 21.9(b) of Agenda 21.

Opportunities for householders to reduce levels of packaging by recycling are evident in a number of cities. However, at present, the ease with which waste can be disposed of through the general collection system provides little incentive to separate out paper, glass or aluminium for recycling. The consequence is that a large amount of packaging is landfilled. A financial reward system may make recycling more attractive to individuals.

The efforts of the packaging industry, government and recyclers are not sufficient in isolation. Consumption and packaging are two sides of the same coin and thus pose interrelated problems. An increase in the use of packaging is the inevitable result of increased resource consumption. It is difficult to stem the levels of packaging waste without concurrently addressing resource consumption patterns. Chapter 4 of Agenda 21 emphasises this point but the New Zealand response is lacking in this regard. Efforts to reduce the levels of packaging brought on by consumption are being applied solely to the packaging side of the coin. Environmental management must adequately address consumption patterns to facilitate increased reduction in packaging waste.

## CASE NOTE

### RUXLEY ELECTRONICS AND CONSTRUCTION LTD V FORSYTH

### LADDINGFORD ENCLOSURES LTD V FORSYTH

#### I. INTRODUCTION

*Ruxley Electronics and Construction Ltd v Forsyth*<sup>1</sup> (“*Ruxley*”) is a recent House of Lords decision which highlights the difficulty in assessing damages for defective performance of a construction contract when:

- (i) there is no diminution in the value of the property containing the defects; and
- (ii) the cost of reinstatement in order to remedy the defects is disproportionately high when compared to the benefit that the owner of the property will obtain from the reinstatement.

The above factors were evident in *Ruxley*. The House of Lords held that it would be unreasonable to award reinstatement costs and agreed that the trial Judge’s decision to award a modest sum of damages to compensate the owner of property for “loss of amenity” was sufficient. In making this decision the House of Lords reversed the majority decision of the Court of Appeal and reinstated the decision of the County Court.

This Note describes the decision and the law prior to the decision, then comments on the new method of calculating damages that the House of Lords adopted. The Note concludes that the introduction into contract law of reasonableness as suggested by *Ruxley* reduces the certainty of contract and moves away from the general rule that damages in contract should put the aggrieved party back in the position he or she would have been in had the contract not been breached.

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<sup>1</sup> *Ruxley Electronics and Construction Ltd v Forsyth* [1995] 3 All ER 268.

## II. THE DECISION

### *1. The Facts*

In 1987 Mr. Forsyth ("Forsyth") entered into contracts with Ruxley Construction Ltd ("Ruxley") and Laddingford Enclosures Ltd ("Laddingford") for the construction of a swimming pool and a building to house it on his property in Kent. Ruxley was to construct the swimming pool and Laddingford the building.

It was an express term of the contract with Ruxley that the maximum depth of the pool would be 7 ft 6 in. Some time after the pool was completed Forsyth discovered that the maximum depth of the pool was only 6 ft 9 in, and only 6 ft where diving was most likely to occur.

During negotiation of the contract Forsyth had specifically requested that the contract be amended to increase the maximum depth to 7 ft 6 in because he was a big man and would feel safer diving into a pool with a greater depth. In agreeing to this request Ruxley did not increase the contract price.

The total cost of the pool and the building was 70,178.74 pounds. Forsyth paid sums on account and Ruxley and Laddington sued for the balance of 39,072.85 pounds. Forsyth counterclaimed for breach of contract.

There was no decrease in the value of the pool as constructed compared with a pool with a maximum depth of 7 ft 6 in. Forsyth claimed the cost of rectification of the pool to satisfy the term of the contract. The evidence at trial established that the only way to do this was to demolish the existing pool, excavate further and rebuild the pool at a cost of 21,569 pounds.

### *2. Approaches of the Courts*

#### *The County Court*

The trial judge awarded Forsyth general damages of 2,500 pounds for loss of amenity.<sup>2</sup> He held that:

- (i) there was no diminution in the value of the pool due to the breach of contract;

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<sup>2</sup> 13 July 1993, Judge Diamond QC, Central London County Court.

- (ii) it would be unreasonable for Forsyth to carry out the rectification work because the cost of the work was disproportionate to the benefit Forsyth would obtain; and
- (iii) he was not satisfied that Forsyth would actually carry out the work.

### *The Court of Appeal*

A majority decision of the Court of Appeal reversed the decision of the trial judge and awarded Forsyth 21,560 pounds in place of the general damages.<sup>3</sup> The Court held that Forsyth had suffered a real loss which could be measured by the cost of rebuilding to meet the terms of the contract, there being no other available measure. The Court confined itself to a choice between two methods of measuring the loss, the difference in value or the cost of reinstatement. Earlier cases had looked at the question of whether or not it was reasonable to award damages for reinstatement. Staughton LJ held that the question of the reasonableness of the remedy sought is a matter of mitigation. He said:

Is it unreasonable of a plaintiff to claim an expensive remedy if there is some cheaper alternative which would make good his loss. Thus he cannot claim the cost of reinstatement if the difference in value would make good his loss by enabling him to purchase the building or chattel that he requires elsewhere. But if there is no alternative course which will provide what he requires, or none which will cost less, he is entitled to the cost of repair or reinstatement even if that is very expensive.<sup>4</sup>

Mann LJ held that it was not unreasonable to construct a new pool because this was a contract for a personal preference rather than for a financial gain. Forsyth contracted for a personal preference i.e. a pool with a maximum depth of 7ft 6 in which he would feel safe diving in and that is what he should be entitled to.

The entire Court agreed that the owner's intended use of any damages award was irrelevant. (At this stage Forsyth had provided the Court with an undertaking that he would use any damages for reinstatement to rebuild the pool).

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<sup>3</sup> [1994] 3 All ER 801, [1994] 1 WLR 650 (Staughton LJ and Mann LJ, with Dillon LJ dissenting).

<sup>4</sup> *Ibid.*, 810.



### *The House of Lords*

The House of Lords reinstated the decision of the trial judge. The Lords focused on the question of reasonableness and held that it was unreasonable to insist on reinstatement of the pool because the cost of rebuilding the pool was wholly disproportionate to any prospective benefit to Forsyth. Lord Lloyd said:

If reinstatement is not the reasonable way of dealing with the situation, then diminution in value, if any, is the true measure of the plaintiff's loss. If there is no diminution in value, the plaintiff has suffered no loss. His damages will be nominal.<sup>5</sup>

Lord Jauncey considered that it is unreasonable to request reinstatement costs where the objective of the contract has been achieved to substantial extent.

The House of Lords held that intention to carry out the work is not a requirement to establishing a claim for compensation but it is a factor to be considered when deciding whether it is reasonable to receive reinstatement costs.

In reinstating the trial judge's award of damages for "loss of amenity" Lord Lloyd saw such an award as falling within, or involving an acceptable extension to the "holiday cases". These cases establish the exception to the general rule that in contract damages for emotional distress are not available. (This general rule has been eroded significantly in New Zealand, see for example *Rowlands v Collow*.<sup>6</sup>)

Lord Mustill on the other hand saw the award as compensation for loss of "consumer surplus" which can be described as the owner's "personal subjective non-monetary gain." This is discussed in more detail below. Unfortunately the Lords were not required to reconsider the award of 2,500 pounds general damages for loss of amenity and no significant conclusions were reached on how this assessment should be calculated.

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<sup>5</sup> Supra note 1, 284

<sup>6</sup> *Rowlands v Collow* [1992] 1 NZLR 178.

### III. THE LAW PRIOR TO THE DECISION

The starting point for any assessment of damages for breach of contract was expressed by Parke B in *Robinson v Harman*<sup>7</sup> as follows:

The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.<sup>8</sup>

In *East Ham BC v Bernard Sunley & Sons*<sup>9</sup> the House of Lords held that the plaintiffs were entitled to damages for the cost of reinstatement of defectively fixed stone panels. The court referred to the alternate methods of calculating damages in defective building cases set out in Hudson's *Building and Engineering Contracts*<sup>10</sup> ("Hudson's (8 ed.)") and concluded that it was reasonable in the circumstances to award reinstatement costs.

Hudson's (8 ed.) sets out the following three alternatives for assessing such damages: (a) the cost of reinstatement; (b) the difference in cost to the builder of the actual work done and work specified; or (c) the diminution in value of the work done due to the breach of contract.

McGregor on Damages accepts the decision in *East Ham BC* as authority for the rule that damages for the cost of reinstatement are available in defective building cases where it is reasonable to effect the necessary repairs.<sup>11</sup> The text goes on to say that, "if, however, the cost of remedying the defect is disproportionate to the end result to be attained, the damages fall to be measured by the value of the building had it been built as required by the contract less its value as it stands".<sup>12</sup> The text does not consider application of this rule in a case where there is no diminution in value. The House of Lords had no difficulty in applying this general rule in *Ruxley* to conclude that, as there was no diminution in value, there was no loss — apart from a loss of amenity.

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<sup>7</sup> *Robinson v Harman* (1848) 1 Exch 850 at 855, [1843-60] All ER Rep 383.

<sup>8</sup> *Ibid*, at 385.

<sup>9</sup> *East Ham BC v Bernard Sunley & Sons* [1965] 3 All ER 619, [1966] AC 406.

<sup>10</sup> 8th edition.

<sup>11</sup> 15th edition (Sweet and Maxwell, 1988) at paragraph 1091.

<sup>12</sup> *Idem*.

In *Radford v De Froberville*<sup>13</sup> Oliver J held that the plaintiff was entitled to damages to cover the cost of building a wall which the defendant had failed to build in breach of a covenant entered into when the property was sold. Oliver J held that in order to award such damages he had to be satisfied that:

- (i) the plaintiff has a genuine and serious intention of doing the work; and
- (ii) the carrying out of the work is a reasonable thing for the plaintiff to do.<sup>14</sup>

In *Ruxley* both the House of Lords and the Court of Appeal referred to this case. Both courts were agreed in their conclusion that the plaintiff's intended use of any damages is irrelevant when deciding whether they should be awarded. However, the House of Lords held that the plaintiff's intention is a relevant factor to take into account when considering reasonableness. In referring to this decision the House of Lords decided that Forsyth's claim for reinstatement costs was unreasonable while the Court of Appeal decided that the claim was reasonable.

The High Court of Australia in *Bellgrove v Eldridge*<sup>15</sup> awarded damages to cover the cost of demolishing and rebuilding a house built with defective foundations in breach of specifications contained in the contract. The court held that the owners right to be compensated for remedial work is subject to the qualification that the work must be necessary to produce conformity with the contract and carrying out the work must be a reasonable course to adopt.

*Bellgrove* was not considered by the Court of Appeal in *Ruxley* but the House of Lords considered it to lend support to its approach to the question of reasonableness: that the reasonableness of an award of damages is to be linked directly to the loss sustained.<sup>16</sup> Where the contractual objective has been achieved to a substantial extent it may be unreasonable to award damages for demolition and rebuilding.

In New Zealand the question of damages for breach of a building contract was considered in the case of *Cooke v Rowe*.<sup>17</sup> The foundations of a

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<sup>13</sup> [1978] 1 All ER 33.

<sup>14</sup> *Ibid*, at 54.

<sup>15</sup> *Bellgrove v Eldridge* (1954) 90 CLR 613.

<sup>16</sup> *Ruxley*, *supra* note 1, at 274, per Lord Jauncey.

<sup>17</sup> [1950] NZLR 410.

house built on a concrete raft failed. The concrete raft was supposed to ensure that the house settled evenly on a section partly filled with sawdust. The only way to remedy the problem was to rebuild using a “pier and beam” system which would cost more than the original house. Stanton J held that the measure of damages is the difference between the contract price and the cost of making the building conform to the contract. He said that the submission that assessment of damages on this basis was unreasonable because of the disparity between the cost of the house and the cost of putting in the new foundations was not a reason for departing from the general rule. He awarded damages reflecting the cost of rebuilding with new foundations, deducting a sum to take account of the added benefit the owner would obtain from the new foundations not contemplated in the original design. The decision in *Cooke v Rowe* appears to conflict with the House of Lords reasoning in *Ruxley*.

In *Bevan v Blackhall & Struthers (No 2)*<sup>18</sup> the New Zealand Court of Appeal referred to *Bellgrove*, holding that it was reasonable to award the cost of reinstatement of a sports centre according to an alternate design which was safe on the basis that the owners would have chosen the safe design at the beginning if they had been aware of the failings in the design they chose. The original engineer was held to be in breach of the implied term to exercise all reasonable skill and care in designing a building which was unsafe. Richmond P referred to the general rule that the owner is to be placed in the same position as he would have been in had the contract been performed.<sup>19</sup>

A review of these cases shows that courts have generally (except in *Cooke v Rowe*) considered whether it is reasonable to award damages for reinstatement before making such an award. If such an award is unreasonable then damages for diminution in value are generally awarded.

#### IV. A NEW PRINCIPLE ?

The decision in *Ruxley* is unique in that a court had never before (in a reported decision) in assessing damages for breach of building contract due to defective performance applied the method of assessing the diminution in value where there was no diminution. In such a case the Lords agreed with the trial judge’s decision to award modest damages for “loss of amenity” and declined to award damages for the cost of reinstatement.

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<sup>18</sup> [1978] 2 NZLR 97.

<sup>19</sup> *Ibid*, 108.

In declining to award damages for reinstatement the House of Lords considered whether reinstatement was reasonable. The application of the principle of reasonableness is not new. The factors which the Court took into account when determining reasonableness were:

- was the cost of reinstatement wholly disproportionate to any prospective benefit the owner would obtain by reinstatement; and
- was the contractual objective achieved to a substantial extent?

Isaac E Jacob (counsel for Forsyth in the House of Lords) asserts that the House of Lords accepted and enunciated a new principle in *Ruxley*: the principle that there is a midway point between giving an owner nil damages because there was no diminution in value and the full cost of the cure.<sup>20</sup> Isaac seems to suggest that the law prior to *Ruxley* required either one of these two methods to be applied. Other methods for calculating such losses have been discussed and applied prior to *Ruxley*. These are discussed below.

There do not appear at this stage to be any reported decisions which discuss *Ruxley*. The Privy Council in *Invercargill City Council v Hamlin*<sup>21</sup> referred to the Court of Appeal decision as being authority for the principle that, the measure of loss for defective buildings will be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not.<sup>22</sup> The House of Lords decision can be said to have applied the same principle but came to a different conclusion on the question of reasonableness.

## V. ALTERNATE METHODS FOR CALCULATING DAMAGES

As has already been stated, the House of Lords and the Court of Appeal in *Ruxley* concentrated on two methods of calculating damages: (i) diminution in value; and (ii) cost of reinstatement.

There are a number of other ways in which damages in defective building cases can be assessed. They are:

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<sup>20</sup> Jacob, "Is Near Enough Good Enough?" 139:27 *Solicitor's Journal* 67 (July 1995).

<sup>21</sup> [1996] 1 All ER 756.

<sup>22</sup> *Ibid*, 772.

- (i) The difference in cost to the builder of the actual work done and the work specified in the contract (in other words the savings to the builder).
- (ii) The difference in the price of the contract and the price the owner would have paid for the work actually completed.
- (iii) An award to take account of the loss of “consumer surplus” or personal preference of the owner.

All of the above methods have limitations but one or other may be an appropriate method of assessment depending on the facts. Each is considered in more detail below.

### *1. The Difference in Cost to the Builder*

This method of assessment is referred to in Hudson’s (8ed.) and the current 11th edition.<sup>23</sup> Although it was mentioned by Lord Jauncey in *Ruxley* by reference to a quote from *East Ham BC* there was no attempt to apply the method.<sup>24</sup> Presumably because there was no evidence submitted on the point and it was not part of the appeal.

The method is in effect a restitutionary remedy and seeks to disgorge any savings made by the builder and credit them to the owner. Application of this method may require the court to order the builder to account for savings in order to assess the amount of damages unless such information can be obtained on discovery.

Hudson’s (11ed.) submits that, “If... cost of reinstatement is rejected as the measure of damage, then the measure should be the difference in cost to the builder, or the diminution in value of the works whichever is the greater”.<sup>25</sup> Hugh Beale talks of redistributing “unanticipated savings”.<sup>26</sup>

This method has in fact been applied in New Zealand. In *Samson & Samson Ltd v Proctor*<sup>27</sup> MacArthur J applied the method in a case where the owner of the building claimed that the building had been built with insufficient steel reinforcing in breach contract. The building had subsequently been

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<sup>23</sup> 11 ed., at 1046.

<sup>24</sup> *Ruxley*, supra note 1, at 272.

<sup>25</sup> *Ibid*, at 1047.

<sup>26</sup> Beale, “Damages For Rebuilding” (1995) 111 LQR 54.

<sup>27</sup> [1975] 1 NZLR 655.

sold at a price equal to the price which would have been obtained had the contract been fully performed so there was no diminution in value. MacArthur J held that the proper measure of damages was the difference in cost to the builder of the actual work done and the work specified. He also said that the owner should be given credit for any element of profit that would have been exclusively referable to the performance of the work as specified. MacArthur J added that he did not think that the adoption of this measure was a departure from the fundamental principle of compensation. It appears that the parties sorted the exact amount of damages out between themselves as the matter was not reported again.

There did not appear to be any evidence in *Ruxley* about the savings the builder made in constructing the pool with a decreased depth. Presumably some concrete was saved and some labour costs. It is difficult to speculate on what the value of any savings might have been. It may however have been a useful exercise.

### 2. *The Difference in Price of the Contract*

Hudson's (11ed.) refers to "an intermediate measure" for assessing damages: that being the higher price paid for the for the contract compared with what would have been paid for the actual performance.<sup>28</sup> It is suggested that this difference represents the value the owner puts on his or her loss. Hugh Beale also suggests that this is a way of measuring the "unanticipated savings" made by the builder.<sup>29</sup>

This approach was not mentioned in *Ruxley*. However, Lord Lloyd noted that the builder agreed to increase the depth of the pool at no extra charge.<sup>30</sup> Application of this method would not therefore have been suitable in *Ruxley*.

### 3. *Award to Take Account of Loss of "Consumer Surplus"*

"Consumer surplus" is described by Harris, Oguis and Phillips as "the excess utility or subjective value obtained from a "good" over and above its market price".<sup>31</sup> The authors suggest that in some cases an attempt should be made to value the "consumer surplus" in order to compensate an owner sufficiently if there has been a loss of that surplus.

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<sup>28</sup> *Supra* note 23, at 1057.

<sup>29</sup> Beale, *supra* note 26.

<sup>30</sup> *Supra* note 1, at 278.

<sup>31</sup> "Contract Remedies and the Consumer Surplus" (1979) 95 LQR 581.

Lord Mustill referred to these authors in *Ruxley* and used the the concept of loss of “consumer surplus” to support the award of 2,500 pounds made by the trial judge for “loss of amenity”. Lord Mustill described “consumer surplus” as representing a “personal, subjective and non-monetary gain” and said that where it is lost the law should compensate for it in order to recognise the true loss suffered by the owner.<sup>32</sup> Lord Mustill was not required to illuminate on how such a loss could be valued because the quantum of the trial judge’s award for loss of amenity had not been appealed.

Hugh Beale submits that an attempt to calculate the loss of “consumer surplus” in a case such as *Ruxley* is a commendable way of seeking to truly compensate an owner for loss.<sup>33</sup> Beale’s article was written before the House of Lords decision was delivered and reflects the sentiments of Lord Mustill in suggesting that the trial judge’s approach may not have been incorrect.

In the case of *Atkins Ltd v Scott*<sup>34</sup> the trial judge refused to grant damages for the cost of repair of defectively laid bathroom tiles but made an award of damages as an allowance for bad workmanship. The Court of Appeal agreed with the trial judge’s approach: he had clearly found that the defects were not of a very serious character and that it would be unreasonable to completely strip the tiles and replace them. This award of damages to take account of poor workmanship is akin to damages for loss of “consumer surplus.”

Although an assessment of the value “consumer surplus” is difficult, it is no more difficult than assessments judges are already required to make under heads such as emotional distress damages. Such an assessment could be a valuable alternative in cases such as *Ruxley*, where the established methods of assessment do not appear to be appropriate.

## VI. CONCLUSION

The House of Lords decision in *Ruxley* raises some interesting questions in relation to assessment of damages for breach of construction contracts due to defective performance. The decision does not preclude development of the alternate methods of assessment discussed above. It is unfortunate that the House of Lords was not required by the terms of the appeal to

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<sup>32</sup> *Supra* note 1, at 277.

<sup>33</sup> *Idem*.

<sup>34</sup> (1980) 7 Const. L.J. 215.



reconsider the award of general damages for loss of amenity granted by the trial judge. Lord Mustill hinted at the possibility of awarding damages for loss of "consumer surplus". Perhaps a fairer result would have been achieved if a more substantial award had been made under this head.

In New Zealand the courts may develop the method of assessment used by MacArthur J in *Samson & Samson Ltd v Proctor*: the difference in cost to the builder. In the end the courts are likely to choose the method of assessment which is most suitable to the facts of the case. The decision in *Ruxley* will not preclude courts from making their own choice.

The introduction of the concept of reasonableness as suggested by *Ruxley* into contract law reduces the certainty of contract and moves away from the general rule that damages in contract should put the aggrieved party back in the position he or she would have been in had the contract not been breached.

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## BOOK REVIEW

### INSTITUTIONAL SHAREHOLDERS AND CORPORATE GOVERNANCE

BY GP STAPLEDON

*New York, Oxford University Press, 1996, xxxii and 376 pp. Price: AUD\$140*

Clark, in a comment published in 1981,<sup>1</sup> argued that the development of the financial markets and, in particular, the equities market in the United States could be separated into four distinct stages.<sup>2</sup> He described the four stages as:

The four stages are like generations. They overlap with one another – indeed, none are dead, and all may continue indefinitely – but each in turn had had its own time of rapid and growth. Each stage has its characteristic business entity and set of roles, and there is a clear overall trend to the changes between the stages. The first stage is the age of entrepreneur, the fabled promoter-investor-manager who launched large-scale business organisations in corporate form for the first time ... He was primarily a nineteenth century phenomenon.

The second stage, which reached adulthood in the first few decades of the twentieth century, is the age of the professional manager. He appeared when the entrepreneurial function was split into ownership and control, a development heralded in 1932 by Berle and Means... The characteristic institution of the age was the modern publicly held corporation. The second stage required the legal system to develop stable relationships between professional managers and public investors, ostensibly aimed at keeping the former accountable to the latter, but also placing full control of business decisions in the managers' hands. A major legal correlate was the enactment of the federal securities laws during the Depression...

The third stage of capitalism has been growing since the beginning of this century, and probably reached young adulthood in the 1960's. It is the age of the portfolio manager, and its characteristic institution is the institutional investor, or financial intermediary. As the second stage split entrepreneurship into ownership and control, and professionalized the latter, so the third stage split ownership into capital supplying and investment, and professionalized the investment function...

The increasing separation of the decision about how to invest from the decision to supply capital for investment is one of the most striking institutional developments in our century. Since 1900, the proportion of savings channelled through financial intermediaries has grown steadily, and about eighty cents of every dollar saved now

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<sup>1</sup> Clark, RC "The Four Stages of Capitalism: Reflections on Investment Management Treatises" (1981) 94 Harvard Law Review 561.

<sup>2</sup> Ibid, 562.

finds its way to some intermediary...

Can the fourth stage be predicted? It can, for it is already discernible in its infancy. One fumbles for an apt label, but perhaps it could be called the age of the savings planner. Just as the third stage split the capital ownership function into the decision to supply capital funds and active investment management, and professionalized the latter, so the fourth stage seems intent upon splitting capital supplying into the possession of beneficial claims and the decision to save, and professionalizing the savings-decision function.<sup>3</sup>

Clark summarised the underlying processes:

...each shift from one stage to the next is marked by two features: increased division of labor, and increased participation in the fruits of capitalist enterprise.

But this sharing...of the benefits of capitalist enterprise has been accompanied by an ever greater concentration of important discretionary powers in the hands of professional managers and group representatives.<sup>4</sup>

Since Clark wrote his commentary legal scholarship has explored the possible role of institutional investors in the corporate governance of listed companies. For example, Baums, Buxbaum and Hopt (eds), in their 1994 book *Institutional Investors and Corporate Governance*, MacIntosh,<sup>5</sup> and Black.<sup>6</sup>

It is in the context of Clark's third and fourth stages, and the importance of institutional investors for, not only investment decisions, but also for the appropriate governance of companies that Stapledon's new book makes a contribution. The book has two approaches:

[The first is] partly a positive approach, in that it aims to increase the state of knowledge about the extent and mechanics of institutional monitoring in the UK and Australia, and about how institutional monitoring interacts with other elements of the monitoring environment. It also has a normative aspect, in that it seeks to identify ways in which one part of the internal control system—monitoring by institutional shareholders could be improved.<sup>7</sup>

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<sup>3</sup> Ibid, 562-565.

<sup>4</sup> Ibid, 567-568.

<sup>5</sup> MacIntosh, J "The Role of Institutional and Retail Investors in Canadian Capital Markets" (1993) Osgoode Hall LJ 371.

<sup>6</sup> Black, B "The Value of Institutional Investor Monitoring: The Empirical Evidence" (1992) 39 UCLA Law Review 895.

<sup>7</sup> *Institutional Shareholders and Corporate Governance* (1996), 18.

Stapledon examined the role of institutional shareholders in corporate governance in the United Kingdom and Australia. While there has been some writing on this area in Australasia,<sup>8</sup> *Institutional Shareholders and Corporate Governance* makes a significant contribution to this area because it contains, not only an extensive overview of the theory and evidence on institutional investors from an international perspective, but also because it is based on extensive interviews with managers and senior officials of institutional investors.

Stapledon compared and contrasted the UK and Australian systems of corporate governance. In his introductory chapter he covers the basic issues of power structure in large corporations (such as the organisation of the board and the general meeting),<sup>9</sup> and the crucial issue of agency costs (which are the costs incurred by shareholders in monitoring management of a company).<sup>10</sup> He further sets the stage for a consideration of the role of institutional shareholders by examining the mechanisms which operate or are supposed to operate as means of monitoring managers. As he points out, these mechanisms have their limitations, but he also notes that institutional investors have already started to play a significant role in this area.<sup>11</sup> In his second chapter he provides details as to the growth of institutional investors as investors in the equity markets of Australia and the United Kingdom.

Parts II and III of the book then deal with the substantive parts of the topic. One of the significant contributions made by this book is the information and analysis provided by interviews that were undertaken by Stapledon with the chief executive or a senior fund manager with 17 UK investment-management firms,<sup>12</sup> and 13 Australian investment-management firms.<sup>13</sup> Unlike previous studies which have relied primarily upon publicly available information,<sup>14</sup> interviews with actual decision

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<sup>8</sup> Ramsay, I and Blair, M "Ownership Concentration, Institutional Investment and Corporate Governance: An Empirical Investigation of 100 Australian Companies" (1993) 19 MULR 153, and Walker, G and Fox, M "Institutional Investment in New Zealand Publicly Listed Companies" (1994) 12 C&SLJ 470.

<sup>9</sup> Stapledon, *supra* note 7, 6.

<sup>10</sup> *Ibid.*, 7.

<sup>11</sup> *Ibid.*, 17-18.

<sup>12</sup> *Ibid.*, 55.

<sup>13</sup> *Ibid.*, 167.

<sup>14</sup> For example Hill, J and Ramsay, I, "Institutional Investment in Australia: Theory and Evidence" in Walker, G and Fisse, B, *Securities Regulation in Australia and New Zealand*, (1994).

makers inside institutional investment firms enables a greater insight into the perceptions of institutional investors as to their roles in corporate governance, the influence of the respective corporate laws, and stock exchange rules.

In dealing with both the UK and Australian position Stapledon deals with the corporate governance issues that institutional investors have been concerned with, such as pre-emption rights, non-voting shares, buybacks, and management by-outs.<sup>15</sup> He then goes on to deal with the manner in which institutional investors become involved in these various issues.<sup>16</sup> In addition, due to the availability of information, he was able to examine the institutional shareholder profile of UK listed companies for large, medium and small companies. The importance of this examination is that it shows the possibility of a small group of institutions challenging the management of a listed company. Not surprisingly he found that it was only in small companies and (to a lesser extent) medium sized companies that an ideal coalition could be formed. This is important because an individual institutional investor would rarely possess a controlling stake in a corporation and, in order to successfully oppose an action proposed by management, such investors would need to act collectively.

In Part IV Stapledon then moves onto the normative part of his book. He examines the desirability of increased institutional monitoring and deals with a number of arguments raised against institutional shareholding.<sup>17</sup> He then examines the potential for increased institutional monitoring, both in the context of the current regulatory regime,<sup>18</sup> and with reforms.<sup>19</sup> The reforms he suggests covers two areas – direct monitoring (where he discusses such reforms as compulsory voting, increased notice of general meetings, etc),<sup>20</sup> and indirect monitoring (through reforms such as board composition and structure, and institutional non-executive directors).<sup>21</sup>

What then is the relevance of this book for the New Zealand's capital market? The answer is that this book is highly relevant for three reasons: the structure of the new Zealand stock market; the regulatory structure for corporations in New Zealand; and the sharing of institutional investors with overseas countries, particularly Australia.

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<sup>15</sup> Stapledon, *supra* note 7, chapters 4 and 7.

<sup>16</sup> *Ibid*, chapters 5 and 8.

<sup>17</sup> *Ibid*, chapter 9.

<sup>18</sup> *Ibid*, chapter 10.

<sup>19</sup> *Ibid*, chapter 11.

<sup>20</sup> *Ibid*, 285-291.

<sup>21</sup> *Ibid*, 291-295.

In the first place, New Zealand's stockmarket structure bears significant similarities with that of Australia, and to a lesser extent the United Kingdom. While we have seen the rise of the fourth stage to a certain extent (with the lack of a compulsory superannuation scheme in New Zealand perhaps holding back the development of the fourth stage in the New Zealand context) Clark's third stage is very much in evidence in New Zealand.

Walker and Fox undertook research into the composition of share ownership in New Zealand.<sup>22</sup> They found:

...over the period from 1962 to 1993, there has been a significant shift to majority control among New Zealand listed companies. By 1993, 50% of our listed companies were majority controlled. This increase in majority controlled companies has taken place along with a decline in the proportion of our companies that are management controlled. Fogelberg's 1980 study found that 39.5 per cent of the 43 largest companies in the year 1962 were management controlled. In contrast, by 1993 only 2.6% of all listed companies were management controlled. A significant increase in the proportion of minority controlled companies is also evident over the 1992 to 1993 period, as is a significant decrease in the proportion of listed companies having joint control.

From the preceding analysis, we conclude that there is little evidence of a "managerial revolution" in terms of the control of New Zealand listed companies. In fact, the reverse is the case, with companies coming increasingly under the control of major shareholders.<sup>23</sup>

They also found foreign direct investment "ha[d] increased from \$8.4 billion in 1988 to \$26.5 billion in 1994, an increase of some 215 percent".<sup>24</sup> This rise impacted on the level of control exercised by foreign investors, with foreign minority control rising from 8.7 percent of listed companies to 23.1 percent (in 1990) and to 29.2 percent (in 1994).<sup>25</sup> During the

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<sup>22</sup> Fox, M and Walker, G "Evidence on the Corporate Governance of New Zealand Listed Companies" (1995) 8 Otago Law Review 317. They used a classification for different control types in companies devised by Fogelberg (Fogelberg, "Ownership and Control in 43 of New Zealand's Largest Companies" (1980) 2 New Zealand Journal of Business 54). He classified control into four types: (1) majority (where one holder or a tightly knit group holds more than 50% of the shares); (2) minority (where an individual or small cohesive group of holders control between 15 to 50% of the share capital and can dominate the company); (3) joint (where a minority interest is strengthened by association with management); and (4) management (where ownership is so widely distributed that no one individual or group has a minority interest large enough to allow them to dominate the company's affairs). Fox & Walker, *ibid*, 320.

<sup>23</sup> *Ibid*, 323.

<sup>24</sup> *Idem*.

<sup>25</sup> *Ibid*, 325.

period 1990 to 1993 the percentage of companies under majority control (foreign or domestic) rose from 28.8 percent to 53.4 percent.<sup>26</sup> This meant approximately 82.6 percent of the New Zealand listed companies were under absolute or effective control.

When the share ownership structure of the New Zealand Stock Exchange Top 40 Companies was examined the predominance of institutional and foreign investors was even more acute. Walker and Fox found the following:

- Between 1989 and 1993 there was an increase in average overseas investment from 19 percent *per company* to 43 per cent;
- From 1989 to 1996 total institutional investment rose from 26 percent to 42 percent;
- Local institutions declined in investment from 16 percent in 1989 to 11 percent in 1996;
- Overseas institutions increased their investment over the period 1989 to 1996 from 10 percent to 32 percent;
- Overseas corporate investment increased between 1993 and 1996 from 16 percent to 26 percent;
- Local corporate investors reduced their holdings from 21 percent in 1989 to 7 percent in 1993.<sup>27</sup>

Walker and Fox's latest research shows a continuation of this trend,<sup>28</sup> and that the New Zealand stockmarket has progressed past Clark's second stage and is well within the third stage. Accordingly, New Zealand's stockmarket shares a similar pattern with Australia.

The second reason for the relevance of this book relates to the regulatory structure for corporations. Unlike Australia, which relies upon the presence of a strong regulatory agency,<sup>29</sup> corporate governance in New Zealand's

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<sup>26</sup> *Idem*.

<sup>27</sup> *Ibid*, 326. Some of the figures for the period 1993 to 1996 are updated from their more recent note, *infra* n.28.

<sup>28</sup> Walker, G & Fox, M "Further Evidence on the Ownership of New Zealand Stock Exchange Top 40 Companies" (1996) 14 *Companies and Securities Law Journal* (forthcoming).

<sup>29</sup> Fitzsimons, P "Disharmony across the Tasman: Australia and New Zealand on Different Corporate Paths" (1994) 8 *Otago Law Review* 267, 283.

corporate law model is shareholder driven, with little power and scope for regulatory agencies to take action and protect the interests of shareholders.<sup>30</sup> This position is emphasised by the inclusion in the Companies Act 1993 of new shareholders' rights and remedies.<sup>31</sup> However, an individual shareholder faces significant information, expertise and cost disadvantages that make the likelihood of actions by individual shareholders difficult and unlikely.<sup>32</sup> Given this vacuum the actions of institutional investors, who have the expertise and better access to information than the individual investor, are very important in the New Zealand context for companies listed on the stockmarket. Accordingly, the views and approaches of institutional investors in necessary in order to understand the regulatory environment actually faced by directors, and the appropriateness of the current regulatory structure. As Walker and Fox noted:

At present there is no direct relationship between the ownership composition of the New Zealand sharemarket and securities regulation. We cannot say, for example, that the New Zealand securities regime currently reflects the dominance of institutional investors. We do know that it is based on traditional goals of investors protection and to this extent the regime indirectly reflects the interests of all owners. Those goals were initially formulated in England in the mid-nineteenth century for the protection of *individual* investors who were then the principal owners of the sharemarkets.<sup>33</sup>

The third reason for the significance of the book is further highlighted by the fact that a large number of the institutional investors are subsidiary or associated companies of Australian institutional investors. An insight into the approaches of Australian institutional investors should provide some insights into possible approaches of New Zealand institutional investors as this association should impact upon their internal policies, and approaches to corporate governance issues. While the Companies Act 1993 makes a number of changes to comparable rules in Australia (such as the requirement that "major transactions have shareholder approval (section 129), and allow a dissenting shareholder to require the company to buy out his or her shares (section 106(b)), the underlying principles and composition of the share registers of listed companies of Australia are

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<sup>30</sup> Ibid, 285.

<sup>31</sup> Idem.

<sup>32</sup> See Fitzsimons, P "Statutory Derivative Actions in New Zealand" (1996) 14(3) Companies and Securities Law Journal 184.

<sup>33</sup> Fox, M and Walker, G "Market Ownership and Control - Implications for Securities Regulation in New Zealand" in *Securities Regulation in Australia and New Zealand 2 ed*, (Oxford University Press, 1997, forthcoming).



sufficiently similar to mean that this book provides valuable insights into this aspect of the capital markets and institutional investor behaviour.

The relevance of institutional investors for stockmarkets in general, and for New Zealand in particular, will grow. As this book provides invaluable insights into institutional investor behaviour in the context of corporate governance it is highly recommended.

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## BOOK REVIEW

### WOMEN IN THE AMERICAN WELFARE TRAP

BY CATHERINE PELISSIER KINGFISHER

*University of Pennsylvania Press, 1996, x and 201pp., including appendices & bibliography. Price \$34.95 including GST (softcover).*

This book explores the social construction of meaning and identity through the roles people find themselves playing in life. In particular, the author studies the social construction of the meaning of welfare recipient. The book is of particular interest to New Zealand as it struggles with its ongoing socio-political-economic realignment. As New Zealand has restructured its economy towards the free market model, it has concurrently redefined its social services network. Social benefits have become viewed more as a burden charitably borne by the better off rather than as a fundamental social obligation. This reconceptualisation is in line with the overall focus on market exchange and contract, and, as this book vividly illustrates, has substantial implications for New Zealand's fundamental ethos of care and equal respect between persons regardless of economic or cultural background.<sup>1</sup>

Kingfisher's account of women's experiences in the American welfare system and of the women's construction of the meaning of those experiences illustrates, as she points out, the genius of the American system in dividing and setting against each other those at the lower ends of the socio-economic scale. This division and opposition works to ensure the continued peaceful dominance of those at the higher end of that scale. The author studies two groups of women, those receiving "welfare" and those dispensing it. She discovers that the two groups of women have nearly identical educational, social, and working backgrounds. Both groups perceive themselves as trapped by the welfare system yet each group perceives the other as personal adversaries and as a major cause of their currently unsatisfactory situation in life.

In the recipient group, Kingfisher finds that the women are trapped by a lack of support from their children's father and by the inadequacies of bridging benefits. Benefits are low, to encourage "beneficiaries" to enter

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<sup>1</sup> See Kelsey, J *The New Zealand experiment: A World Model for Structural Adjustment?* (1995) 19-21.

the work force and become “self-sufficient.” The strategy is to assure a level of discomfort that will prompt the women to accept the low rates of pay currently offered by the jobs for which they are qualified. This discomfort is not only fiscal, but enhanced by the social stigma attached to being a “beneficiary.” Yet, the paid employment within this group’s grasp are low-waged jobs with minimal, if any, benefits. Further, the bridging benefits — i.e. the benefits intended to ease the transition of low income people into the paid work force — are set at such a low level that solo women with children cannot afford adequate childcare, transport, medical care and housing on the wages they are able to earn in the private sector. Thus, they find themselves falling behind on bills and forced *out* of work in order to adequately provide for their children. Other primary reasons for leaving were worries which the mothers had as to the safety of children entrusted to the cheapest of childcare and as to their and their children’s healthcare (worries which Kingfisher finds substantiated by the facts). Kingfisher found that the women in the recipient group tended to hold their bureaucratic case workers as responsible for, or even as authors of, these systemic shortfalls, and as those who could, if only willing, provide adequate levels of assistance.

The structural situation, combined with the American social ethos that people on welfare are there because of personal inadequacies, is tremendously destructive to these women’s sense of self.<sup>2</sup> Kingfisher explores how the women fight back and attempt to construct identities that reaffirm their status as valuable human beings. However, Kingfisher discovered that in so doing the women often unwittingly reaffirm the hegemony that devalues their lives and contributions in the first place. Rarely do the women focus on the overall social structure that depends on a pool of reserve labour, ready to toil for any wage. Rather, they accept the negative social construction of many beneficiaries as lazy, dishonest, and unmotivated, but explain how they are different. According to Kingfisher, in so differentiating themselves from the stereotype, they reinforce it, and reinforce the focus of blame for poverty on the individual

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<sup>2</sup> Kingfisher also briefly considers the negative social construction of these female welfare recipients in concurrence with the feminisation of poverty. A solo father raising five children with the aid of a socially provided benefit is viewed with admiration and as entitled to help with his difficult situation. A solo mother in the same situation is viewed as morally unsavory and lazy. Further, the solo father has a much higher chance of landing a job with a living wage — “men’s work” — than does the solo mother, who will likely be relegated to much lower paying “women’s work.” These factors, combined with the relative rarity of men assuming solo childrearing responsibilities, assure that the beneficiary roles are heavily feminised.

rather than on the social system which requires poor people. The women also accept the ideology of education as the way out, again acknowledging the legitimacy of social blame, focusing on their perceived personal inadequacies and away from the social structure. Kingfisher also found that while some beneficiaries rationalise episodic dishonesty with the welfare system as forced upon them by the very irrational counterincentives built into it, others prove their otherness from the dishonest stereotype by super rule-adherence and by reporting any irregularities in the situations of their beneficiary peers. All women in the beneficiary group engaged in some sort of positive counter construction of their individual social identities, but most also participated in the social construction of a negative identity for beneficiaries as a group.

Interestingly, Kingfisher's study found that the women functioning as front office bureaucrats in the benefits office were nearly identical in social (i.e. class) background, education attainment, and level of economic precariousness to the beneficiaries. Both groups of women came from primarily working-class backgrounds, often with some postsecondary education and with similar employment histories — that is, with employment histories in primarily low paid “women's work.” Kingfisher found three things differentiating the two groups. The bureaucratic group had not, as a rule, been left with sole responsibility for the care of children. The bureaucratic group had obtained government employment with the attendant socially responsible level of benefits and wages. And, perhaps due to their relative economic fortune, the bureaucratic group had no history of resorting to employment in extralegal jobs. Nonetheless, the bureaucratic women also felt trapped by the welfare system. Kingfisher found that this group of women had admittedly unrealistic case loads, no workplace dignity or respect, and high levels of stress-related illnesses. In so many words, they reported themselves to be miserable. Nonetheless, economic fear and the realisation that only their current jobs<sup>3</sup> separated them from their “clients” kept the women working in a system they resented deeply. While there were differing views of how to cope with the job, there were no illusions voiced as to the women's freedom to choose another. The other jobs for which they were qualified, and which many had held prior to working for the state, paid much less with few if any benefits. Opting out of the bureaucracy would mean accepting a palpable risk of becoming a beneficiary.

The front office bureaucrats also engaged in the social construction of stereotypes of beneficiaries, as either deserving (not to blame for their

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<sup>3</sup> See the discussion of the feminisation of poverty, *supra* note 1.

situation) or undeserving (at fault for their economic straits). Kingfisher notes that the main difference in the perceptions of the two groups is that, while the bureaucrats felt a sense of commonality with the “deserving” beneficiaries, recognising their similarities in situation and powerlessness, the beneficiaries did not perceive any common interest with the bureaucrats. Rather, they often considered the bureaucrats as their oppressors, not as co-oppressed. Likewise, even while recognizing a commonality of interest and situation, the front-line bureaucrats, each personally responsible for deciding the eligibility of large numbers of beneficiaries to various social programs, perceived the beneficiaries as taking money from or deceiving (as the case may be) the bureaucrats in their personal capacity. Thus the bureaucrats often *did* view and treat the beneficiaries as adversaries to be managed and controlled. Ultimately both groups worked to fulfill the cynical adage that the genius of the American system is dividing the oppressed against themselves.

Kingfisher’s goal is explicit and modest: to record and analyse the women’s social construction of themselves and their group, and of the “opposing” group and individuals. She skillfully attains this goal. She cheers when that construction is counterhegemonic and is concerned when the construction reinforces the reigning hegemony. Signs of recognized commonality of interests of the two groups against the market patriarchy are also greeted with satisfaction and hope.

What Kingfisher does not do is explain why the social meaning constructed by the participants in the welfare state — i.e. the general negative stereotype with the self-differentiation or deserving client differentiation — is incorrect. She does not make the case for the relative “betterness” of her preferred counterhegemonic construction. The superiority of welfare as fundamental right rather than as charity is broadly assumed, not proven. In a sense, the book is aimed at those already opposed to the conception of welfare as charity, and; perhaps, at facilitating the recognition of “comembership” between women, especially between economically vulnerable women with little education. However, *any* woman reading the book would in all honesty realise that there, but for a few lucky accidents of fate, goes she. And, more pointedly, there, but for sustained luck, goes she at some point in the future. Nonetheless, Kingfisher’s excellent book would have been even more powerful if she had taken the time to expand on what she asserts (albeit with appropriate references) as accepted givens: the artificially low pay status of most jobs classified as “women’s” work; the informal but very effective barriers to women’s access to better paying “men’s” work; the inequity of stigmatizing women who need financial assistance to care for their children while leaving unscathed the father who has abdicated his equal share of responsibility;

the market model's requirement of an impoverished class desperate to perform low wage labour; the intentional insufficiency of benefits; and the profound economic vulnerability of any mother regardless of employment status or education, though doubly profound for those with less education. Many of these points come across anecdotally; but to reach the other side — those who accept the construction of welfare as charity to market failures, with the attendant value judgments on people as the authors of their own poverty — a more detailed and rigorous exposition would be required.

In New Zealand, one need not wonder about the fluidity of the socially constructed reality of recipients of certain types of state aid or about the necessity of an impoverished class for a successful “market” economy. New Zealanders have seen the state benefits of those lower on the socio-economic scale cut to “encourage” them to accept the lower-waged jobs made possible through the Employments Contracts Act. From a society where comembership was recognized by law, New Zealand has gone to a system of division of the lower paid set against themselves. Out with compulsory unions and cooperation; in with cut-throat competition between the labourers. New Zealand society has seen its most vulnerable members, the Maori and Pacific Islanders, bear the brunt of the attendant restructuring towards “efficiency.”<sup>4</sup> At the same time, the idea that the victims of this restructuring are at fault and are social parasites has gained currency. That is, the social construction of lower income state beneficiaries has gone from less fortunate comember to market outsider grudgingly given charity. The many state benefits received by the “employed” are viewed as the rights of comembers, but, as in America, the “unemployed” have been evicted from the social club. These developments can only exacerbate the growing ethno-economic division in New Zealand, the same division which New Zealanders rightly decry in America.<sup>5</sup>

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<sup>4</sup> See Kelsey, J, *supra* note 1 at 262 (Maori unemployment rates rose from 10.8% in 1987 to 25.8% in 1992 and remained at 16.1 % in 1995; Pacific Islander unemployment rates went from 6.1% to 28.8% and remained at 17% for the same time frame; while the Pakeha unemployment rate went from 3.1% to 8.1% and dropped to 4.4% during the same periods).

<sup>5</sup> Compare “Belated but Welcome” *New Zealand Herald*, January 16, 1997, A10 (editorial welcoming the belated award of Congressional Medals of honour to 7 African-Americans and decrying the racial socio-economic disparities in America) with articles revealing similar problems in New Zealand social background. See, e.g., “Racial problems loom” *New Zealand Herald*, Jan 17, 1997 A3 (wide discrepancies between the economic situations of Pakeha and Maori detailed in briefing report to the Minister of Maori Development) “Maori VC case angers MP” *New Zealand Herald*, January 20 1997, A1 (alleging racism in the failure to award a Victoria Cross to a Maori World War II hero).

Kingfisher's book is thus instructive to New Zealand as to the ultimate alienation to which denial of social comembership leads. Small wonder that there is has been a rise in violent, senseless crime coincidentally paralleling the change in New Zealand's construction of its social reality — its rejection of a previously recognized commonality of interests and identities.<sup>6</sup> Readers of Kingfisher's book should ask themselves if the American construction of social reality against which the women and children in her study struggle is the social reality they want to construct for New Zealand. If they do so, and are given pause, the book will have been a great success.

GAY MORGAN\*

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<sup>6</sup> Numbers of reported crimes of violence remained at a relatively stable for a five year period, ranging both up and down from 27, 479 crimes of violence reported in 1988 to 29, 899 crimes of violence reported in 1992. Statistics New Zealand, *New Zealand Now, Crime Tables*, (1996) 10. In 1991, welfare benefits were slashed and the social construction of those on welfare was changed from less fortunate comember to social parasite. Russell, M *New Zealand from Fortress to Free Market: REVOLUTION* (1996) 219-28; Kelsey J, supra note 1 at 212-14. One must wonder if it is only coincidentally that from 1992 to 1995 numbers of reported violent crime rates skyrocketed, nearly doubling from the 29,899 violent crimes reported in 1992 to 45,454 crimes of violence reported in 1995. Crimes Tables, supra 10. The rate of offenses of disorder also rose 60% between 1992 and 1995 after a period of relative stability. Statistics New Zealand, *New Zealand Now, Crime* (1996) 13. The statistics reveal sharp rises of many other catagories of crime during this period of benefit cutting and social redefinition.

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## REVIEW

### THE TARANAKI REPORT: KAUPAPAP TUATAHI MURU ME TE RAUPATU. THE MURU AND RAUPATU OF THE TARANAKI LAND AND PEOPLE

BY THE WAITANGI TRIBUNAL

*Wai 143 & Ors. 30 April 1996. Chief Judge ET Durie, E Manuel, Prof GS Orr, Right Reverend MA Bennett, Prof MPK Sorrenson. 370pp*

The gravamen of our report has been to say that the Taranaki claims are likely to be the largest in the country. The graphic muru of most of Taranaki and the raupatu without ending describe the holocaust of Taranaki history and the denigration of the founding peoples in a continuum from 1840 to the present.<sup>1</sup>

This sentence of the Waitangi Tribunal's first Taranaki report, which caused much controversy because of its perceived overstatement, follows a summary in the final chapter which veritably shakes with anger. The tribunal concludes that "the whole history of Government dealings with Maori in Taranaki has been the antithesis to that envisaged by the Treaty of Waitangi".<sup>2</sup> Following the end of the war in Taranaki the Government "embarked on a macabre buying spree" of remaining lands accompanied by "fraud and corruption".<sup>3</sup> The invasion and sacking of Parihaka, "must rank with the most heinous action of any government, in any country, in the last century."<sup>4</sup> It has had "devastating effects" on race relations.<sup>5</sup> And the system of perpetual leases to Pakeha farmers over the reserves which remained was the "cruellest" of many "false promises", ensuring that Taranaki Maori "should never be allowed to forget the war, the imprisonments, and their suffering and dispossession."<sup>6</sup>

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<sup>1</sup> Waitangi Tribunal, *The Taranaki Report* (1996), at 312.

<sup>2</sup> *Ibid.*, 300.

<sup>3</sup> *Ibid.*, 309-310.

<sup>4</sup> *Ibid.*, 309.

<sup>5</sup> *Idem.*

<sup>6</sup> *Ibid.*, 310.



The report is subtitled “Muru me te Raupatu. The Muru and Raupatu of the Taranaki land and People.” The claimants had urged the use of this terminology. “*Muru*” means the plunder of property as punishment for alleged offences and “*raupatu*” the conquest or subjugation of people by an external force. The report details both sorts of loss.

#### PRE WAR PURCHASING

The first chapters of the report deal with the government claim to have purchased for settlement 75,370 acres in 9 blocks around New Plymouth between 1844-1859. The purchases were initiated by the NZ Company and subsequently taken over, adjusted, then confirmed by the government. The tribunal faults the Crown conduct in several ways. The initial NZ Company purchase which was the basis for subsequent arrangements in fact post-dated Hobson’s proclamations preventing private land dealings with Maori and was therefore simply invalid. The Land Claims Commission established by the Crown to investigate the transactions denied Maori the right to determine matters within their autonomy and prevented much needed dialogue directly between the Crown and Maori. Customary law was misconstrued and many valid owners were simply ignored because it was convenient to argue that they had abandoned the lands when they had temporarily moved to Cook Strait and other places. The government’s subsequent efforts to finalise matters by ‘purchasing’ within the area of the Company’s “purchase” were invalid, as these efforts took place in an atmosphere of tension and fighting between Maori sellers and non-sellers, and as more settlers were being introduced. In addition, inadequate reserves were made from the purchases and there was a general failure to properly consult with the proper Maori leadership. Faced with numerous settler encroachments associated with these purchases, the tribunal finds that the Maori response was restrained.

#### WAITARA PURCHASE AND THE LEAD UP TO THE WAR

In Chapter 3 the tribunal examines the pre-war situation and found that in accepting an offer to sell at Waitara in 1857 the Governor had acted in disregard of customary tenure, despite advice to the contrary, and in breach of principles of law that in establishing custom in such cases the law of the people themselves is paramount. The rangatiratanga exercised by Wiremu Kingi was also misunderstood, to the convenience of the government. Kingi was unjustly attacked. Examining the government documents at the time, the tribunal agrees with the interpretation of events offered by historians like James Belich, Hazel Rizeborough, Ann Parsonson and others, that the real issue was not a land dispute but the imposition of government authority.

## THE WARS IN TARANAKI

Given this assessment, the tribunal not surprisingly finds that the government was an unjust aggressor in the war in North Taranaki beginning in March 1860. The second war, on which the land confiscations were based, was a result of government failure to properly investigate the Waitara purchase, its military reoccupation of areas, and a military trespass which resulted in a Maori ambush in May 1863. These actions were not only contrary to the Treaty, but because no act of rebellion had taken place the confiscation was possibly unlawful in terms of the NZ Settlements Act 1863. The tribunal is at pains to stress that the war continued longer in Taranaki (9 years) than elsewhere in the North Island. Some 534 Maori were killed and 161 wounded, to 205 European troops and Maori allies killed and 321 wounded. It also highlights an issue of ongoing distress to the claimants: the fact that street names in places such as Waitara are a celebration of military and political conquerors. The tribunal comments that “name changes are needed.”<sup>7</sup>

## CONFISCATION

The tribunal closely examines the legal background to the confiscations. While it was within the authority of the NZ General Assembly to enact the NZ Settlements Act 1863, since exceptional legislation is permissible where the existence of the state is threatened, the confiscations were unlawful because they were ultra vires that legislation. There was no indication that the Governor was satisfied, as the legislation required, that groups were in rebellion in Taranaki, and the facts suggest that they were not. The most serious error was that while the Act provided for only specific lands to be taken for settlement within a district, the Governor took all the land of the Taranaki district for military settlement, including clearly unsuitable land, such as Mount Taranaki. The confiscation was also not referable to the purpose of the Act i.e. settling sufficient numbers of armed settlers to keep the peace. The actual purpose was simply to take all land capable of settlement. Arguably, later validating acts could not correct such gross illegalities, but only irregularities in form and process. However, to calm any fears that new legal avenues were being opened up, the tribunal commented that this point is now of academic interest only as proceedings are statute barred and properties have since changed hands to bona fide purchasers.

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<sup>7</sup> Ibid, 105-106.

As expected, the tribunal concludes that the confiscations were a clear breach of the Treaty of Waitangi:

While the specific terms of the Treaty may be suspended in an emergency, the general principles enure to the extent that they provide criteria for assessing the circumstances. The Treaty furnishes a superior set of standards for measuring the propriety of the State's laws, policies, and practices. This shifts the debate from the legal paradigm of the state where the rules must protect the Government's authority to one where Government and Maori authorities are equal.<sup>8</sup>

Contemporary records of the debate surrounding the introduction of the confiscation legislation and its application show that the government did not act in good faith. The tribunal also notes that confiscation in other jurisdictions (e.g. Scotland and Ireland) has always been for the purposes of conquest, not of peace.

#### COMPENSATION

Chapter 6 of the report deals with efforts to compensate 'loyal' Maori whose lands had been confiscated. This is an aspect of the confiscations which has not been well understood in previous historical research. The tribunal finds that the Compensation Court established by the government made inadequate inquiries and wrong decisions on custom (e.g. absentees were disentitled, ancestral interests were distorted by artificial calculations of loyal versus rebel entitlements), had a thin veneer of legality only, and the judicial process was subservient to executive actions to reach agreements with groups, which the court would not look into. The scheme as implemented was probably unlawful, and certainly entirely inconsistent with Treaty principles, there being nothing on the record as evidence of "even minimal protective standards or the performance of fiduciary obligations."<sup>9</sup> By returning individualised titles the scheme was "an engine for the destruction" of Treaty guaranteed traditional values. Worst of all, promissory papers rather than land was actually given so that 14 years after the court decisions almost none of the land awarded had actually been returned (The court made 518 determinations entitling 'loyal' Maori to 79,238 acres. By 1880 only 3500 acres had actually been returned).

From 1864 there was a government power to adjust compensation court awards. In practice these amounted to no more than a series of promises

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<sup>8</sup> Ibid, 132

<sup>9</sup> Ibid, 162.

of further land for absentees and others who had missed out on the court awards, promises which were in almost all cases never implemented. In past assessments of the impact of confiscation, the amount of land "returned" to individuals has been treated as a credit to government. The tribunal argues that a viable approach to assessing loss and prejudice is to look at land in Maori ownership and determine how far it is an asset for the people, not just individuals. On this approach, "*hapu*," as "*hapu*," retained nothing when the land was confiscated from "*hapu*" and then returned to individuals.

### LAND PURCHASES 1872-1881

Another aspect of Taranaki history not previously well understood was a series of transactions between 1872 and 1881 in which the government used deeds of cession and purchase and payments of gratuities to secure 648,048 acres both inside and outside the confiscation boundaries. In north and central Taranaki, the 'purchases' inside the confiscation line, in effect payments for land already technically in Crown ownership, could not, the tribunal says, count as land returned and then properly purchased since the Maori vendor had no title and no ownership if the 'sale' was resisted. For 'purchases' outside the confiscation line, the operation of the Native Land Court in these areas was a "wrongful imposition, promoting individual caprice and judges' preference above traditional decision-making" and failed to provide any protection for Maori.<sup>10</sup> 'Purchases' in the south and on the Waimate plains by way of payments of gratuity or "*takoha*" to individuals and groups on lands already confiscated were "thoroughly bad and meaningless in law".<sup>11</sup> Fraud and undue influence in all these activities was also evident.

In chapter 10 of the report the tribunal broadly attacks the work of the Native Land Court in the district, and in particular reviews a decision in 1882 awarding almost all Ngati Tama lands (66,000 acres) to a few individuals from a neighbouring *hapu*, as an apparent means of punishing Ngati Tama for allying with the King movement (the tribunal termed the award 'confiscation'). Overall, the tribunal finds that Native land legislation was contrary to the principles of the Treaty since it deprived Taranaki Maori of authority over their lands. Maori land, in social and cultural terms was made an "illusory and meaningless asset" for the people and community it had traditionally served.<sup>12</sup>

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<sup>10</sup> Ibid, 192.

<sup>11</sup> Ibid, 198.

<sup>12</sup> Ibid, 285.

## PARIHAKA

The tribunal outlines the well known basic history surrounding the invasion of Parihaka and offers some fresh perspectives. Te Whiti's peer, Tohu, was of equal status to Te Whiti. Parihaka was extremely prosperous by 1880, acknowledged as such by government officials, and provided "proof of that which governments past and present have sought to avoid admitting: that aboriginal autonomy works and is beneficial for both Maori and the country".<sup>13</sup> There was no reason, "apart from motivation" why central Taranaki should not have been declared a Maori district under the New Zealand Constitution Act 1852.<sup>14</sup> The NZ Settlements Act 1863 provided that confiscated Maori land did not become Crown land freed of all Maori interests until it was Crown granted for settlement. Since the central Taranaki confiscation was effectively abandoned, and no fresh land could be confiscated after 3 December 1867, and *takoha* which had been paid was of no legal significance, Parihaka lands were in 1881 held by the Crown subject to Maori interests. Consequently, the Crown assumption of land in central Taranaki and the invasion of Parihaka were unlawful and remains so today. Although, again, to remove any fear that new legal avenues might be opened up by this conclusion, the tribunal comments that current land titles would be secure under the land transfer system.

The tribunal concludes that the taking of land and the invasion of Parihaka was contrary to Treaty principles as was the imprisonment without trial of many Parihaka people. The tribunal came to no definite views on the treatment of prisoners. It quotes at length from Martin Luther King's statements about non-violent protest and challenges to unjust laws. It notes also that Parihaka was completely rebuilt after the return from imprisonment of Tohu and Te Whiti.

## WEST COAST LEASES

The report critically examines the work of two West Coast Commissions which reported on the failure to reserve lands after confiscation, and the second commission which went on to make reserves, finally giving effect to most of the awards of the Compensation Court. The tribunal finds that there was a bias in the commission towards European settlement, it had limited terms of inquiry, it acquiesced in the Parihaka invasion, which broke its own recommendation that adequate reserves needed first to be

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<sup>13</sup> Ibid, 214.

<sup>14</sup> Ibid, 215.

made, it lacked independence from government, it 'punished' Parihaka leaders by reducing their reserve awards, and it individualised all but 991 acres of the 200,000 acres put into reserves. Worst of all, the reserves were, by statute, put in the hands of the Public Trustee with power to lease to promote settlement, which in practice resulted in leases to Pakeha farmers (of 193,996 acres in reserves in 1912, 138,510 were leased by Europeans). From 1892 the leases were, by statute, made perpetually renewable. The tribunal looks briefly at the subsequent history and the amalgamation of all reserve interests in a single incorporation in 1976 ('PKW') and ongoing disputes among Taranaki Maori about the role of that body.

With regard to currently proposed changes to alter the perpetual leases, to end their perpetual nature and provide a fair return to Maori, the tribunal takes a hard line. While, it says, the sanctity of private contracts should be respected "There is nothing sacred about those contracts. They are entirely profane."<sup>15</sup> This was not a situation of competing equities or of a contractual relationship between Maori and lessees, but rather of each group having mutually exclusive and distinct claims to make to government. The proposed government scheme would see some leases terminating 62 years after amending legislation is passed. This delay, the tribunal says, was "excessive and unacceptable."<sup>16</sup> There should be termination after no longer than 42 years from the enactment of amending legislation, and 5 yearly rent reviews. Maori were also separately entitled to compensation for loss of possession, control, land and rental (compensation for loss of rents should go only to those who were owners when the loss occurred. Latecomers would be excluded). The loss of opportunity to maintain and develop the society must also be considered.

Perpetual leasing was the unkindest blow, for it visited upon succeeding generations the pain of knowing the family lands were held by another people; and as parents were forced to send their children away to work, they did so knowing how their lands were worked by others.<sup>17</sup>

## REPARATION

The tribunal considers the Sim Commission report of 1928, its limitations, and the creation of the Taranaki Maori Trust Board, with its struggle to apportion money among Taranaki tribes and provide a wide range of

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<sup>15</sup> Ibid, 274.

<sup>16</sup> Ibid, 275.

<sup>17</sup> Ibid, 276.

services with inadequate resources. The continuing role of the Board should be a live issue in settlement discussions, the tribunal finds. The tribunal also looks at the momentary re-vesting of Mount Taranaki in the trust board in 1978 which had led to it popularly being called “magic mountain” — returned one moment, gone the next. This settlement had obviously not satisfied the people. The tribunal notes that there was no legal basis for the mountain’s confiscation in the first place.

### SETTLEMENT OPTIONS

As a guide to the negotiations which were proceeding as the report was released, the tribunal comments in detail on the factors which should be taken into account in any settlement which might be reached. It comments that the Taranaki claims are likely to be the largest in the country. Long term prejudice may be more important than quantification of past loss. Taking the broad approach suggested by s6(3) Treaty of Waitangi Act 1975, compensation:

should reflect a combination of factors: land loss, social and economic destabilisation, affronts to the integrity of the culture and the people over time, and the consequential prejudice to social and economic outcomes.<sup>18</sup>

In all 1,199,622 acres were confiscated and no distinction should be made between this and 296,578 acres said to have been purchased, and 426,000 ‘expropriated’ by the government’s Native Land Court process. When determining injurious affection, the impact of loss by reference to the proportion of the land taken and the amount retained in regard to the size of the group is more important than the amount taken in absolute terms. The amount remaining to Taranaki Maori is probably less than 3% and hapu, as distinct from individual, loss appears to be total. Social and economic destabilisation should be compensated as should personal injuries i.e. damage to the psyche and spirit of people. Current social and economic performance may be a measure of past deprivation. Little weight should be placed on reparations previously paid.

Significantly, the tribunal comments that any settlement should not be full and final since a full accounting for loss will not be politically possible in any settlement. The tribunal then turns to the detail of the groupings within Taranaki — a matter of contention throughout the hearings, and which continues to hamper negotiation efforts. The tribunal names eight *hapu* deserving separate consideration in any settlement (including

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<sup>18</sup> Ibid, 312

Pakakohi and Tangahoe, although with a lesser standing than the other six *hapu*). The apportionment of any settlement between *hapu* is a matter for themselves. The broad perception from the evidence is that Taranaki people in the centre of the province account for 1/7, and the north and south 3/7 each; but any apportionment should be settled locally without further reference to the tribunal. Separate settlements for north, south and central groupings seemed appropriate and compensation should be directed to *hapu* and not the trust board, unless *hapu* otherwise agree. The same applies to the PKW incorporation, as settlements should not be dissipated by individuals. However PKW and the trust board should be reimbursed for funding the research and presentation of claims.

### COMMENTS

The report is unusual in that it is the first issued by the tribunal before the hearing of Crown evidence. This approach was agreed by the Crown and the claimants because a negotiated settlement is intended and it was felt that a report would give an indication to both parties of the quantum and nature of the settlement. Prior to the report, the Crown had simply filed a short series of concessions on major points raised by the claimants in their evidence.

A consistent historical theme of the report is the struggle of Taranaki Maori to retain autonomy. The report reflects on aboriginal autonomy as it is understood internationally, and the government insistence that its authority prevail in all matters, not just in war and confiscation but in setting up “wrong processes” such as trustee administration and the land court to decide issues that Maori ought to have been left to decide themselves.

The tribunal view that there has been an “expropriation in Treaty terms” of 1,922,200 acres (777,914 hectares) is a large departure from previous assessments of loss in Taranaki, which arrive at a figure of 462,000 acres actually taken by that legal process.

The report will set the historic framework for the tribunal’s consideration of confiscation in other districts. For example, the NZ Settlements Act was applied, and the Compensation Court operated, in districts such as the Bay of Plenty and Waikato, and the findings in Taranaki will no doubt have some bearing on findings in those districts. Of equal interest, perhaps, to the findings in relation to confiscation, however, are the findings with regard to Native land legislation and the work of the Native Land Court. It is questionable whether the Native Land Court, which in the first decades of its existence operated clearly with the government interest in mind,



can be said to have been a truly impartial judicial body in those decades. The tribunal in the Taranaki report clearly tends to the opposite view.

Leave has been given to the parties to the Taranaki claims to seek a further hearing if proposed negotiations prove unsuccessful or clarification on particular items is required. The tribunal has promised a second report which will look at the history of particular groups and ancillary claims that may need to be distinguished for any comprehensive settlement “unless matters are earlier resolved.”<sup>19</sup>

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<sup>19</sup> Ibid, xi and 311.

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